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PROFESSOR OF COMMERCIAL LAW

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Prof. Dr. H. Ercüment Erdem

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PREFACE

The Erdem-Erdem Law Office has always placed an emphasis on academic studies and supported them since the day it has been founded. The academic background of the founders of the Office and the academic studies of the attorneys on staff ensured that the Office would be distinguished in this regard. The fact that we approach legal issues not only from a practical point of view, but also with a regard for their broader jurisprudential implications has also enhanced our studies.

Our Office publishes a monthly “Newsletter” on its web site in both English and Turkish in order to inform its clients and its business partners. The attention that this publication has attracted in last two years has encouraged us to collect the published articles into a book. In this work, we share the articles written by the attorneys and published in the Newsletters during 2010 concerning the current legal issues. The articles are classified according to subject matter and by the key notes for relevant month. This classification of the articles was done for the convenience for of the reader.

For this book, we used articles which are still on our website. The key notes throughout the year have also been collected. We attached a detailed index to facilitate research.

This work is a collaborative effort not only by those who wrote the articles, but also by those translating and proofreading, doing the necessary legislative research and producing the website. Without the selfless, loyal, and concentrated efforts of all of the Erdem-Erdem team, this work could never appear. Being aware of that fact, we sincerely thank all the attorneys, trainees, assistants, information technology consultants, and public relations staff who believed in this project.

We hope the content of this work will be useful for our clients and business partners, and we wish a New Year full of health, happiness and success to all.

Nisantası, January 2011

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LIST OF ABBREVIATIONS¹

CC	: Civil Chamber
D.	: Decision
ECJ	: European Court of Justice
etc.	: Et Cetera
fn.	: Footnote
ICC	: International Chamber of Commerce
No.	: Number
p.	: Page
par.	: Paragraph
TCC	: Turkish Code of Commerce
TCO	: Turkish Code of Obligations

¹ Abbreviations set forth in that part are general abbreviations. All other abbreviations are mentioned in articles.

INTERNATIONAL COMMERCIAL LAW

International Trade Terms are Renewed: Incoterms ® 2010*

1. Purpose and Scope of Incoterms

a) Purpose

The purpose of Incoterms is, as stated by ICC “*to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree*” .

Since international sales contracts are generally realized between the non-present parties from different nationalities, it is very important how the parties interpret the terms and the abbreviations commonly used in foreign trade. By this regulation of Incoterms, at least the confusions and the differences of interpretation will be overcome and the conflicts arising out of international trade will be reduced.

b) Scope

The scope of the Incoterms is limited to the rights and obligations of the parties’ arising from the delivery of the sale of goods. Incoterms do not define the goods, but the goods should be understood as commodities.

Incoterms do not regulate any contract other than sale contract. However, even in a sale contract, Incoterms do not cover all the contractual aspects. The topics that Incoterms govern can be gathered under four groups: (i) the delivery of goods, (ii) transfer of risks, (iii) division of costs, and (iv) obligations concerning the documents. Incoterms do not provide rules for the (i) payment and payment methods, (ii) transfer of ownership, (iii) variants, (iv) dispute resolution and (v) other issues relating to fulfilment of the contract.

* *Article of October 2010 – Prof. Dr. H. Ercüment Erdem*

2. Incoterms® 2010

a) Need for Changes

It is stated under the Foreword of Incoterms® 2010, since the creation of the Incoterms® rules by ICC in 1936, this globally accepted contractual standard has been regularly updated to keep pace with the development of international trade.

It is also stated that the continued spread of customs-free zones, the increased use of electronic communications in business transactions, the heightened concern about security in the movement of goods and changes in transport practices required the ICC to revise the Incoterms® 2000.

Moreover, the urge of the traders to commonly use Incoterms rules for purely domestic sale contracts within the boundaries of countries or trade blocks like EU and the greater willingness in the United States to use Incoterms rules in domestic trade rather than the former Uniform Commercial Code shipment and delivery terms also motivated ICC to revise Incoterms in a way that would enable the trade terms to be used also on domestic basis in addition to its previous use on international basis.

b) Main Novelties

i) New Incoterms Rules

First of all, the number of Incoterms rules has been reduced to 11 from 13.

Two new rules that may be used irrespective of the agreed mode of transport being namely (1) DAT (Delivered at Terminal) and (2) DAP (Delivered at Place) replace the Incoterms 2000 rules DAF, DES, DEQ and DDU. Both of the new rules provide for delivery to occur at a named destination. In DAT, the delivery occurs at the buyer's disposal unloaded from the arriving vehicle. In DAP, it occurs at the buyer's disposal, ready for unloading. These new rules, like their predecessors, are "delivered", with the seller bearing all the costs, other than those related to import clearance, where applicable, and risks involved in bringing the goods to the named place of destination.

ii) Classification of Incoterms

Under the previous version of 1990 and 2000 of Incoterms, the rules were classified under four groups as;

- “E” Group consisting of “Ex Works: EXW”,
- “F” Group consisting of “FCA, FAS and FOB”,
- “C” Group consisting of “CFR, CIF, CPT and CIP”, and
- “D” Group consisting of “DAF, DES, DEQ, DDU and DDP”.

Incoterms® 2010 prefers a completely different distinction and a classification system based on modes of transport each Incoterms could be used for. Under the new classification, there are two groups as;

- Group 1: Rules for any mode or modes of transport consisting of EXW, FCA, CPT, CIP, DAT, DAP and DDP; and
- Group 2: Rules for sea and inland waterway transport consisting of FAS, FOB, CFR and CIF.

The first group includes the seven Incoterms® 2010 rules that can be used irrespective of the mode of transport selected and irrespective of whether one or more than one mode of transport is employed.

In the second group, the point of delivery and the place to which the goods are carried to the buyer are *both* ports. Under FOB, CFR and CIF all mention of the ship’s rail as the point of delivery in the previous versions of Incoterms has been omitted in preference for the goods being delivered when they are “on board” of the vessel. ICC states that this approach more closely reflects modern commercial reality and avoids the rather outdated image of the risk swinging to and across an imaginary perpendicular line.

iii) Electronic Communication

Incoterms® 2010 grant electronic means of communication the same effect as paper communication, as long as the parties so agree or where customary under Articles A1/B1 of each Incoterms. It is emphasized by ICC that this formulation facilitates the evolution of new electronic procedures throughout the lifetime of the Incoterms® 2010 rules.

iv) Insurance Cover

There are only two terms which provide an insurance obligation for the parties. CIP and CIF refer to Institute Cargo Clauses as to the coverage of the insurance. Institute Cargo Clauses were subject to a revision which started on 2006 and finalized on 2009. The Incoterms® 2010 rules take account of the Institute Cargo Clauses 2009.

The Incoterms® 2010 rules provide for information duties relating to insurance in articles A3/B3, which deal with contracts of carriage and insurance.

v) Security related clearances

ICC paid attention to the heightened concern about security in the movement of goods, requiring verification that the goods do not pose a threat to life or property for reasons other than their inherent nature in the new version of Incoterms® 2010¹. Therefore, ICC have allocated obligations between the buyer and seller to obtain or to render assistance in obtaining security-related clearances, such as chain-of-custody information, in articles A2/B2 and A10/B10 of various Incoterms rules.

vi) Terminal Handling Charges

The Incoterms® 2010 rules seek to avoid multiple payments of terminal handling charges by the buyer. Under Incoterms 2000 CPT, CIP, CFR, CIF, DAT, DAP, and DDP, the seller must make arrangements for the carriage of the goods to the agreed destination. While the freight is paid by the seller, it is actually paid *for* by the buyer as freight costs are normally included by the seller in the total selling price.

The carriage costs will sometimes include the costs of handling and moving the goods within port or container terminal facilities and the carrier or terminal operator may well charge these costs to the buyer who receives the goods.

In these circumstances, the buyer would want to avoid paying for the same service twice: once to the seller as part of the total selling price and once independently to the carrier or the terminal operator. The Incoterms® 2010 clearly allocate terminal handling costs in articles A6/B6 of the relevant Incoterms rules.

vii) String Sales

During the sale of commodities, goods in subject are frequently sold several times during transit “down a string”. ICC notes that a seller in the middle of the string does not “ship” the goods because these have already

¹ Incoterms 2010, p. 8.

been shipped by the first seller in the string². The seller in the middle of the string therefore performs its obligations towards its buyer not by shipping the goods, but by “procuring” goods that have been shipped.

Incoterms® 2010 rules includes the obligation to “procure goods shipped” as an alternative to the obligation to ship goods in the relevant Incoterms rules.

c. Significant issues that must be taken into consideration when using Incoterms® 2010

Not only uniform interpretation of Incoterms is significant but also being well informed about Incoterms in order to be able to choose the appropriate Incoterm rules convenient for the particular transaction between them is rather important for the parties. Therefore, while incorporating the Incoterms 2010 rules into their contract, parties must carefully read the rules and the guidelines that are placed before each Incoterm. The mentioned guidelines explain the fundamentals of each Incoterm rule and try to assist the users to accurately and efficiently choose the appropriate Incoterm rule for that particular transaction.

It is also very important to specify the place or port as precisely as possible in order for chosen Incoterm rule to be able to work and to avoid the parties to face unexpected duties to be borne on them.

As a last remark, as stated under Section II (B) (1) (b) above, Incoterm rules do not regulate every aspect of a commercial relationship and do not give the parties a complete contract of sale. Therefore, parties should deal with through express terms in the contract of sale or in the law governing that contract as to issues not covered by Incoterms.

The parties should also be aware that mandatory local law may override any aspect of the sale contract, including the chosen Incoterms rule.

Incoterms® 2010 Rules have been launched on September 2010 and will enter into force officially on 1st January 2011. Until the entry in force of Incoterms® 2010, the parties are free to use either Incoterms 2000 or Incoterms® 2010. After 1st January 2011, unless otherwise stated by the parties, all references to Incoterms rules will be deemed to be made to Incoterms® 2010. As any new version of Incoterms does not cancel the old

2 Incoterms 2010, p. 9.

versions, it is recommended to the parties to clearly set forth in their contract to which version of the Incoterms rules they refer to.

Conclusion

The new provisions of Incoterms® 2010 rules reflect the current developments and novelties in the business life. Even if Incoterms® 2010 does not change the presentation of the rules, it makes an important reform by replacing the DAF, DES, DEQ and DDU rules which are less used and lost their importance by the new DAT and DAP rules. Moreover, the fact that the Incoterms® 2010 rules provide explicitly that the rules may be used not only for international trade but also for domestic trade will considerably enlarge their scope of application.

Montreal Convention for the Unification of Certain Rules for International Carriage by Air*

The Signature and Entry into Force of the Montreal Convention

Montreal Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter referred to as the “Montreal Convention”) was presented for signature by the States which participated in the International Air Law Conference held on 10-28 May 1999 in Montreal in order to adapt the Warsaw Convention to contemporary circumstances. Turkey also signed this Convention. “The Act on the Approval of the Ratification of the Convention for the Unification of Certain Rules for International Carriage by Air” dated 2 April 2009 and numbered 5866 were published in the Official Gazette numbered 27200 of 14 April 2009. In line with this Act, the decision of the Council of Ministers for the ratification of the Montreal Convention was published in the Official Gazette numbered 27716 of 1 October 2010.

Before the Montreal Convention

Although the Warsaw Convention, which was replaced by the Montreal Convention, was a widely accepted Convention with many member states, it has been criticized since its entry into force in 1929 for focusing on the interests of the carrier airway companies and for not sufficiently protecting the rights of passengers due to the low level compensation to be paid to the victims of accidents. In accordance with these criticisms, some actions were taken to update the Warsaw Convention, particularly by the 1955 The Hague, the 1971 Montreal, and the 1975 Guatemala Protocols. However, as these protocols were not accepted by many states, they failed to be effective, and they caused discrepancies in the system. In order to prevent the disadvantages arising out of these discrepancies, the airway companies of various states signed bilateral agreements which provided for higher limits than the limits of the Warsaw Convention. The Montreal Convention combines the provisions of the Warsaw Convention and the Additional Protocols in order to more effectively protect the interests of the consumers/passengers.

* Article of September 2010

Certain Provisions of the Montreal Convention

The Montreal Convention applies to all international carriage of persons, baggage, or cargo performed by aircraft for compensation.

According to the Montreal Convention:

- The parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier will be settled by arbitration. Such an agreement must be in writing.
- The right to damages is extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
- The carrier is liable for damages in case of the death or bodily injury of a passenger only if the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The carrier is liable for damages in case of the destruction of, the loss of, or damage to checked baggage if the event which caused the destruction, loss, or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.
- Nothing contained in the Montreal Convention prevents the carrier from refusing to enter into any contract of carriage, from waiving any defenses available under the Convention, or from laying down conditions which do not conflict with the provisions of the Convention.
- In the case of carriage to be performed by various successive carriers, each carrier which accepts passengers, baggage, or cargo is subject to the rules set out in the Montreal Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision. In the case of carriage of this nature, the passenger or any person entitled to compensation can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

The Novelties Provided by the Montreal Convention

The Montreal Convention introduces the concept of “the liability of the carrier without any limits”. According to the Montreal Convention, which provides for a two-tier compensation system, the first tier is strict liability up to 100,000 Special Drawing Rights¹, independent of the fault of the carrier. The second tier depends on the fault of the carrier, and there is no limit for the liability.

Furthermore:

- In the case of aircraft accidents resulting in the death or injury of passengers, the carrier will, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments do not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.
- A carrier may be required to furnish evidence that it maintains adequate insurance covering its liability under the Convention.
- An expedited procedure is provided for the payment of compensations in a short period of time.
- The actions for damages, on certain conditions, may be brought before the courts at the place of destination or where the passenger has his/her permanent residence.
- The passenger, baggage, and cargo documents, which have an important evidentiary value in compensation actions, are simplified and updated.

From the Turkish perspective, it is expected that the Montreal Convention will financially protect passengers/consumers in accidents that occur during carriages by air between member states.

1 The sums mentioned in terms of Special Drawing Right in the Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

Uniform Rules for Demand Guarantees*

The International Chamber of Commerce's (hereinafter referred to as the "ICC") revised Uniform Rules for Demand Guarantees (hereinafter referred to as the "URDG") entered into force on July 1, 2010.

The rules, approved by the ICC in 1991, have as their objective the balancing of the conflicting interests of applicants, beneficiaries, and guarantors. In simplifying the drafting of demand guarantees, they serve as a model for guarantee practice worldwide.

Demand guarantees are irrevocable undertakings, independent of underlying contracts, issued by a guarantor on the instructions of an applicant to pay the beneficiary any sum that may be demanded up to a maximum amount stated in the guarantee. Whereas a documentary credit assures the exporter of being paid upon the presentation of complying documentation showing that a shipment was made, a demand guarantee provides protection to the importer against non-performance, or late or defective performance, by the exporter.

In recent years, the URDG have gained increasing worldwide acceptance. They were adopted by the International Federation of Consulting Engineers (hereinafter referred to as the "FIDIC") in their model guarantee forms and later by the World Bank. National lawmakers have taken the URDG as a model for independent guarantee statutes.

The revision, formally called URDG 758, replaces URDG 458 and was agreed to after a two-and-a-half year revision process that produced five comprehensive drafts based on 600 comments from 52 countries.

The revised rules contain new definitions and interpretation rules to provide greater clarity and precision, as well as the solution to non-documentary conditions, asymmetrical guarantees, and counter-guarantees.

In this brief study, URDG 758 will be compared to URDG 458 as to four points chosen from the contractors' point of view.

1. In URDG 458, there is a risk of contradiction between the description of the beneficiary in the description part and the definition of "demand guarantee" in the definitions part (Article 2(a) of URDG 458). The description of the beneficiary in the introduction part

* *Article of April 2010*

is *“The beneficiary wishes to be secured against the risk of the principal’s not fulfilling his obligations towards the beneficiary in respect of the underlying transaction for which the demand guarantee is given. The guarantee accomplishes this by providing the beneficiary with quick access to a sum of money if these obligations are not fulfilled.”* In Article 2(a) the demand guarantee is defined as *“a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgment or an arbitral award.”* The reference to *“a judgment or an arbitral award”* has been criticized as there are new procedures for the settlement of disputes as to international construction contracts which can be referred to, such as *“expert determination”* or *“adjudication”* where FIDIC conditions for international construction contracts provide for the initial settlement of disputes by a *“Dispute Adjudication Board”*.

By simplifying the definitions part, URDG 758 provides a solution to the problem mentioned above. In Article 2 of URDG 758, the beneficiary is defined simply as *“the party in whose favor a guarantee is issued”*. URDG 758 also defines *“the document”* as an *“assigned or unsigned record of information, in paper or in electronic form that is capable of being reproduced in tangible form by the person to whom it is presented. In these rules, a document includes a demand and a supporting statement.”* There is no reference to a judgment or arbitral award in URDG 758. Article 15 (Requirements for demand) of URDG 758 permits judgment, arbitral award or Dispute Adjudication Board resolution or other documents in demanding payments as sub-paragraph (a) states that *“a demand under the guarantee shall be supported by such other documents as the guarantee specifies.”*

2. Article 4 URDG 458 states that *“the Beneficiary’s right to make a demand under a Guarantee is not assignable unless expressly stated in the Guarantee or in an amendment thereto. This article shall not however affect the Beneficiary’s right to assign any proceeds to which he may be, or may become, entitled under the Guarantee.”* This is an important stipulation if contractors agree to provide for issuance of an on-demand guarantee since a contractor is doing so in light of the particular identity of the owner or the beneficiary.

Therefore, it is very important for the contractor that the beneficiary cannot assign the right to make a demand to a third person without the consent of the contractor.

In URDG 758, a whole article is dedicated to the transfer of guarantees and the assignment of proceeds in Article 33 by specifically addressing some of the issues on which URDG 458 is silent. First of all, URDG 758 Article 33(a) states that “*a guarantee is transferable only if it states that it is ‘transferable’, in which case it may be transferred more than once for the full amount available at the time of transfer. A counter-guarantee is not transferable.*” Article 33(b) URDG 758 states an exception to the transferability of guarantees as transfers can only be realized with the consent of the guarantor. Article 33(d) URDG 758 defines the scope of the transfer, and 33(e) indicates who will pay the transfer charges.

3. Article 13 of URDG 458 stipulates the limits of liability or responsibility for the guarantors. Contractors have been critical of the provision that guarantors are not to be relieved of liability for “*strikes, lockouts or industry actions of whatever nature*” as these matters are within the control of the guarantors (banks). URDG 758 provides a force majeure provision in Article 26 where “*force majeure*” is defined to mean “*acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupts its business as it relates to acts of a kind subject to these rules.*” The new rules also stipulate an extension period of 30 calendar days in case the guarantee or the counter-guarantee expires at a time when presentation or payment under a guarantee is prevented by force majeure.
4. According to Article 20 of URDG 458, a demand for payment must be supported, at a minimum, by a written statement stipulating: (i) that the contractor is “*in breach of his obligations under the underlying contract or in case of a tender guarantee the tender conditions*”, and (ii) “*the respect in which*” the contractor is “*in breach*”. This is sharply criticized by many contractors who complain that the demand could contain more detail in order to discourage an unfair call, such as the quantification of claims for damages as the result of the underlying contract or at least the estimation

of a damage amount. URDG 758, on the other hand, stipulates in Article 15 (requirements for demand) that a presentation made to the guarantor must be supported by such other documents as the guarantee specifies and by a statement by the beneficiary indicating in what respect the applicant is in breach of its obligations under the underlying relationship. The provisions of URDG 758 generally repeat the provisions of URDG 458 in this respect.

Uniform Customs and Practice for Documentary Credits*

The techniques and methods for handling letters of credit in international trade finance were standardized by the International Chamber of Commerce (hereinafter referred to as the “ICC”) by publishing the Uniform Customs and Practice for Documentary Credits (hereinafter referred to as the “UCP”) in 1933. The ICC has developed the UCP by regular revisions, the current version being the UCP600. The result is the most successful international attempt at unifying rules ever, as the UCP has a substantially universal effect. The latest revision, called the UCP600, formally commenced on 1 July 2007, and it is the sixth revision of the rules since they were first promulgated in 1933.

UCP600 does not automatically apply to a credit if the credit is silent as to which set of rules it is subject to.

Below you will find a basic comparison which focuses on some major points of divergence between UCP500 and UCP600.

Major Changes

Six articles of UCP500 have been removed:

Art.– 5 – Instructions to Issue/Amend Credits; Art.– 6 – Revocable vs Irrevocable Credits; Art.– 8 – Revocation of a Credit; Art.– 12 – Incomplete or Unclear Instructions, Art. – 30 – Freight Forwarders Transport Documents; Art. – 38 – Other documents.

Several Articles merged:

The content of UCP500 articles 2, 6, 9, 10, 20, 21, 22, 30, 31, 33, 35, 36, 46 & 47 were merged or dealt with in other ways within the text of the revision.

The new definition: “honor”

UCP500 has no specific definitions section, while UCP600 has. However, some definitions like Advising Bank, Applicant, Beneficiary, and Issuing Bank have the same meaning as in UCP500. There are new definitions such as “honor” and “negotiation”. The definition only introduces a new word “honor” and demonstrates what kinds of payment

* *Article of November 2010*

may be used to “honor”. Article 2 lists three kinds of payments (i) sight payment under sight payment credit; (ii) promise against documents together with payment at maturity under deferred payment credit; and (iii) acceptance (promise against bills of exchange) together with payment at maturity under acceptance credit. The payment under negotiation credit does not constitute an honoring, whether by the negotiating bank or the issuing bank. However, according to the definition of “negotiation”, negotiation need not be confined to negotiation credit. Any purchase by the nominated bank may be deemed as negotiation. And any payment by the issuing bank at sight or at maturity may not be considered as negotiation.

Negotiation may be constituted in credits other than the negotiation credit

UCP500 permits only the bank authorized by the issuing bank to negotiate, and “negotiation” was defined as “giving value”. That means that negotiation may only be constituted under a negotiation credit (a credit available with negotiation). However, the new definition of “negotiation” in UCP600 is, “*the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.*” There is no restriction as to whether the credit is a negotiation credit or not. According to the current definition, the prepayment of a nominated bank may be deemed as negotiation. And according to the definition of nominated bank, a bank with which the credit is available is a nominated bank. It follows that an issuing bank may be a nominated bank when a credit stipulates that it is available with the issuing bank by acceptance. If such issuing bank prepays, it negotiates. According to art.12 (b) of UCP600, under an acceptance or deferred payment credit there is a nomination from the issuing bank to allow the nominated bank to prepay or purchase their promised undertaking. It signifies that an acceptance or deferred payment credit may be also a negotiation credit. Negotiation means “purchase” under UCP600.

A separate undertaking of issuing/confirming bank to reimburse nominated bank

UCP600 explicitly stipulates that the issuing/confirming bank has a separate undertaking to the nominated bank other than that to the beneficiary. So, it may be understood that when a credit stipulates a nominated bank,

it contains two undertakings: one is to the beneficiary, the other to the nominated bank. The two are independent of each other.

Advising bank has an obligation to accurately advise the terms and conditions of the credit received

This is the result of standard letter of credit practice, and it is consistent with sub-rule 2.05(a) (ii) of ISP98 and 5-107(c) of the revised UCC.

The nominated bank is allowed to prepay or purchase its promised undertaking

UCP600 adds a stipulation that, “a nomination by an issuing bank for a nominated bank to accept a draft or incur a deferred payment undertaking includes an authorization for the nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by the nominated bank.” Such wording was added to clarify the obstruction brought by the cases in relation to the discounting before maturity. With this revision, the controversial issue regarding the nominated bank’s prepayment under acceptance or deferred payment credit is settled under UCP600.

Different addresses of beneficiary and applicant are allowed unless they are part of consignee information in bills of lading

The use of different addresses for the beneficiary and the applicant has always been used by the banks as a reason for refusal, although it does not affect the underlying transaction and the identification of the beneficiary and the applicant. ICC discourages using such a “minimal” discrepancy as the basis for refusal, but there are two exceptions mentioned in UCP600. The first is the indication of a different country from that of the credit, and the other is indication of different addresses in the consignee or “notify party” fields on bills of lading. Another point that merits attention is that if the credit specifically requires indication in a document of the beneficiary or applicant’s address as stipulated in the credit, the address shown in that document should be the same as that on the credit.

The requirement for “reasonable time” is replaced with a fixed period of five banking days

Under UCP500, when the credit lacks agreement both in express terms and implied terms for determination of the time of refusal, the

“reasonableness test” is inevitable and requires a flexible interpretation and application in individual cases, which cause complexity and uncertainty in banking practice. UCP600 is specifically designed to avoid a “reasonableness test” by removing the wording “reasonable time” and instead stipulating a fixed period of 5 (five) banking days for bankers’ examination and refusal of documents.

Refusal notice

Two points are important and should be paid attention to:

- (i) UCP600 clearly stipulates that a refusal notice, “*must state that the bank is refusing to negotiate or honor,*” whilst UCP500 only implies such a requirement.
- (ii) UCP600 allows a refusal notice to state that, “*the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver*”, whilst under UCP500 it is not allowed because from the perspective of the law such a conditional statement cannot bind the beneficiary as it is only a unilateral modification of UCP Article d(ii) imposed only by the issuing bank but unaccepted by the beneficiary. UCP600 proposes making this type of conditional statement to the beneficiary, and consequently makes it not unilateral.

However, the beneficiary should bear in mind that given that the documents belong to the beneficiary as long as he or she has not been paid for them, whether the disposal clause discussed above is incorporated into the credit or stated in UCP, it may introduce a possibility of depriving the beneficiary of the alternative of selling goods to a third party as it is not uncommon that upon receipt of a refusal notice the beneficiary may choose a new buyer considering high demurrage, a rising market for the goods, or the nature of the goods (e.g., perishables). So, allowing and accepting the new stipulation discussed above in UCP, the beneficiary or presenter will automatically waive the right of disposal of the refused documents so long as the issuing bank waives the discrepancies and honors the said documents. It follows that, in this connection, the incorporation of the clause into UCP or the credit seems unfair and disadvantageous to the presenter or the beneficiary. Therefore, the beneficiary or presenter should

be fully cognizant of the effect and result of the incorporation of such a clause.

The multimodal transport

ICC has considered the increasing popularity of multimodal transport in the international trade, and it has changed the position and order of the transport stipulations by moving the stipulations for multimodal transport to first place in UCP600.

On board notation in case of place of receipt different from port of loading

According to UCP600, if the field “port of loading” on the bills of lading presented indicated clearly the port of loading stipulated in the credit, even if the place of receipt indicates a place other than that port, the on-board notation need not include the port of loading stipulated in the credit and the name of the vessel on which the goods have been loaded.

Master’s name need not be indicated

When an agent for the master signs the bills of lading, the master’s name need not be indicated which follows the current transport practice.

The issuing date and the actual flight date of AWB

UCP600 states that AWB must indicate the issuing date. When there is a special notation regarding the dispatch date/flight date, such a date in the notation will be deemed as the shipment date regardless of whether the credit requires the AWB presented to show such dispatch date/flight date. UCP600 states no such requirement for other transport documents, especially for bills of lading. The latter one overrules UCP500 art 27(a) (iii) and previous ICC opinions.

Insurance documents may be signed by the proxy of the insurer or underwriter

It is the result of ICC Official Opinion Documents following the insurance practice.

An insurance document may contain reference to any exclusion clause

Such stipulation listing specific exclusion clauses was the result of ICC Official Opinions Documents. However, the problem is because such listing is not exhaustive, it will easily bring possibility and uncertainty for banks to judge which exclusions may be accepted and which exclusions may not. It follows that some banks may refuse insurance documents bearing an exclusion clause which is not listed in the stipulation mentioned above. If so, such practice may be against insurance practice as it is usual and acceptable practice for the insurer to insert exclusion clauses.

Recognition and Enforcement of Arbitral Awards and Foreign Judgments*

Recognition and enforcement of arbitral awards

The prevailing party in an international commercial arbitration expects the award to be realized without delay. The purpose of arbitration, unlike mediation and most other methods of alternative dispute resolution methods, is to arrive at a binding decision on the dispute. The ultimate sanction for non-performance of an award is being forced to execution as a result of enforcement proceedings in a national court.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter referred to as ‘New York Convention’ and/or ‘Convention’), which is applied in 144 countries on all continents, provides for the enforcement of foreign arbitral awards. Turkey is a party to the New York Convention.

The main legislation on the enforcement of arbitral awards in Turkey is International Private and Procedure Law No.5718 dated December 12, 2007 (hereinafter referred to as ‘IPPL’) and the New York Convention which was ratified by Turkey on July 2, 1992, and which entered into force on September 30, 1992.

In respect of enforcement of foreign arbitral awards in Turkey, provisions of the IPPL are applicable only if the award is decided by a non-contracting (signatory) State to the New York Convention.

Under the New York Convention

Under the New York Convention, a foreign award is to be recognized and enforced in any signatory state unless the defendant proves the existence of the specific grounds set forth in Article V of the Convention, *i.e.*:

1. The parties to the arbitration agreement did not have the capacity to contract, or the agreement to arbitrate is otherwise invalid;
2. The party against whom the award is made did not have proper notice of the arbitration or could not present its case;

* *Article of March 2010 – Prof. Dr. H. Ercüment Erdem*

3. The award exceeds the scope of the arbitration agreement;
4. The composition of the arbitral panel or procedure was contrary to the agreement of the parties or the law of the forum country;
5. The award was set aside under the law of the forum country;
6. The subject matter is not arbitrable; or
7. The enforcement of the award is contrary to public policy.

Firstly, the New York Convention does not permit any review on the merits of an award to which the Convention applies. This principle which is referred to as prohibition of the *revision au fond* will not allow the national enforcing judges to retry the whole case.

Secondly, the grounds for refusal of recognition and enforcement set out in the New York Convention are exhaustive. They are the only grounds on which recognition and enforcement may be refused.

Thirdly, the New York Convention sets out five separate grounds on which recognition and enforcement of a Convention award may be refused at the request of the party against whom it is invoked. It is significant that under the Convention the burden of proof is not upon the party seeking recognition and enforcement. The remaining two grounds on which recognition and enforcement may be refused relate to the public policy of the place of enforcement and are grounds which may be invoked by the domestic court *sua sponte*.

Fourthly, even if grounds for refusal of the recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement. The opening lines of paragraphs (1) and (2) of Article V say that enforcement “may” be refused. They do not say that it “must” be refused.

Fifthly, the intention of the New York Convention is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.

Under the International Private and Procedural Law (“IPPL”)

It should be noted that there are no significant differences between the rules of enforcement provided in the IPPL and the provisions of the New York Convention.

Considering the foregoing, we may briefly state that, in respect of the enforcement of foreign arbitral awards in Turkey, the provisions of the IPPL are applicable only if the award is decided by a non-contracting (signatory) State to the New York Convention.

Enforcement and recognition of foreign judgments

International Private and Procedural Law regulates the choice of substantive law issues, international civil procedure, and the recognition and enforcement of foreign judgments.

Turkey has signed and ratified bilateral agreements concerning reciprocity for the recognition and enforcement of foreign judgments with the following countries:

Italy, Romania, Tunisia, North Cyprus Turkish Republic, Poland, Austria, Iraq, Azerbaijan, China, Georgia, Albania, Kazakhstan, Macedonia, Egypt, Moldova, Croatia, Kuwait, Tajikistan

Turkey is also a party to the following Conventions:

- Convention on Recognition and Enforcement of Decisions concerning the Matrimonial Bond dated 1975
- Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations Towards Children dated 1958
- Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations dated 1973
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children dated 1980

Enforcement of Foreign Judgments in Turkey

“Rules of Simplified Procedure” apply. A foreign judgment, which is final under the law of the country where it is decided, cannot be recognized and enforced by a Turkish judge without holding a hearing. In this hearing, the facts of the case are not re-opened, and the judge only examines if all the statutory preconditions necessary for recognition are present.

Lawsuits concerning the recognition and enforcement will be handled pursuant to the rules of simplified procedure. The defendant can only raise

objections that the conditions for enforcement under the relevant provisions of the IPPL do not exist, that the foreign court decision has already been partly or fully fulfilled, or that an event which hinders its fulfillment has occurred.

The Turkish court may decide to enforce the judgment fully or partially, or may refuse enforcement.

Cautio Judicatum Solvi. Foreign real or legal persons who commence an action in a Turkish Court, participate in a pending lawsuit, or seek execution of a judgment must provide security in an amount to be determined by the court to cover court and execution costs and the damages of the counterparty.

On the basis of reciprocity, the court may release the foreigner claimant from the obligation to provide security.

Conditions of Recognition and Enforcement

Only foreign judgments in civil law matters (or exceptionally in criminal matters to the extent they contain money judgments) are subject to recognition and enforcement.

Reciprocity

The IPPL regulates that the competent court renders a decision for enforcement if there is a reciprocity agreement between the Turkish Republic and the State where the judgment has been rendered or if a statutory provision or actual practice in that country makes the enforcement of Turkish court decision possible.

Turkey has signed reciprocity agreements with some countries, but reciprocity established by an international agreement is not a prerequisite for enforcement of a foreign judgment. *De facto* reciprocity is also sufficient. Such *de facto* reciprocity has already been established for court decisions rendered in some of the Western European countries, including Germany, Holland, the UK, and Switzerland.

Exclusive Jurisdiction

The foreign court decisions concerning a matter where Turkish Courts have exclusive jurisdiction cannot be enforced in Turkey. Under

Turkish law, some of the jurisdiction rules are related to *ordre public* and are regulated within the exclusive jurisdiction of Turkish Courts. These are mainly matters relating to immovable assets, claims within the scope of the Code of Execution and Bankruptcy, and claims pertaining to the registration, deregistration, or a cancellation of an intellectual or industrial property right in Turkey.

Turkish Public Order

A foreign judgment which is obviously against the Turkish *ordre public* will not be enforced. The determination of when the basic values of Turkish Law are damaged is within the discretion of the Turkish judge. Some examples of a contradiction of *ordre public* are violations of the right to be heard, judgments without merits, judgments against good morals, and judgments violating foreign trade, customs, or tax regulations.

Respecting the Defendant's right of defense

A foreign judgment will not be enforced if under the law of the foreign country, the person against whom the enforcement is sought has not been properly summoned, was not represented in court, or had a default judgment rendered against him or her which was contrary to the laws of that country. Enforcement in these cases will be rejected if the party against whom the enforcement is sought raises these objections before the Turkish court.

Effects of the Enforcement Decision

Foreign judgments that are enforced by a Turkish court decision are treated like Turkish local court judgments and can be executed as if they were Turkish court decisions.

Conclusion

As Turkey is a party to the New York Convention, the recognition and enforcement of arbitral awards are mostly subject to the Convention.

The recognition and enforcement of foreign judgments is regulated in the IPPL. However, Turkey is a party to various international conventions and many bilateral agreements concerning this matter. Briefly, the Turkish courts are not allowed to re-review the merits of the case, and the grounds for refusal of enforcement are exhaustively listed in the IPPL.

Application of Jurisdiction Agreements which Authorize Foreign Courts and the Parties' Choice of Foreign Law by the Turkish Court of Appeal*

I. Jurisdiction of Turkish Laws

According to Article 47 of Law No. 5718 on International Private Law and Procedural Law, parties may agree that a foreign court will have jurisdiction to resolve disputes which carry a foreign element and arise from a private law relationship. Pursuant to Article 47/1:

Jurisdiction Agreements and its Limits

ARTICLE 47- (1) The parties may agree that a foreign court will have jurisdiction to resolve any disputes which carry a foreign element and arise from a private law relationship, where the domestic courts do not have exclusive jurisdiction. Such an agreement must be made in writing. Such a case may only be brought before a competent Turkish court, provided that the foreign court has deemed itself incompetent, or no plea of jurisdiction have been raised in the Turkish court.

In cases where a lawsuit is brought before Turkish courts despite a jurisdiction agreement, contradictory judgments have been delivered by the 11th Civil Chamber of the Court of Appeal.

In one of its decisions given when the prior Law No.2675 on International Private Law and Procedural Law was in force, the 11th Civil Chamber of the Court of Appeal decided on the non-competence of the Turkish court of general jurisdiction by stating that, "...It is clear from the scope of the file that the claimant is a foreign entity and that the dispute in question carries a foreign element; in such disputes, provided they not to related to exclusive jurisdiction and public order, a jurisdiction agreement is applicable; in the contract between the respective parties, a foreign court is deemed to have jurisdiction; under the given circumstances, refusal of jurisdiction is appropriate in terms of the respective procedure and law".

The same chamber, in another decision during the same period, approved the Turkish court's judgment which held that it has jurisdiction

* *Article of February 2010*

despite the existence of a jurisdiction agreement by stating that, “...*although the incident in question occurred in the Pacific Ocean, the jurisdiction agreement authorizing a foreign court may not abolish the international jurisdiction of Turkish Courts that are generally, and exclusively competent; Turkey has not become a signatory of the London Convention; thus, the lawsuit in question has been brought before the Turkish Courts as the forum of the place of performance and thus competent in accordance with Articles 22 and 23 of the Law on International Private Law and Procedural Law, and Articles 9 and 10 of the Law of Civil Procedure*”.

As there are contradictory decisions from the same Chamber, the ambiguity was clarified by the new provision of Law No. 5718 which provides that the Turkish courts may assume jurisdiction only in two exceptional cases. These cases are (i) if the competent foreign court decides on its non-competence for some reason; or (ii) the respondent does not object to the jurisdiction of the Turkish court.

In line with that, in a more recent decision, following the adoption of Law No. 5718, the 11th Civil Chamber of the Court of Appeal decided that, “*As it has been agreed that disputes which arise from bills of lading, subject to the lawsuit in question, would be resolved in the Naples court and Italian Law would be applicable in the settlement thereof, and that an issue of jurisdiction, or public order is not in question, a foreign court may accordingly be deemed competent in such disputes carrying a foreign element. Thus, it is supposed to dismiss the lawsuit in terms of non-jurisdiction, and to have the decision stating that the Naples courts are the competent courts approved*”.

II. Applicable Law

According to Article 24 of Law No.5718 on International Private Law and Procedural Law, the choice of law of the parties to the disputes arising out of contractual relations carrying a foreign element must be respected.

Pursuant to the said Article:

Applicable law to the contractual relations

ARTICLE 24- (1) A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their

choice the parties can select the law applicable to the whole or a part only of the contract.

(2) The parties may also agree that the applicable law shall be applied to the whole or part of the contract in question.

(3) The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

(4) To the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law with which it is most closely connected. It shall be presumed that the contract is most closely connected with the law where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that law shall be the law in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the law in which that other place of business is situated. However, if it appears from the circumstances as a whole that the contract is more closely connected with another law, that law shall be applied.

In its decisions with regard to the applicable law, while Law No.2675 on International Private Law and Procedural Law was in force, the 11th Civil Chamber of the Court of Appeal indicated that the applicable law agreed upon in the respective contracts will be taken into consideration by consistently stating that, “...In accordance with the respective provision

of Article 2 of Law on International Private Law and Procedural Law, a judge is obliged ex officio to investigate the applicability of a foreign law in a lawsuit; in accordance with the respective provision of Article 24/1, private relationship of the parties, arising from a contract is subject to the law decided expressly as applicable therein; in compliance with the letter of warranty, deemed as the provision of the contract by the parties thereto, Swiss Law is applicable to the dispute; under such a circumstance, the court should demand the assistance of the parties, with regard to the submission of the Swiss Laws, and the respective regulations applicable to this lawsuit, as well as summon the respective provisions of the said laws by mediation of the Ministry of Justice, and have the compliance of the expertise report with the provision of the submitted foreign laws in question examined” .

Pursuant to the clear provision of Law No. 5718, although the lawsuit in question is tried before the Turkish Courts, the applicable law will be the law of the foreign country, having been expressly agreed upon by the parties in the respective contract. The settled practice of the 11th Civil Chamber of the Court of Appeal is in line with the Law.

Latest Developments on Work Permits for Foreigners*

Law no. 5951 was published in the Official Gazette No. 27484 of 5 February 2010 and amends some provisions of the Law on Work Permits for Foreigners No. 4817. Moreover, some of the important provisions of the Application Regulation For the Law on Work Permits of Foreigners, which are stipulated in accordance with Article 22 of the Law on the Work Permits of Foreigners, are modified through the Regulation which amends the Application Regulation For The Law on Work Permits for Foreigners published in the Official Gazette No. 27469 of 21 January 2010.

1) Latest Developments brought by Law no. 5951 for Foreigners

- The Ministry will finalize all applications that are duly made, provided that all documents are complete and in full force, within latest 30 days.
- Without prejudice to the relevant legislations' provisions, a foreigner who will perform "Professional Services" (architect, engineer, city or environment planner, etc.) may have preliminary permission for up to one year until the foreigner fulfils all conditions regarding "academic and professional proficiency".
- Foreigners who will work out of the scope of their profession will be exempted from academic and professional proficiency, license requests, and proficiency applications. Moreover, decisions of other authorities will not be requested.

2) Major Developments on the Application Regulation For the Law on Work Permits for Foreigners

- Technological Application: Applications can be made electronically. Upon request, the Ministry of Labor can grant the work permit electronically.
- Issuance of the Residence Permit: Applicants from Turkey will apply for work annotated residence permits to the police authorities within 30 days following the date of the notification of a work permit. Otherwise, the work permit will not be valid.
- Decisions should be given within a specific time period by

* *Article of January 2010*

relevant authorities: The relevant authorities should give their decisions within a specific period of time. Public institutions should give document requests at the latest within 5 days and information and decision requests should be given at the latest within 15 days. The relevant authorities should provide their decisions to the Ministry at the latest within 15 days. If necessary, the relevant authorities may request an extension of the period.

- **Benefit of Foreign Employment for the National Economy:** In the assessment of work permit requests, the Ministry will consider certain criteria such as the educational status of foreign personnel, appropriate wage levels, and the contribution of the relevant enterprise to the national economy as well as the specific conditions of the work.

State Aid for Export*

The Council of Ministers adopted a Decree numbered 94/6401 regarding State Aid for Export¹ (hereinafter referred to as the “Council of Minister’s Decree”) aiming to sponsor activities supporting the economic and social targets designated in developmental plans and yearly plans. On the basis of the Council of Minister’s Decree, the appropriate instruments for providing the mentioned sponsorships have been created through many Communiqués adopted by the Turkish Republic Prime Ministry International Trade Undersecretariat’s (hereinafter referred to as the “Undersecretariat”) Money-Credit Coordination Council in compliance with European Union and GATT norms.

1. Sponsorship for Participation in Fairs Abroad

The Communiqué numbered 2009/5 regarding the Sponsorship of Participation in Fairs Abroad² is the latest legislation and is in compliance with the Council of Minister’s Decree.

The aim of the Communiqué is to sponsor export by the following means:

- To ensure the participation of Turkish companies in fairs abroad and individual participation in international sector-specific fairs,
- To present and market Turkish export goods.

The relevant export sponsorship provides the expenses of the parties mentioned below from the Sponsorships and Price Stability Fund:

- organizers of the fairs abroad
- companies and institutions which participate in these fairs
- individual participants in international sector-specific fairs

The sponsorship amount varies from around 50% to 75% of the total fair cost depending on the nature of the fair or the participant. In no circumstances can the sponsorship amount exceed the cap designated in the Communiqué.

* *Article of January 2010*

1 The mentioned Decree was published in the official gazette dated 11 January 1995, numbered 22168 and entered into force.

2 The mentioned Communiqué was published in the official gazette dated 30 December 2009, numbered 27448 and entered into force.

In order to benefit from this sponsorship, an application must be filed with the secretary general of the relevant export union at least fifteen days prior to the commencement of the international fair.

2. Design Sponsorship

The Communiqué numbered 2008/2 regarding the Sponsorship for Design³ aims to establish and spread the culture of design in Turkey. To this end, it provides the presentation, advertising, marketing, employment, and consultancy expenses of the design companies, offices, unions, and associations from the Sponsorships and Price Stability Fund. The Communiqué also provides for the expenses arising out of the opening of international branches to be recovered.

In this context, the expenses of the design companies and offices mentioned would be covered up to 50% of their actual amount.

If there is a registration of a patent, utility model or industrial design, an application must be filed within 18 months from the remittance of the expenses in order to benefit from this sponsorship. For other expenses, the time limit for applications is 6 months from the remittance of those expenses.

3. Refund for Export of Agricultural Products

In order to enhance the competitive power and export potential of Turkish agricultural products in international markets, the Communiqué numbered 2008/1 regarding the Refund for the Export of Agricultural Products⁴, was adopted.

The sponsorship of an export refund provides payments to be made in compliance with the caps designated by the World Trade Organization in Agricultural Agreements.

In order to benefit from this sponsorship, an application must be filed with the secretary general of the relevant export union no later than one year from the actual export date.

3 The mentioned Communiqué was published in the official gazette dated 18 April 2008, numbered 26851 and entered into force.

4 The mentioned Communiqué was published in the official gazette dated 19 March 2008, numbered 26821 and entered into force.

4. Sponsorship for Education and Consultancy

According to Communiqué numbered 2007/3⁵, the following expenses would be covered by the Sponsorships and Price Stability Fund:

- the quality, efficiency, management techniques, design, international marketing, etc. expenses of companies with industrial and commercial activities and software companies,
- the education and consultancy expenses on international trade of the companies mentioned above
- the award winning designer's education expenses

The sponsorship includes the payment of 70% of the education expenses up to the cap designated in the Communiqué. The application must be filed within six months of the actual remittance of expenses.

5. Sponsorship for Market Research and Marketing

The Communiqué numbered 2006/6⁶ regarding the Sponsorship for Market Research and Marketing allows the following expenses of companies with industrial and commercial activities and software companies to be covered by the Sponsorships and Price Stability Fund:

- Expenses for obtaining systematic and objective information about potential markets
- Expenses of activities for increasing market share in traditional markets and creating new export markets

The sponsorship includes the payment of 70% - 80% of the companies' expenses for relevant sector-specific market research projects; 50% - 60% of the expense of buying market research reports and statistics from institutions or organizations in order to create a marketing strategy and an action plan; 50% - 60% of the expenses for attending the trade delegation's sector-specific program coordinated by the Undersecretariat on the basis of sole sector; 50% - 60% of the expenses for being a member of e-commerce sites, which are not intended for customers and are deemed suitable by the

5 The mentioned Communiqué was published in the official gazette dated 28 July 2007, numbered 26596 and entered into force.

6 The mentioned Communiqué was published in the official gazette dated 21 October 2006, numbered 26326 and entered into force.

Undersecretariat in order to market their products abroad. The sponsorship would be up to the cap designated in the Communiqué.

In order to benefit from this sponsorship, the companies must apply to the secretary general of the relevant export union or to the Export Promotion Center within 6 months of the issue date of the documents with respect to the expenses.

6. International Branding of Turkish Products, Establishing the Image of Turkish Products and Promotion of Turquality

Within the scope of the Communiqué numbered 2006/4⁷ regarding the International Branding of Turkish Products, Establishing the Image of Turkish Products and the Promotion of Turquality, the following expenses would be covered by the Sponsorships and Price Stability Fund in accordance with the international rules:

- the expenses incurred by the Exporter Unions, Manufacturers' Associations, and Manufacturers' Unions for the international presentation of the sectors,
- the expenses incurred by companies dealing with industrial and commercial activities in Turkey for branding of their products,
- the expenses incurred by the Exporter Unions for promoting the firms within the scope of the TURQUALITY® Program and during the branding period in domestic and international markets,
- the expenses of all activities and organizations for the entrance of Turkish brands to the market and their maintenance in the market
- the expenses incurred in Turkey or abroad for creating a positive image of Turkish products and the expenses incurred for the maintenance of this image

In order to benefit from this sponsorship, the companies must apply to secretary general of the relevant export union within 18 months of the issue date of the documents with respect to the expenses of the registration and maintenance of the trademarks and the registration of patents, utility models, or industrial designs and within 6 months of the issue date of the

7 The mentioned Communiqué was published in the official gazette dated 24 May 2006, numbered 26177 and entered into force.

documents with respect to the other expenses. However, the institutions must apply directly to the Undersecretariat. The scope of the sponsorship would be 50% - 80% of the expenses up to the cap designated in the Communiqué.

7. Sponsorship for Establishing an Office or a Store Abroad, Business Management and Presentation of Trademarks

The Communiqué numbered 2005/4⁸ regarding the Sponsorship for Establishment of an Office or a Store Abroad, Business Management, and Presentation of Trademarks aims that the expenses incurred by companies operating in Turkey with regard to presentation of their products in international markets, registration of their trademarks, and the expenses with regard to the entities established for the trade of products abroad would be covered by the Sponsorships and Price Stability Fund in accordance with the international rules.

Companies with industrial and commercial activities or software companies, international trading companies, and sector-specific foreign trade companies would benefit from sponsorship, although at different levels of support.

If the companies mentioned above establish a store abroad, 50% - 60% of the expenses with regard to assets, decoration, and lease; if they establish an office or a showroom abroad, 50% - 60% of the expenses for assets, decoration, and lease; if they establish a warehouse abroad, 50% - 60% of the expenses for assets, decoration, and lease; 50% of the companies' international advertising, promotion, and marketing expenses; 50% of the expenses for the registration and maintenance of the trademarks abroad are covered up to the cap designated in the Communiqué.

In order to benefit from this sponsorship, the companies must apply to the secretary general of the relevant export union, within 18 months of the issue date of the documents for the expenses of the registration and maintenance of the trademarks and within 6 months of the issue date of the documents with respect to the other expenses.

8 The mentioned Communiqué was published in the official gazette dated 25 November 2005, numbered 26004 and entered into force.

8. Sponsorship for the Technical Consultancy Firms' Activities Abroad

In order to increase the export of products and services, the Communiqué numbered 2004/5⁹ regarding the Sponsorship for the Technical Consultancy Firms' Activities Abroad, designated the state aid for some of the activities in Turkey and abroad by the following organizations.

- Technical consultancy firms,
- Construction firms,
- Firm groups,
- Private sector-specific institutions,
- Fair organizations
- Seminar and conference organizations

Within the scope of the sponsorship, the expenses for offices located abroad; expenses with regard to marketing research; fees for attending fairs, conferences, and seminars; and expenses for the preparation of feasibility studies and contracts are covered up to the cap designated in the Communiqué.

9. Sponsorship for Employment

The aim of the Communiqué numbered 2000/1¹⁰ is to provide for the employment of experienced and highly educated managers and employees in order for them to deal solely with international trade procedures in international trade companies.

In this context, the fees of an experienced and highly educated manager (one) and employees (two), are paid up to 75% for only 1 year, provided that the mentioned manager and employees are hired for the first time in the relevant international trade company.

An application must be filed with the Undersecretariat's Export General Directorate in order to benefit from this sponsorship.

9 The mentioned Communiqué was published in the official gazette dated 09 June 2004, numbered 25487 and entered into force.

10 The mentioned Communiqué was published in the official gazette dated 29 January 2000, numbered 23948 and entered into force.

10. *Sponsorship for Research and Development* (hereinafter referred to as the “*R&D*”)

The Communiqué numbered 1998/10 Regarding the Sponsorships for R&D¹¹ aims to cover the monitored R&D expenses of industrial companies and to provide capital aid to them through the Undersecretariat.

The coverage of the sponsorship is as follows:

- To Sponsor R&D Activities on a Project Basis

This sponsorship provides for the partial payment of the expenses arising out of (i) the in-house R&D activities of the institutions or (ii) the R&D activities outsourced by the mentioned companies, as long as they are carried out in Turkey.

The R&D activities are evaluated by The Scientific and Technological Research Council (hereinafter referred to as “TÜBİTAK”), and the competent authority to approve the sponsorship is the Undersecretariat.

- Procurement of Capital Aid for Projects

An agreement must be signed between the Technology Development Foundation of Turkey (hereinafter referred to the “TTGV”) and the applicant companies. The competent authority to approve the sponsorship is the Undersecretariat. The capital aid is procured in two ways: (i) capital aid for product development projects and (ii) capital aid for projects focused on strategic issues.

- Sponsorship for Other Projects

The Communiqué also envisages sponsorships for the R&D expenses of EUREKA projects and of companies established by several industrial institutions together with TÜBİTAK or TTGV.

11. *Sponsorship for Environmental Costs*

In the scope of the state aid for export, the Communiqué numbered 97/5¹² aims to partially cover the expenses of companies active in Turkey

11 The mentioned Communiqué was published in the official gazette dated 4 November 1998, numbered 23513 and entered into force.

12 The mentioned Communiqué was published in the official gazette dated 31 July 1997, numbered 23066 and entered into force.

in the fields of commerce, industry, agriculture, or software technologies arising out of the procedures for the documentation of quality and environmental standards, security signs for human health and wealth, and agricultural laboratory analyzes, which will be obtained from accredited institutions.

The mentioned sponsorship includes the following expenses to be paid up to 50% per document or analysis report up to a cap of USD 25.000:

- ISO 9000 series quality management system documentation
- ISO 1400 environmental management system documentation
- ISO 22000 food safety management system documentation
- CE sign
- Other international quality and environmental documentation
- Agricultural documentation procedures and laboratory analysis reports, provided that they are positive.

In order to benefit from this sponsorship, an application must be filed with the secretary general of the relevant export union no later than 6 months from the actual remittance of the expenses.

12. Sponsorship for Expertise Fairs in Turkey with International Qualifications

The Communiqué numbered 95/7¹³ has been entered into force in order to promote expertise fairs in Turkey with international qualifications and increasing the attendance at these fairs at the international level.

Pursuant to the this Communiqué, some of the expenses with regard to the domestic organizations' presentation and promotion activities conducted before and during the fairs would be covered by the Sponsorships and Price Stability Fund. Within the scope of the Communiqué, 50% of the expenses for the fairs would be sponsored. Additionally, the sponsorship would not exceed the cap designated in the Communiqué.

In order to benefit from the sponsorship, an application must be filed with the secretary general of the relevant export union no later than 2 months prior to the commencement of the fairs.

13 The mentioned Communiqué was published in the official gazette dated 1 June 1995, numbered 22300 and entered into force.

Convention on Contact Concerning Children*

The ratification of the Convention on Contact Concerning Children was approved by Law numbered 6066, published in the Official Gazette of 30 November 2010.

Contact with children and the possible restrictions thereon, when these are considered necessary for the best interests of the child, is a major concern for the member States of the Council of Europe. The Convention also addresses non-member States of the Council of Europe and will therefore also be open to their accession to this Convention.

The inherent problems with respect to the exercise of contact give rise to significant disputes in many countries. Some parents are reluctant to grant contact rights while others are deprived of the possibility of obtaining or of maintaining any type of contact at all with their child. Disputes relating to contact are often long and painful for the parties concerned and raise problems as regards making, modifying, and enforcing court orders relating to contact. Furthermore, the internationalization of family relations and the difficulties created by geographical separation, which brings with it the application of different legal systems, different languages, and cultural differences, illustrate just some of the problems encountered in transfrontier contact.

The aim of the Convention is to improve certain aspects of the right of national and transfrontier contact and, in particular, to specify and reinforce the basic right of children and their parents to maintain contact on a regular basis. This right may be extended, if necessary, to include contact between a child and persons other than his or her parents, in particular when the child has family ties with such a person.

A contact order is defined as a decision of a judicial authority concerning contact, including an agreement concerning contact which has been confirmed by a competent judicial authority or which has been formally drawn up or registered as an authentic instrument, and is enforceable.

In this respect, the object of the Convention is to determine the general principles to be applied to contact orders, as well as to fix appropriate safeguards and guarantees to ensure the proper exercise of such contact

* *Article of November 2010*

and the immediate return of children at the end of the period of contact. It establishes co-operation between all the bodies and authorities concerned with contact orders and reinforces the implementation of relevant existing international legal instruments in this field.

States which are parties must provide a system for the recognition and enforcement of orders made in other party states concerning contact and rights of custody; a procedure whereby orders relating to contact and rights of custody made in other party states may be recognized and declared enforceable in advance of contact being exercised within the state addressed.

The judicial authority of the party state in which a transfrontier contact order made in another party state is to be implemented may, when recognizing or declaring enforceable such a contact order, or at any later time, fix or adapt the conditions for its implementation, as well as any safeguards or guarantees attaching to it, if necessary for facilitating the exercise of this contact, provided that the essential elements of the order are respected and taking into account, in particular, a change of circumstances and the arrangements made by the persons concerned. In no circumstances may the foreign decision be reviewed as to its substance.

Where a child at the end of a period of transfrontier contact based on a contact order is not returned, the competent authorities will, upon request, ensure the child's immediate return, where applicable, by applying the relevant provisions of international instruments, of internal law and by implementing, where appropriate, such safeguards and guarantees as may be provided in the contact order. A decision on the return of the child will be made, whenever possible, within six weeks of the date of an application for the return.

The Convention concerns subject matter which causes many problems in practice, which especially harm innocent children; thus, any attempt at international cooperation in this matter is pleasing.

COMMERCIAL LAW

Appointment of a Trustee for Joint Stock Companies*

In practice it is frequently seen that an appointment of a trustee for a joint stock company is sought from the court where the company lacks bodies or where the bodies are not functioning due to disputes between the shareholders.

Applicable Provisions

There is not a private regulation in the Turkish Commercial Code (hereinafter referred to as the “TCC”) with regard to appointment of a trustee for a joint stock company. Therefore, Articles 403, 426/3 and 427/4 of the Turkish Civil Code (hereinafter referred to as the “CC”) are applicable.

- Pursuant to Article 403 of the CC, a trustee is appointed for conducting certain transactions or managing the assets.
- Article 426/3 stipulates that if the legal representative cannot conduct its duty due to an obstacle, then a trustee will be appointed ex officio or upon a request of the person concerned.
- Article 427/4 regulates the legal entity becoming lack of bodies and becoming functionless as it is read as “in case that a legal entity becomes lack of its mandatory bodies or the management cannot be conducted in any manner...”

Conducting Certain Transactions

Article 403 of the CC allows the appointment of a trustee for conducting certain transactions. The business of a joint stock company is managed by its bodies and therefore, this Article is not applicable as long as the bodies are in charge of the business. Article 427/4 of the CC applies when there is lack of a body.

* *Article of February 2010 – Prof. Dr. H. Ercüment Erdem*

In practice, a trustee was used to be appointed in order to call for a general meeting and conduct the general meeting if the board of directors or the auditors could not call for a general meeting because their terms had expired. However, the Court of Cassation later on decided that although the term of a body has expired, the call for a general meeting due to election of a new body and the general meeting held for adoption of a decision with regard to election are deemed to be legal. Therefore, pursuant to Article 403 of the CC, appointment of a trustee for conducting certain transactions is not required unless there are conditions other than the expiration of the term of a body. In principle, the duty of the body will continue on a limited basis for the purpose of the election of new members and for conducting the current business.

Default of the Legal Representative

The legal bodies of a joint stock company are the general assembly, the board of directors, and the auditors. The bodies of a legal entity are the components of the legal entity, just as the organs of a real person are the components of that person. As is known, joint stock companies can use their rights and incur debts by its bodies. Thereby, the acts and transactions of the bodies are deemed as the legal entity's acts and transactions. Therefore, the bodies of the joint stock company are not the representatives of the company. The body does not declare the intent of a third person as representatives do; on the other hand, the body, as a component of the joint stock company, declares the intent of the company.

Within the framework of the explanation above, the bodies cannot be assessed in the scope of Article 426/3 of the CC, and this Article does not cover the bodies of a joint stock company. The bodies of a joint stock company are not the legal representatives.

Lacking Bodies

Lacking bodies, which is stipulated in Article 427/4 of the CC emphasizes the joint stock company being lack of its mandatory bodies. Pursuant to Article 435, lacking bodies is also a reason for termination. A variety of possibilities may be taken into account with regard to this matter.

- If a general meeting cannot be called;

- If the board of directors or the auditors cannot be elected by the general assembly;
- If any members cannot be appointed to the board of directors or any members cannot be appointed as auditors in order to fill the empty positions, and therefore the quorum cannot be met;
- If a body becomes functionless because the quorum cannot be met;

the joint stock company will be deemed to lack of bodies.

Lack of quorum or contrary to the decisions by some of the members shall not be deemed as “lack of body” provided that the board of directors meets regularly.

In practice, when the board of directors cannot meet or cannot adopt a decision during the meeting, a “deadlock” occurs. Generally, in the Articles of Association or in the Shareholders’ Agreement, a special provision is stipulated with regard to deadlocks. It is given superiority to such provisions in accordance with the freedom of contract in case that they are not contrary to obligatory provisions. If a provision with regard to deadlock is not stipulated and the deadlock continues for a long time and the company becomes nonfunctional as a result, then the deadlock will cause the company to lack bodies. The entire private conditions and positions of each matter will be taken into account when deciding on whether the time is long enough.

Disputes between Shareholders do not Require Appointment of a Trustee

Disputes between the shareholders or disputes arising from different relations do not require the appointment of a trustee. It is not possible for the shareholders to agree on each and every issue. Some of the shareholders may support an investment whereas some of them do not. However, such differences of opinion do not require the appointment of a trustee.

A weakness in the representation and the management of a joint stock company do not require the appointment of a trustee. Also, problematic situations such as the inability of the board of directors to manage or represent the company efficiently, or the company’s failure to realize an anticipated level of profitability also do not require the appointment of a trustee. Representation and management are duties of the board of

directors. The TCC regulates the necessary remedies for shareholders' dissatisfaction with the management and representation. The members of the board of directors can be dismissed, they can be held liable provided that the required conditions exist, and new members can be elected. However, the "incapacity of management" does not require the appointment of a trustee.

It is not appropriate for the shareholders who fail to continue the management of the company to demand administration of the company by the trustee through a public interference instead of terminating the company or providing the most appropriate management form by the way of auditing body.

Also, it is not possible to seek appointment of a trustee for a company which is not operating and which is in liquidation.

The Duties and the Powers of a Trustee

The duties and the powers of a trustee are determined and the limitations are defined by the court. As the duty of a trustee is temporary, the term of the duty, the powers, and the fee will be defined in the decision explicitly. It is important to remember that the trustee's duty is limited with the situations requiring the appointment of a trustee. If an appointment of a trustee is sought for certain transactions, the powers, the duties, and the term are determined by taking into account the transactions. If a trustee is appointed for a company lacking bodies, the duty of the trustee will be the election of this body. The trustee cannot be appointed as a substitute for this body. For instance, if the board of directors cannot be elected because the general meeting cannot be called, then the trustee is empowered to conduct the general meeting and elect the board of directors. The trustee cannot be a substitute for the board of directors. If the trustee cannot conduct the general meeting, then this situation will be a reason for the termination in accordance with Article 435 of the TCC, and the duties of the trustee will be determined as stated above.

The Subjects Regarding the Procedural Law

The case with regard to the appointment of a trustee concerns a joint stock company, and, therefore, it is definitely a commercial case. The case will be initiated before the commercial court of first instance or if it does

not exist, before the civil court of first instance acting for the commercial court.

The competent court is the court with jurisdiction for the place where the head office of the company is located.

The case will be initiated against the company along with the shareholders. The decisions of the Court of Cassation are also in agreement with this.

In practice, the appointment of a trustee is sought as a precaution before the case has ended. It is important to emphasize that the court will not decide on a precaution which will reach the same conclusion as the decision. The trustee will be charged with the urgent and necessary duties as a precaution. For instance, a case is initiated for the appointment of a trustee because all the members of the board of directors have died in a traffic accident and the company lacks a body. However, while the case is continuing, the term of the specimen signature has expired. In this situation, the appointment of a trustee is sought as a precaution for the issuance of a new specimen signature.

Conclusion

An appointment of a trustee for a joint stock company is an exceptional resolution, and it is a temporary remedy for preventing the termination of the company due to lack of bodies. Therefore, the courts take into account that the real reason for an appointment of a trustee is to provide for the continuation of the company. The courts will not appoint a trustee in order to settle disputes between shareholders.

In case of a requirement for an appointment of a trustee, the duties, the powers, the term and the fees are determined in the decision explicitly. The decision will not cause the trustee to be a substitute for a body with authority to manage and represent the company permanently.

Expiration of Term of Office of the Board of Directors in Joint Stock Companies*

The term of office of the board of directors in joint stock companies is limited to three years in article 314 of the Turkish Commercial Code (hereinafter referred to as the “TCC”) titled “Term”. This term may be shortened by the articles of association and additionally, the terms of office of board members may be determined by the general assembly.

It is discussed whether the duties of former board members continue or whether the situation of a lack of organs arises in the joint stock company according to art. 435 of TCC if new board members cannot be elected in the general assembly held to elect new board members in lieu of the former ones or if an election does not take place since the general assembly cannot be held.

If new board members are not elected even though the terms of the current members have expired in accordance with the Code limitation of three years, there is no provision in the TCC regarding whether the duties and competences of the members of the board of directors whose terms have expired will continue. This issue has been discussed in the doctrine and in court decisions. It is also possible to see controversial decisions by the Court of Appeals.

For example, decision numbered 1981/4751-1981/5019 and dated 24.11.1981 of the 11th Chamber of the Court of Appeals pointed to the risks associated with continuing the powers of board members whose terms have expired:

“It is possible to accept that the duties of board members may continue until the new members are elected at least as to existing services and works. But this method also has some disadvantages. To accept that the competences of former board members continue as they were before means giving indirectly the competences to persons that the general assembly did not elect and did not give any competence. This would be against the will and demands of shareholders. What will be the term of this duty? The term of office of board members who were elected for

* Article of December 2010

one year will be extended for 3 years if new members are not elected (TCC art. 314/1), and this situation means circumventing the provisions for agency and contradict the purpose of art. 397/2 of the Code of Obligations. In case a competence is granted for a definite term or for 3 months with a temporary registry pursuant to art. 34/4 of TCC, if the new members are not elected by the end of this term, the result may not change and the same gap will continue. To grant a limited competence would not be valid according to art. 321/1 and 321/2 and will have also the abovementioned disadvantages. To accept that the former members will continue their duties until the new members are elected gives former members the opportunity to delay the election of board members until the last possible moment. Moreover, these members will not act prudently in conducting the affairs of company since they are acting temporarily.

In this case, it is more acceptable to decide that the company no longer has its organ pursuant to art. 435/1 of TCC. Despite the fact that there is a risk that the company will be terminated because the election of new members is not effectuated until the time granted by the judge for the election of members, this disadvantage may be remedied by the court's granting a long and appropriate term..”

However, in general, the decisions of the Court of Appeals accept that as the TCC does not have any provision stipulating that the duties of board members are terminated automatically at the end of their terms, the former members of board will continue their duties until the new ones are elected. It is not possible to mention a lack of organ in the company due to the expiration of the term of office of board members.

To present the opinion of the Court of Appeals, the decision of the 11th Chamber numbered 2009/5463-2009/6666 and dated 01.06.2009 may be given as an example:

“Concerning joint stock companies, there is no provision stipulating that the duties of board members are terminated automatically at the end of their terms and because of

that the former members of the board will continue their obligatory duties until the new ones are elected.

In this case, it is not possible to mention the lack of an organ because of the expiration of the terms of office of the members of the board of directors and auditors.

In line with these explanations and precedents of our Chamber, the board of directors may summon the general assembly to meet even if its term of office has expired.

Regarding this issue, it is set forth in sub-article (g) of article 9 of the Regulation on General Assembly Meetings of Equity Companies and Commissars of Minister of Industry and Trade in These Meetings that, *“the general assembly in companies which have a lack of organ because of resignation, expiration of term or for any other reason whatsoever, will be invited to a meeting by trustees nominated by a court or by the minority shareholders having the competence to invite. In order to determine whether the competence to invite the general assembly to meeting is still valid, the last day of the sixth month of the year following the year in which the term of company organs expired will be taken into consideration.”*

With this regulation, the board members whose terms have expired may invite the general assembly to a meeting before a certain date, but there is no provision clarifying whether they could perform other works and transactions of the company. In light of the Regulation and the recent court decisions, it should be possible to accept that the duties and competences of board members whose terms have expired continue provided that they are limited to existing works and services of the company.

If the general assembly is not held within the determined period and new board members are not elected, it is necessary to mention the lack of organ in the company. Consequently, upon a demand by one of the shareholders or creditors of the company or by the Ministry of Industry and Trade, the commercial court of first instance will grant an appropriate period to find remedies. If the situation continues, the company must be terminated. Following the filing of the lawsuit, the court may also nominate a trustee for the company upon a request by one of the parties.

Infrastructure Real Estate Investment Trusts*

A real estate investment trust (hereinafter referred to as the “REIT”) is a corporation or a business trust that combines the capital of many investors to acquire (or provide financing for) various real estate assets. REIT is introduced in 1994 to the Turkish legal system to provide investors with the opportunity to participate in the benefits of ownership of larger-scale commercial real estate or mortgage lending and to receive an enhanced return as the income is not taxed at the REIT entity level. REITs not only offer to investors current income and liquidity as the shares of publicly traded REITs are readily converted into cash, but also professional management and performance monitoring.

In 2009, the Capital Markets Board (hereinafter referred to as the “Board”) has introduced infrastructure real estate investment trust with the Communiqué on Principles Regarding Infrastructure Real Estate Investment Trusts (Track VI, No: 24) (hereinafter referred to as the “Communiqué”). The purpose of the Communiqué is to regulate the principles and procedures with regard to founders and establishment procedures, licensing of portfolio management activity, organizational structure, registration of securities with the Board, investment activities, obligations concerning public disclosure and the information policy of infrastructure real estate investment trust.

An infrastructure real estate investment trust is a special type of real estate investment trust for infrastructure investment and services defined in the Communiqué as agricultural, irrigational, mining, manufacturing, energy, transport, communication, information technology, tourism, housing, cultural, rural and urban infrastructure investment, and services conducted by public administrations affiliated with the central government, social security institutions, local administrations and state economic enterprises, as well as municipal services, urbanization, environment, research & development services, education, health, justice, security and general administration infrastructure investment and services. Infrastructure real estate investment trusts (hereinafter referred to as the “IIT”) are the corporations whose scope is to manage portfolios consisting of assets invested within the scope of article 19 of this Communiqué.

* *Article of February 2010*

An IIT can be established instantaneously or existing companies can be converted. Within the limitations of the last paragraph of Article 4 of the Communiqué, existing Infrastructure Companies defined in the Communiqué, capital stock companies, foreign companies or companies established to operate in infrastructure investments and services conducted by municipalities as defined in “The Law regarding the Realization of Certain Investments and Services within the Framework of Build-Operate-Transfer Model” numbered 3996 which was published in the Official Gazette dated 13.6.1994 and numbered 21959, can be converted into infrastructure investment trusts by amending their articles of association in accordance with the procedures of the Communiqué and the Law. An IIT should have at least TRY 100,000,000 capital initially, and 10% of the capital should be issued cash. The initial capital requirement is lowered to TRY 5,000,000 if a public authority or municipality has at least 80% of the shares of the company, but has to reach TRY 100,000,000 capital after the public offer.

One of the founders of the IIT has to be called the “leading shareholder”, and within two years following the registration with the Trade Registry Office, the IIT has to apply to the Board for a portfolio management license. The leading shareholder is the shareholder or shareholder individually or as a group own(s) at least 20% of the shares of IIT. Regarding the establishment applications of the IIT, the leading shareholder or real or legal person founders who possess 10% or more of the corporation’s shares must provide the required sources obtained from their own commercial, industrial, and other legal activities as free from any debt and must have sufficient capital to be able to meet amount of capital committed. The leading shareholder or real or legal person founders who possess 10% or more of the IIT’s shares must have a reputation required to be shareholders of a capital market establishment. In Article 6, the Communiqué further stipulates special qualifications for the leading shareholder. For example, a real person leading shareholder should own movable and immovable assets of at least TRY 100,000,000 (in case of more than one person TRY 150,000,000). Legal entities should have a business record of at least three years; consolidated and non-consolidated financial statements belonging to the last accounting period must be audited by an independent auditor; financial statements must show issued capital/paid in capital at least equal to the capital of the corporation to be established; total assets must be at least two times the capital of the corporation to be established; equity

must be at least equal to the equity of the corporation to be transformed; and total assets must be at least two times the equity of the corporation to be transformed. Leading shareholders having the capacity of public entity and non-profit legal persons working for the public interest are not subject to the financial adequacy requirements apart from their own legislation.

The IIT has to go public after the registration of the portfolio management license, and the minimum required amount of floating shares has to be 49% of the capital. That amount can also be allocated to private equities and institutional investors.

The IITs may invest in a certain infrastructure company or project before its operation period or to the Infrastructure Companies and projects in the operating period under the conditions that such a provision exists in their articles of association. However such investments may not exceed 60% of the portfolio value and, the allotment offering of the shares of the corporation to the qualified investors or previously determined investors can be performed by mentioning on the prospectus and the circular.

Share transfers within the IIT before going public are subject to the approval of the Board. At least one third of the board members have to be independent, as the Communiqué accepts corporate governance principles similar to the REIT regulations issued by the Board.

The IIT investment capability includes investments in infrastructure projects or services, projects, other IITs and infrastructure companies, infrastructure projects' receivables-backed securities, operating companies and other securities deemed eligible by the Board which the latter have not to be exceeded 25% of the total portfolio value.

The following criteria should be taken into consideration by the IITs when investing.

- They shall not invest in more than 10% of their portfolio to the securities of a single corporation.
- They shall not own more than 5% of capital or voting rights in any corporation.
- The shareholders having 10% or more of the capital or voting rights in a corporation, members of the board of directors or general manager with more than 10% of capital separately or together shall not invest 10% of the company portfolio. The separate

project companies financed by the IITs or infrastructure companies established by the IITs are not considered within the scope of this subparagraph.

- They can not invest in assets and rights that are subject to any kind of restrictions in transfer.
- They may issue securities, capital market instruments and other structured instruments that approved by the Board and invest in that kind of instruments.
- They may establish or participate to the operating company in order to operate infrastructure investment or services.
- They may purchase and sell capital market instruments and can make inverse repurchasing and ISE Settlement and Custody Bank Inc. money market transactions, and time and demand deposit accounts in Turkish Liras or any foreign currency except more than 10% portfolio value,
- They may participate in the tenders of privatizations or Build-Operate-Transfer projects and invest infrastructure investments or services with this context, reserving the special regulations.
- For hedging against the exchange, interest and market risks; they may use portfolio management techniques and capital and money market instruments appropriate with investment objectives. They may undertake option contracts, forward, financial forward transactions and option transactions based on forward transactions, providing that a provision exists in their articles of association and the prospectus and in accordance with the Board's conditions.

Mergers and Acquisitions in the Draft Turkish Commercial Code*

The provisions of the current Turkish Commercial Code (hereinafter referred to as the “TCC”) concerning mergers and acquisitions are highly insufficient to guide the practice. They significantly restrict and even render impossible the merging of companies. However, the new Draft Commercial Code (hereinafter referred to as the “Draft Code”) prescribes the procedures for mergers and acquisitions in detail.

The Draft Code is inspired by the Swiss Mergers Code which is based on European Union directives.

The Draft Code preserves the provisions of special codes concerning mergers and acquisitions. This is especially important for the special provisions and system prescribed for the mergers and acquisitions of banks. The special provisions of the Capital Markets Code are also preserved.

The Draft Code introduces many new legal concepts. This study gives special emphasis to these new concepts.

Types of Mergers. The Draft Code does not introduce any novelty concerning the types of mergers. There are two types of mergers: merger through acquisition and merger through new establishment.

Valid Mergers. Unlike the TCC, the Draft Code permits the merging of different types of companies. It provides three main models showing how capital companies, personal companies, and cooperatives will merge with other types as transferor and transferee. According to the TCC, the merging of liquidating or highly indebted companies or those losing their capital is forbidden. According to the Draft Code, mergers are possible in certain conditions even though such companies are involved. There is one provision which is found in the Swiss Mergers Code but not found in the Draft Code; the merger of commercial companies with associations, foundations, and personal establishments is not addressed. This is an intentional gap. The reasons for leaving such a gap are the small number of such mergers and the difficulty of such regulation in the Commercial Code system.

Protection of Rights. Rights are protected by detailed provisions in the Draft Code. There is a new provision concerning equalization payments.

* *Article of April 2010 – Prof. Dr. H. Ercüment Erdem*

Equalization payments may be explained as follows: as mergers will be based on a transfer rate, there will be remainders in the shares. For example, TRY 1.1, TRY 1.2. It is not easy to calculate and account for these remainders as shares. Therefore, certain payments are made instead of these remainders. This is called an equalization payment. This payment is not unlimited; it may not exceed 10% or 1/10.

Exit – Squeeze out. According to the TCC, shareholders have one vote against the merger while the companies decide on the merger. However, if the company decides on the merger, the shareholder is bound by this decision. This, in practice, usually results in the frustration of the merger due to various lawsuits initiated by the shareholders. The Draft Code, on the one hand, entitles the shareholder who is unhappy with the merger to exit, and, on the other hand, gives companies the opportunity to dismiss certain shareholders who continuously cause problems, frustrate the works of the company, and act contrary to the interests of the company. Thus, the Draft Code accepts the exit and squeeze out of a shareholder, which is completely foreign to the joint stock companies' nature.

The rights to exit and squeeze out are to be provided for in the merger agreement. The right to exit will be given to shareholders by the merger agreement, and squeeze outs are to be provided for in the merger agreement. A compensation payment will be effectuated consisting of a certain amount of cash or other consideration. The reason for such payments may be explained as follows. If the shareholders participated in a merger, they would have certain shares and rights in the new company equal to those they had in the previous company. Thus, they need to be compensated for the shares and rights they are deprived of as a result of their squeeze out. The compensation payment does not have to be made in cash; it may be some other consideration. For example, it may be the shares of another company. It must be noted that if compensation payments are provided for, the voting majority needed for mergers will be increased; the affirmative votes of more shareholders will be necessary.

Merger Documents. There are two basic documents for merger. The first is the merger agreement, and second is the merger report. The merger agreement is addressed in the Draft Code in detail; the required provisions and the minimum mandatory features are stipulated. The merger agreement must be in written. It is signed by the management and approved by the

general assembly. The merger report sets forth the purpose of the merger, its economic and legal consequences, its results for the shareholders, and how creditors are protected. It is possible to say that the merger report discloses the grounds for the merger. Waiver of the merger report is possible for medium- and small-sized companies.

Audit. The Draft Code gives special importance to audits. The merger agreement, the merger report, and the balance that the merger is based on are audited by the transaction auditor. The transaction auditor prepares an audit report. This audit may be waived for small-sized companies. In addition to an audit, the creditors of the company and others who have an interest in the merger are entitled to conduct an examination. All of the documents and information on which the merger is based are submitted for review by not only the shareholders, but also – this is the special feature – the usage shareholders, the owners of securities, and any interested parties, including the creditors. Again, the right to review may be waived for small-sized companies.

Decision to Merge. The merging companies separately decide on the merger in their own general assemblies. Different number of voting majority is needed for different company types. It must be noted that there are higher voting majority for any company if a compensation payment will be effected; that is 90%.

Capital Increase. It is natural that the acquiring company will increase its capital as a result of the merger, with certain exclusions, so that it gives shares to the shareholders of the acquired company and satisfy them. Thus, the capital increase is to be appropriate for the equalization payment which is supposed to be effected as a result of the merger. This is not a mandatory rule. There may be some mergers where a capital increase is not necessary, such as the merger of a parent company with an affiliate.

Facilitated Merger. These many stages stipulated for preparation, audit, and review may be facilitated. For example, an affiliate is merging with the parent company, or a company is acquiring another company in which it holds all or a majority of the shares. There is no need to effectuate all the formalities. Another new novelty is the facilitated merger. According to this, if the shareholding structures of the merging companies are somewhat similar, then certain transactions may be waived. Within this framework, it is possible to avoid preparing a merger report; the audit and examination

rights may be waived; and the merger agreement need not be voted on in the general assemblies.

Registration. Merger decisions are to be registered in the trade registry. Any decisions as to capital increases or other amendments of the articles of association must also be registered. Upon registry, the merger enters into force, the full succession is realized, the acquired company ceases to exist, and the shareholders of the acquired company become the shareholders of the acquiring company. The provisions of the Code on the Protection of Competition are preserved. If a control change is concerned and certain thresholds are exceeded, the approval of the Competition Board is necessary.

Protection of Creditors. There are detailed provisions on the protection of creditors in the Draft Code. Creditors are entitled to request a warranty; however, the report of the transaction auditor may determine that such a warranty is not necessary. Even if the report finds it necessary, the company may choose to pay the debt instead of giving a warranty. In other words, it is possible to continue the merger by giving a warranty to the creditors or by paying the debts. The aim of this provision is to prevent the frustration or delay of the merger procedure upon the exercise of certain rights by the debtors or shareholders.

The Lawsuit on the Scrutiny of Company Shares and Rights. It is possible to initiate a lawsuit for the cancellation of a general assembly decision pertaining to the merger. However, this new type of lawsuit is different. A breach of rights is claimed in this lawsuit. The merger is not suspended upon such claim, but it is possible to require equalization. Thus, the initiation of this lawsuit does not delay the merger.

Liability Arising out of Merger. Many persons including transaction auditor or managers are involved in the merger, and all these persons have liability. This is a fault liability.

Conclusion. It is possible to say that nothing has changed in the main structure and construction of the merger. However, the issues which cause problems in practice, such as the condition mandating the types of the merging companies to be the same, are eliminated. The gaps in the TCC are filled. The detailed provisions on the merger agreement are very important. The procedures and stages of merger are clarified. You may see a very clear road map upon review of the provisions on mergers. The duties

and roles of different organs and their scope are clarified. Transparency is achieved in mergers since audits and reports are required, and declaration, disclosure, and review of these are possible. In my opinion, “a system promoting mergers” may be a suitable slogan or headline for the provisions concerning mergers. The rights of the creditors and shareholders are protected. However, they will not be allowed to block or prevent the merger, and a balance is thus achieved.

Draft Regulation for Amendment of the Regulation on Principles for the Establishment and Operation of Financial Leasing, Factoring, and Financing Companies*

It is envisaged to make amendments and additions to some of the articles of the Regulation on Principles for the Establishment and Operation of Financial Leasing, Factoring, and Financing Companies (hereinafter referred to as the “Regulation”) which was prepared by the Banking Regulation and Supervision Agency (hereinafter referred to as the “BRSA”) and published in the Official Gazette dated 10 October 2006, numbered 26315. The amendments and additions are in draft form and have not yet entered into force. They were announced on the web site of the BRSA. Pursuant to the Draft Regulation, article 4/1 (b) of the Regulation will be amended as follows:

“b) paid up capital shall not be less than seven million five hundred thousand Turkish Lira for factoring and financing companies and the sum prescribed by Article 11 of Financial Leasing Law No. 3226 for financial leasing companies.”

Therefore, it is envisaged that paid-up capital shall be increased from five million Turkish Liras to seven million five hundred thousand Turkish Liras for factoring and financing companies.

The article mentioned below is added to article 7/1 of the Regulation.

“The capital subscribed by the company founders shall be paid fully in cash up to the minimum capital amount”

By the above referred addition, if case BRSA considers an application for the establishment appropriate, it is necessary that the capital subscribed by the company founders shall be paid fully and in cash up to the minimum capital amount, besides other conditions following the conclusion of the establishment procedures in order to obtain permission for an operating license.

Article 20/1 of the Regulation will be amended as follows:

(1) Financing companies conclude general agreements with suppliers in advance for goods and services for

* Article of June 2010

which they will be extending credit. Lines of credit to be extended by financing companies are directly paid to suppliers for and on behalf of consumers or against delivery or supply of services in line with the principles of general contracts. However, credit repayments are made to financing companies by those to which credit is extended.”

The current article stipulates that lines of credit to be extended by financing companies are directly paid to suppliers for and on behalf of consumers or against “*delivery **and** supply*”, whereas the Draft Regulation amended the article as “*delivery **or** supply*”.

The below mentioned sub-paragraph is added to article 23 of the Regulation.

“(3) The minimum equity capital of factoring and financing companies shall not be less than the minimum paid up capital mentioned in article 4/1 (b) of the Regulation. The companies shall increase their equity capital to the minimum paid-up capital within 1 year in case their equity capital amount falls under this amount”

Article 26/1 of the Regulation will be amended as follows:

“(1) It is obligatory that annual balance sheets and income statements of companies to be presented to the general assemblies be audited in accordance with the principles and procedures foreseen in the “Regulation on Authorization and Activities of Institutions to Perform Independent Audit to Banks”, and by the institutions authorized to perform independent audits of banks. It is obligatory that companies submit their end-year independent auditing contracts and independent audit reports to the Agency no later than the end of October of the relevant year and April 15 of the following year, respectively.”

By this amendment, it is envisaged that the audit is to be performed in accordance with the principles and procedures foreseen in the “Regulation on Authorization and Activities of Institutions to Perform Independent

Audit to Banks” and by the institutions authorized to perform independent audit to banks.

Furthermore, this second sub-paragraph is added to article 26 of the Regulation.

“The independent audit institutions shall give opinions in their independent audit reports, stating that the financial statements and statistical data of the companies are scheduled in accordance with the form and scope of article 24/2 of this Regulation and in compliance with the company records. In case there are differences between the financial statements attached to the independent audit reports and financial statements reported to the Agency in accordance with article 24/2 of the Regulation, such differences will be explained by the independent audit institutions under a separate title.”

Article 29/6 of the Regulation will be amended as follows:

(6) Those having their operating licenses cancelled cannot engage in operations indicated by this Regulation and neither can they use any words, phrases, or signs in their commercial titles, notices, and advertising materials or their work places which would suggest or imply their engagement in such work.”

By this amendment, the phrase “those who do not have a valid operating license” is excluded from the article.

The sub-paragraph below is added to temporary article 2 of the Regulation.

“(2) The companies shall comply with article 4/1 (b) and article 23/3 of this Regulation until the date of 31.12.2011.

Pursuant to this article, the companies are to increase their paid-up capital from five million Turkish Liras to seven million five hundred thousand Turkish Liras and increase their minimum equity amounts to the minimum paid-up capital amounts no later than 31 December 2011.

Late Charge Clause on Commercial Invoices*

Introduction

In daily commercial life, invoices are used as documents issued in exchange of goods sold or services provided. Invoices are significant for the determination of the relationship between the parties and the price of goods or services.

The Turkish Commercial Code (hereinafter referred to as the “TCC”) does not define invoices. However, Article 229 of the Tax Procedural Law includes a definition. In this regard, an invoice is defined as “*a commercial document given to the customer by the merchant, who sells goods or provides services, in order to show the debt incurred by the customer in exchange for the goods sold or services provided*”. As can be seen from this definition, an invoice is a document related to the fulfillment of an agreement previously concluded. Accordingly, first of all, a valid contractual relationship between the parties is required.

Although the TCC does not contain a definition for invoices, Article 23 of the TCC titled “*Invoice and Confirmation Letter*” stipulates that a person who buys goods or procures services may demand an invoice from the person who sells such goods or provides such services and may also demand that the effected payment to be stated within the contents of the invoice.

The same article also stipulates that “*A person in receipt of an invoice is deemed to have accepted its contents unless there is an objection to the invoice or its contents within eight days from its receipt*”. This article shows that an invoice is a means of proof and that unless there is an objection, it maintains the presumption of a benefit to the issuer and against the receiver. The most frequent dispute arising out of the application of this article is the controversy as to the validity of late charge clauses written on invoices. Regarding this controversy, the Court of Appeal Grand Assembly has concluded a unification of precedents dated 27 June 2003 and numbered 2001/1 E. and 2003/1 K., in order to resolve the different opinions issued by different chambers.

* *Article of June 2010*

Decision on Unification of Jurisprudence

There is a full consensus by the Court of Appeal Civil Chambers that a late charge can be accrued if there is a written agreement between the parties justifying the late charges or a commercial custom to this effect.

However, there was a disagreement between the Court of Appeal Civil Chambers as to whether late charges could be accrued when there is no written agreement between the parties, no established custom, and no objection to the relevant invoice bearing a late charge clause within eight days pursuant to Article 23/2 of the TCC. Thus, conflicting decisions were given by different chambers. Therefore, the Court of Appeal Grand Assembly decided to unify the precedents by its decision dated 27 June 2003 and numbered 2001/1 E. and 2003/1 K. Pursuant to this decision, the following conclusions were rendered:

1. If there is a written agreement between the parties as to implementation of a late charge, the invoice bearing a late charge clause would be considered a notice. The objection in time or no objection to the late charge clause on the invoice would not have any legal consequences, and the late charge can be accrued.
2. If there is no clause included within the written agreement between the parties as to a late charge requirement, the price, which is an essential element of the agreement, cannot be altered by a unilateral will. Therefore, even there is no objection issued within eight days against the contents of the invoice bearing a late charge, the late charge can not be accrued.
3. Even if there is no agreement on the implementation of late charge, if there is an established custom in this manner between the parties, a late charge may be accrued provided that there is no objection to the invoice within eight days from its receipt.
4. If there is no written agreement or established custom between the parties as to the implementation of a late charge, an invoice including a late charge clause notified to the counter party and not objected to within eight days causes the invoice to be final and does not grant the issuing party a right to accrue a late charge.

The Acquisition of Real Property and Limited Rights In Rem by Companies with Foreign Capital*

The procedures and principles regarding the acquisition of real estate and limited rights in rem and their use by legal entities established in or associated with Turkey by foreign investors were regulated by the Regulation concerning the Acquisition of Real Estate by Companies With Foreign Capital (Official Gazette No 27052 dated November 12, 2008). The acquisition of real estate and limited rights *in rem* was reformed by the Regulation concerning the Acquisition of Real Estate and Limited Rights *in Rem* by Companies With Foreign Capital (Official Gazette No 27721 dated October 6, 2010), and the Regulation dated 2008 was abrogated.

Legal Grounds Concerning the Acquisition of Real Property and Limited Rights in Rem by Companies with Foreign Capital

The acquisition of real property by legal entities established in or associated with Turkey by foreign investors was regulated by the Direct Foreign Investment Act numbered 4875 (hereinafter referred to as the “DFIA”), in Article 3/d. Pursuant to this article, the acquisition of real estate or limited rights *in rem* by legal entities established in or associated with Turkey by foreign investors was permitted in the zones where the acquisition of these rights was also permitted to Turkish citizens. Nevertheless, this article was cancelled by the Constitutional Court in its decision of March 11, 2008.

The legal gap formed because of the cancellation decision of the Constitutional Court has been filled by the Regulation concerning the Acquisition of Real Estate by Companies with Foreign Capital (hereinafter referred to as the “Former Regulation”). The Former Regulation was applied until the entry into force of the Regulation concerning the Acquisition of Real Estate and Limited Rights *in Rem* by Companies with Foreign Capital (hereinafter referred to as the “Current Regulation”), on October 6, 2010.

Clauses to be applied to Turkish Citizens Residing Abroad

In Article 1 of the Former Regulation, the object of the Regulation was defined as establishing the procedures and principles regarding the

* *Article of September 2010 – Prof. Dr. H. Ercüment Erdem*

acquisition of real estate and limited rights *in rem* and their use by legal entities established in or associated with Turkey by foreign investors. In the Current Regulation, a new paragraph concerning Turkish citizens residing abroad was added to this article. Companies established in or associated with Turkey by Turkish citizens residing abroad, by Turkish citizens who lost their citizenship by a permit of alienage, and by their children subject to the same process can acquire real property and limited rights *in rem*, provided that the company does not have a foreign shareholder. In this way, a subject that causes problems in practice was clarified.

Who are Foreign Investors?

In the Former Regulation, foreign investors were not defined. This gap is filled by the Current Regulation. Pursuant to Article 3 of the Current Regulation, a foreign investor is a natural person with foreign citizenship who establishes a new company or who forms an association with an existing company by the acquisition of shares outside the stock exchange markets, by the acquisition of 10% of the shares, or by acquisitions that grant the same percentage of voting rights, or is a legal person established in compliance with foreign legislation or an international organization.

The Application Procedure and the Evaluation of Applications

Pursuant to Article 4 of the Current Regulation, companies wishing to acquire real property need to apply to the Provincial Planning and Coordination Directorate for the district where the real estate is located and must provide the information and documents as stated in Article 4 of the Regulation. The Current Regulation abolished the system concerning the review of the company's real estate acquisition request in terms of the company's main field of activity. From now on, the entire review will be handled by the Coordination Directorate. The documents stated in the aforesaid article are listed as *numerus clausus*. The investors cannot be requested to provide additional documents. This clause is relevant for avoiding some public institutions from arbitrary treatment. On the other hand, the application documents need to be whole and complete. The proceedings concerning the application are initiated under this condition.

If the application is intended for the establishment of a mortgage, the application needs to be made to the Land Registry Office Director where the real estate is located.

The designation of the Real Estate's Location

The Current Regulation, in parallel with the Former Regulation, regulates the military forbidden zone, the military security zone, the zones determined for their proximity to the military forbidden zones or for any other strategic causes in accordance with the proposals of the Presidency of General Staff, or private security zones, under different dispositions. Pursuant to Article 6 of the Current Regulation, if the real estate is located in these areas, the Office of the Governor will send copies of the application documents to the Presidency of the General Staff and to other empowered commandships, and will ask whether the request for acquisition of real property is appropriate or not for the state security. Their decision must be notified within fifteen days. If the notification is not received within fifteen days, the request for acquisition of real property will be considered appropriate for state security.

If the real estate is not within the scope of prohibition, the Office of the Governor will provide the company and the Land Registry Office with written information for the registration procedures. The registration will be effectuated within three months beginning from the notification of this information to the company. In case the time limit is exceeded, the application will be renewed. The imposition of such a severe sanction in case the time limit is exceeded is unnecessary. It would be suitable to designate an exception for cases of *force majeure*.

The same process is applied for the acquisition of limited rights *in rem*. For the establishment of a lien, a request must be submitted directly to the Land Registry Office where the real estate is located, without applying to the Office of the Governor.

If the application is rejected, the Office of the Governor will provide the company with relevant information, including legal remedies against the action and the prescribed terms.

The Conversion of Companies into Companies with Foreign Capital

The fact that a company was converted into a company with foreign capital will be notified to the Undersecretariat of the Treasury in accordance with the Regulation on the Application of the Direct Foreign Investments Act (Official Gazette No 25205 dated August 20, 2003). The Undersecretariat

of the Treasury will send this information to the General Directorate of the Land Registry on a monthly basis. The General Directorate of the Land Registry will send to the Offices of the Governor the information about real estate acquired by these companies after the entry into force of the Former Regulation. The Offices of the Governor will examine whether the real estate is located in the forbidden zone by sending the information to the Presidency of General Staff or to the empowered commanderships. In case the company is not located in the forbidden zone, the company will be asked to provide the commitment letter regulated by Article 4/c of the Current Regulation. If the real estate is located in the forbidden zone, the documents referred to in Articles 4/c, d and e of the Current Regulation will be requested, and the appropriate entities will examine the issue in terms of state security. In case the acquisition of real property is found unsuitable for reasons of state security, the issue is to be notified to the Commission formed within the entity of the Office of the Governor, provided that the company wishes it. The Commission may grant 45 days to the company, so that it can remedy any deficiencies. In case the result of the examination is negative, the Commission will make a notification to the Office of the Governor for the liquidation of the real estate, in accordance with Article 14 of the Current Regulation.

The Utilization of the Acquired Real Estate

The Commission assesses whether or not the acquired real estate or limited rights *in rem* are utilized within the scope of activity designated in the articles of association of the acquiring company. At first, the examination is executed on the basis of the file. If necessary, an examination on-site is conducted.

If it is established at the end of the investigation that the real estate or the limited right *in rem* are being utilized in a way that is contrary to the Current Regulation, this situation is notified to the company, and a reply within 30 days is demanded. The Commission will grant a one-time delay of 6 months and will request that the utilization be conformed to the clauses of the articles of association. If the assessment is unfavorable, the Commission will notify the Office of the Governor in order to permit the liquidation of the real estate in accordance with Article 14 of the Current Regulation.

The Liquidation of the Real Estate

If it is established at the end of the investigation that the real estate or the limited rights *in rem* are being utilized in a way that is contrary to the Title Deed Act or the Current Regulation, this situation is notified to the Ministry of Finance. The Ministry of Finance will grant the company a delay of 6 months for the liquidation. This delay may be extended once for justified reasons. In case the liquidation does not take place within this period, it is effectuated by the Ministry of Finance according to the general provisions. The income generated from the liquidation will be deposited into a bank account that will be opened on behalf of the holder of the right.

Transitional Clauses

The clauses of the Current Regulation will apply to operations initiated before October 6, 2010, and that have not yet been finalized.

The utilization within the scope of activity designated in the articles of association of the real estate and limited rights *in rem* acquired before the entry into force of the Current Regulation will be evaluated in accordance with the Current Regulation.

Conclusion

It can be clearly seen that the points in the Former Regulation that were criticized have been fixed by the amendments. Firstly, the definition of foreign investor is given, so as to avoid confusion. The system of examination of conformity to the articles of association of the company concerning the acquisition of real estate is abandoned, and a commitment by the company in this matter is found adequate. A time limit is set forth for the institutions that will make an examination of any step of the application, and the arbitrary prolongation of the operations is prevented. In addition, the fact that the documents requested in the application process are listed as *numerus clausus* will avoid differing practices. I think that these new clauses will significantly facilitate and accelerate the acquisition of real property and limited rights *in rem* by the foreign investors, provided that uniformity is obtained concerning the practice of the different governors' offices. On the other hand, taking into consideration the importance of the issue and the effects and consequences concerning liquidation, it would

be more appropriate and suitable for legal security if the matter were regulated by an act. As a conclusion, the legal gap formed because of the cancellation of article 3/d of DFIA should have been filled by an act of law, rather than a Regulation, in terms of legislative technique.

The Circular Numbered 2010/24 of the General Directorate of Land Registry and Cadastre, General Directorate of Foreign Affairs Regarding Companies with Foreign Capital Purchases of Immovable and Limited Real Rights in Turkey*

Purchases of immovable and limited real rights in Turkey by companies with foreign capital are evaluated based on the circulars dated 20.11.2008, numbered 2008/18 and dated 02.12.2008, numbered 2008/21 within the frame of “Regulation on Purchase of Immovable and Limited Real Rights in Turkey by the Companies with Foreign Capitals” published in the official gazette dated 12.11.2008 and numbered 27052, and the transactions are concluded accordingly.

However, the Regulation on Purchase of Immovable and Limited Real Rights in Turkey by Companies with Foreign Capital has been newly regulated by being published in the official gazette dated 06.10.2010 and numbered 27721 and has entered into force.

In the Circular of the General Directorate of Land Registry and Cadastre, General Directorate of Foreign Affairs numbered 2010/24 (hereinafter referred to as the “Circular”), it is stated that the practice of forwarding the requests for purchase of immovable and limited real rights (except for mortgages) in Turkey by companies with foreign capital to the office of the governor by the Land Registry and directing the transaction pursuant to the result of the investigation held by the office of the governor will be continued. On the other hand, in mortgage transactions, as the mortgagee does not have the right of usufruct and usage on the mortgaged immovable for his credit, it will be sufficient to attach the specimen signature and directly apply to the Land Registry provided that the authorization document to be submitted by the company pursuant to article 2 of the Land Law numbered 2644 grants authorization to make mortgage transactions or give credit. The request for registration must be made within three months following delivery of the written information to the company. If the mentioned time is exceeded during the application, the application for purchase of immovable and limited real right will be renewed, and the company will be referred to the office of the governor.

* *Article of December 2010*

If the authorization document to be submitted by the company which made the application pursuant to article 2 of the Land Law numbered 2644 does not bear the statement “company with foreign capital”, then the official deed will bear the statement, “the company purchasing the immovable does not have foreign capital, otherwise, the company hereby accepts and considers that the immovable will be subject to the liquidation process pursuant to article 36 of the Land Law numbered 2644” and will be signed by the parties.

In the Circular, it is stated that the circulars dated 20.11.2008, numbered 2008/18 and dated 02.12.2008, numbered 2008/21 have been annulled.

Current Problems Concerning Pledge on Commercial Enterprise*

Introduction

The pledge of movable assets of undertakings, such as machines, vehicles and engine transport vehicles, and intangible assets, such as trademarks, patents, and the licenses of undertakings, is important for securing the increasing financing needs of undertakings. However, delivery of the aforementioned movables for fulfillment of a pledge causes the enterprise to become inactive and the financing becomes functionless. The pledge on a commercial enterprise is created to avoid this inconvenience. With a pledge on a commercial enterprise, the movables are pledged entirely by a single pledge agreement without the delivery of their possession. This sort of pledge is regulated by the Law of Pledges on Commercial Enterprises (hereinafter referred to as the “LPCE”) numbered 1447, the regulation, and the bylaw regarding implementation of the Law.

Main Rules Regarding the Subject and Scope of Pledge

Pledges on commercial enterprises are created on assets allocated to commercial enterprises or craftsmen enterprises. It is possible to classify these elements in scope as “obligatory elements” and “facultative elements”.

In principle, the obligatory elements of pledge are the trade name, firm name, and movable operation installments. The trademarks, patents, brevets, images, and licenses allocated to commercial enterprises are facultative elements; one or some of these may be excluded from the scope of a pledge. The assets apart from these elements and which are not included in the pledge agreement are beyond the scope of the pledge. New elements brought into an enterprise must be included on the list and registered in the Trade Registry or Registry of Craftsmen and Artisans so that these elements are within the scope of the pledge.

An immovable related to a commercial enterprise is not within the scope of this pledge. It is necessary to have a separate mortgage on this immovable. The provisions concerning the mortgages on ships are reserved.

* *Article of November 2010 – Prof. Dr. H. Ercüment Erdem*

As a result of the modification in LPCE by the Law numbered 4952, in agreements of pledges on commercial enterprises in which one party is an industrial enterprise, only the movable operation installment bought by the related loan is put in the pledge. Nevertheless, the pledge may also include, within the scope of freedom of agreement, other assets if these elements are insufficient to satisfy the needs of the creditor.

Conclusion of Agreement

The parties to an agreement of pledge on a commercial enterprise are the borrower merchant or craftsmen in one party and the creditor in the other.

In LPCE, the creditors are limited to (i) credit institutions, (ii) institutions engaged in credit sales, and (iii) cooperatives. The objective of this limitation is to ensure constitution of this exceptional pledge only among certain persons.

The institutions engaged in credit sales are enterprises which sell movables, and they may acquire pledge rights only on a movable operation installment subject to the sale between the parties.

The pledge agreement on commercial enterprises must be in statutory form notarized by the public notary in the registry district of the commercial enterprise. This form is a requirement for the validity of the pledge. Also the Court of Appeals considers this requirement as a mandatory rule and deems null and void any agreements that do not respect that requirement.

In addition, a list indicating all the elements within the scope of the pledge and their distinctive characteristics must be annexed to the pledge agreement.

Registration and Effects of Pledge

For origination of the right of a pledge, the agreement of a pledge on a commercial enterprise must be registered within 10 days following the conclusion of the agreement. Registration is to be made with the Trade Registry for commercial enterprises and with the Registry of Craftsmen and Artisans for craftsmen enterprises. This registration is a validity requirement and has a constitutive effect for the pledge. The legal term for the registration is a controversial issue in the doctrine. According to an opinion with which the Court of Appeals agrees, the rule is mandatory; registration after 10 days is void, and it becomes necessary to renew the

pledge agreement for a valid pledge transaction. According to another opinion with which we agree, the mandatory quality of this term has no supporting evidence, and the pledge could be registered even after expiry of this term. The registration of the pledge is essential.

The right of pledge on elements subject to the pledge arises through registration. Since the pledge on a commercial enterprise is a sort of pledge without delivery of possession, delivery of possession to the pledgee is not necessary. The owner of the enterprise is entitled to use the pledged goods in his or her possession for the ordinary conduct of commercial activity. Any extraordinary transactions such as transfers, limitations by a limited real right, transport to another place, or exchanges of pledged goods with others are subject to the approval of the pledgee. The owner of the enterprise also has an obligation to protect the value of assets subject to a pledge in addition to this important limitation on the power of disposition over the pledged goods. A default in fulfillment of this obligation is also subject to penal sanction.

Another consequence of the registration of a pledge on a commercial enterprise is its effect against third persons. This right of pledge is effective against everyone who acquires the commercial enterprise. This right may be enforced against not only those who acquire the commercial enterprise, but also against those who acquire the elements of pledged assets in the registry district. Contrarily, acquisitions of separate elements of pledged assets by third persons out of the registry district are protected.

The pledge registered with the trade or craftsmen registry must be notified to other relevant registries as well. Notification is necessary to the registry of motor vehicles if there are vehicles among the elements included in the pledge, to the patent registry for patents, to the trademark registry for trademarks, to the mines registry for ore, and to the trade registry where the branch office is registered. In case the immovable on which the enterprise is established belongs to the owner of the enterprise, the pledge on the commercial enterprise must be notified to the land registry where the immovable is registered.

Current Problems Concerning Pledges on Commercial Enterprises

Public notary in registry district. LPCE requires that the pledge agreement be prepared by a public notary in the registry district of the

relevant enterprise. The Court of Appeals considers this requirement as a validity requirement and considers null and void the agreements which are not prepared by the notary in the registry district. This opinion does not have any supporting evidence. The point is to have the agreement prepared by a public notary. It is not important whether the notary is in or out of the registry district because all the public notaries in Turkey have the same authority and responsibilities. Preparation of the agreement by a public notary in a statutory form is sufficient.

Elements which are not included on the list. In case the entire movable operation installment existing at the moment of the conclusion of the agreement is not included on the list, what will happen? According to the prevailing opinion, the pledge agreement is valid and enforceable if this deficiency results from negligence, but if the parties deliberately exclude some elements of the movable operation installment from the scope of the pledge, the pledge agreement is null and void. The elements brought into a commercial enterprise following the constitution of the pledge must be included on the list and registered with the registry.

Pledge on head office or branch office. In our opinion, it is also possible for assets only in the head office or a branch office of a commercial enterprise to be pledged. The branch office needs special authority for this transaction.

Pledge in favor of third persons. Due to the *numerus clausus* character of parties in a pledge agreement as creditors, it is also controversial in the doctrine whether constitution of pledge in favor of third persons is possible. In our opinion, a pledge in favor of third persons is possible. In other words, the owner of enterprise may pledge the elements within his commercial enterprise in favor of a third person. In the law of pledges, the main rule is the possibility of a pledge in favor of a third person. LPCE does not have any prohibitive provision regarding this issue.

In examining the problem in terms of *ultra vires*, it is necessary to accept that a legal entity merchant does not need any special provision in its articles of association for constitution of a pledge on its commercial enterprise. Considering all these reasons, the possibility of constitution of a pledge in favor of a third person should be accepted.

Assignment of the claim secured by the pledge. Another problem resulting from the *numerus clausus* character of parties as creditor is the

effect of assignment of a claim on the pledge. The dominant opinion in doctrine accepts that this limitation is only for the moment of constitution of the pledge. Consequently, the transfer of a claim secured with a pledge has no effect on the pledge. The other opinion in the doctrine, considering that the pledge on a commercial enterprise can be extended contrary to its *ratio legis* in case of a free transfer of a pledge right, stipulates that the claim may be transferred, but in this case, the right of pledge is terminated. In our opinion, the legal requirement is satisfied once the agreement is concluded among the parties stipulated by the law. Since the pledge is an accessory right to the principal claim, the pledge on a commercial enterprise can be transferred to the extent that the principal claim may be transferred.

Use of foreign currency for pledge. In creating a pledge, it is required that the amount of the claim must be stated in Turkish Liras in the pledge agreement. Because of this requirement, it is also unclear whether foreign currency may be used for a pledge. Despite the different opinions, we opine that Art. 851/II of the Civil Code should be applied by reference of Art. 20 of LPCE and that, in case of satisfaction of the requirements in this article, the use of foreign currency for a pledge is possible.

Conclusion

As seen above, pledges on commercial enterprise are created to satisfy the financing needs of merchants and craftsmen. However, the negligence and carelessness in the regulation of legal principles cause many controversial issues. Correction of the wording and the deficiencies in relevant provisions and having new provisions clarifying the controversial issues would ensure smooth functioning of the procedure.

COMPETITION LAW

Commitments in Merger Transactions under Turkish Competition Law*

Commitments are the remedies offered by the parties in order to overcome any competition concerns arising out of a merger transaction.

For a long time, the Competition Board (hereinafter referred to as the “CB”) has authorized the operation of concentrations normally not acceptable under competition rules, subject to certain conditions that it has imposed on the parties. More recently, its practice has changed to the granting of merger clearances within the framework of commitments proposed by the parties despite the absence of any special provision in the competition legislation addressing this practice.

Legal Basis

Commitments are not expressly regulated by the Act on the Protection of Competition No. 4054 (hereinafter referred to as the “Act”). The only article referring to this system is Article 6 (3) of Communiqué No. 1997/1 on Mergers and Acquisitions Calling for the Authorization of the Competition Board (hereinafter referred to as the “Communiqué”).

Types of Commitments

Although the CB gives place to both structural and behavioral commitments within its decisions, it principally opts for structural remedies as in European Competition Law. The Commission notice on remedies acceptable under Council Regulation states that structural remedies are preferred to behavioral remedies because they do not require medium or long-term monitoring measures¹. In line with this practice, two types of structural remedies can especially be observed in the CB’s decisions:

* *Article of January 2010 – Prof. Dr. H. Ercüment Erdem*

1 OJEU, 2008/C – 267/01.

- **Divestiture:** The CB gave numerous decisions on the basis of divestiture remedies. Indeed, in its *Roche* decision in 2003, the CB authorized an operation of a concentration on the condition that one of the parties divests its feed enzyme business. This decision does not include any limitation as to area². Following this decision, in the *Syngenta* decision of 2004, the CB authorized the operation of a concentration on the condition that one of the parties divests its sunflower seed business in a designated area³. Recently, in its *Vatan Gazetesi* (Vatan Newspaper) decision rendered in 2008, the CB authorized the operation of a concentration because of two-year divestiture commitments⁴.
- **Transfer of License:** The CB gave three decisions related to this subject. In the *Glaxo Wellcome* decision of 2000, the CB authorized the merger of two drug companies on the condition that certain drug brands in Turkey are transferred to third parties⁵. Following this decision, the CB authorized, in its *Nazar trademarks* decision of 2007, the operation of a concentration of two chewing gum companies because of commitments to complete two successive transfers of a brand⁶. Finally the CB authorized in 2008 the operation of a concentration of two margarine companies based on commitments to transfer certain commercial brands⁷.

Behavioral remedies set forth in CB's decisions are as follows:

- **Limitation of the entrance and exit of designated brands during certain periods:** The CB, in its *P&G* decision, authorized the operation of a concentration of two toothpaste companies with such remedies to be applied within the European Economic Area⁸.
- **Suspension of flights:** The CB in its *Lufthansa* decision granted individual exemption to the operation of a concentration of two airlines on the condition that they suspend some of their flights⁹.

2 Decision DSM N.V – Roche Holding AG, 11.09.2003, 03-60/730-342.

3 Decision Syngenta Crop Protecton AG – Astazenece Holdings B.V – Koninklijke Venderhave Groep B.V., 29.07.2004, 04-49/673-171.

4 Decision Doğan Gazetecilik / Vatan Gazetesi, 10.03.2008, 08-23/237-75.

5 Decision Glaxo Wellcome / SmithKline, 03.08.2000, 00-29/308-175.

6 Decision *Greencastle DRinks Limited – Jak AMRAM – Leon AMRAM – Filip AMRAM – Lolita AMRAM*, 23.08.2007, 07-67/836-314.

7 Decision Marmara Gıda / GıdaSa, 07.02.2008, 08-12/130-46.

8 Decision P&G, 08.09.2005, 05-55/836-228.

9 Decision Deutsche Lufthansa AG – Condor Flugdienst GmbH, 11.04.2007, 07-31/323-119.

- **Capacity limitation:** The CB authorized in 2008, in its *Toros Gübre* decision, the operation of a concentration on the condition that one of the companies limits its production capacity during three years¹⁰.

Submission of Commitments

In Turkish Competition Law, the submission rules, i.e., when and by whom the commitments are to be submitted, have not yet been regulated. However, in our view, only the parties are entitled to submit commitments, as is the case under European law. Consequently, the CB is not entitled to dictate commitments for two principal reasons:

- **“Appropriate commitments”:** Due to their deep knowledge of the case and the relevant market, only the parties can submit appropriate commitments. The Communiqué provides for the CB to impose conditions for the granting of merger clearances. However, the conditions that a merger clearance will be subject to not have the same consequences as those of the commitments. The imperfect knowledge of the CB on the market and the undertakings may cause unfavorable results and not reach the expected goal. The CB granted some conditional authorizations although there were no commitments submitted by the parties¹¹.
- **“Appropriate measures”:** Commitments cannot impose a greater burden on the parties than is necessary as per the principle of proportionality. Consequently, commitments should only be submitted by the parties since the CB is not capable of determining which measures are the most appropriate for the parties¹².

Content of Commitments

Commitments must set forth that they will eliminate the identified competition concerns in the relevant market¹³.

10 Decision *Toros Tarım / Sümer Holding*, 21.02.2008, 08-16/189-62.

11 Decision *Metro / Migros*, 19.03.1998, 57/424-52; decision *POAŞ*, 18.02.1999, 99-8/66-23, decision *Glaxo Wellcome / SmithKline* (fn. 5), decision *Toros Tarım / Sümer Holding* (fn. 10) and decision *Doğan Gazetecilik / Vatan Gazetesi* (fn. 4)

12 In the *Toros Tarım / Sümer Holding* decision (fn. 10), the CB decided to limit the capacity although the parties had not submitted commitments. However, this imposed a greater burden than necessary on the parties because it prevented an eventual increase in the exportation activities of the parties.

13 The CB’s decisions generally do not explain how the submitted commitments would eliminate competition concerns: decision *TÜPRAŞ*, 21.10.2005, 05-71/981-270.

- **Complete commitments:** Commitments must include all factors, such as a suitable purchaser or the assets to be divested in order to eliminate competition concerns¹⁴.
- **Ad hoc commitments:** In order to reach the expected goal and eliminate all competition concerns in the relevant market, all commitments must be determined in accordance with the case at hand. The CB, in some decisions, fully accepts the Commission's decisions without making further analyses¹⁵.

Implementation of Commitments

The implementation phase is the most important phase because it permits the merger clearance to be put into practice.

- **Implementing factors:** The correct implementation of the commitments is to be ensured through determinant factors, such as trustees to monitor the implementation or time limits which guarantee the implementation within a relatively short time period.
- **Absence of implementing factors:** The absence of implementing factors in the CB's decisions may cause a failure to eliminate competition concerns by reason of imperfect implementation¹⁶. For instance, some of the CB's decisions do not include the nomination of a trustee in order to monitor the correct implementation of the commitments.

Sanctions in case of Imperfect Implementation of Commitments

In order to fill the gap in the competition legislation, the CB, on the basis of Article 4 of the Act, generally decides to launch an *ex officio* investigation if the commitments are not correctly implemented¹⁷.

14 The CB does not include all factors in its decisions. For instance, the Glaxo Wellcome / Smith-Kline decision (fn. 5) does not include any reference to a suitable purchaser.

15 Decision DSM N.V – Roche Holding AG (fn. 2) and decision Syngenta Crop Protecton AG – Astazenece Holdings B.V – Koninklijke Venderhave Groep B.V (fn. 3)

16 Decision Toros Tarım / Sümer Holding (fn. 10); decision Deutsche Lufthansa AG – Condor Flugdienst GmbH (fn. 3) and decision TÜPRAŞ (fn. 13)

17 Decision Metro / Migros (fn. 11); decision Glaxo Wellcome / SmithKline (fn. 5) and decision Bankar / Fiba Bank, 18.09.2001, 01-44/433-111

Conclusion

The Turkish merger control regime contains deficiencies both in legislation and in practice. These deficiencies result from the absence of special provisions in the competition legislation and from the CB's incomplete decisions.

In order to fill the gap in the legislation, the commitments and conditional authorization have been included in the Draft Law Amending the Act on the Protection of Competition. However, this provision only provides a general outline without providing details. Thus, a communiqué including all the steps from the submission until the implementation of the commitments will be issued in order to fill in the missing information.

The Communiqué to be issued will necessarily include the following points:

- **Purpose and efficiency of the commitments:** The elimination of all competition concerns in the relevant market represents the main reason for the submission of commitments. Thus, the parties must clearly demonstrate that the submitted commitments serve that purpose.
- **Submission of commitments by the parties:** If the CB raises competition concerns in the relevant market, only the parties are entitled to submit commitments. In case the parties refrain from submitting commitments or if the submitted commitments do not eliminate the detected competition concerns, the CB, in lieu of submitting commitments itself, will not authorize the operation of a concentration.
- **Types of commitments:** Behavioral and structural commitments to be submitted must be clearly indicated and among structural commitments the following are to be provided in detail:
 - The determination of a suitable purchaser including its characteristics and its power to maintain competition at the same level as the acquired undertaking.
 - Characteristics of the business to be divested: any pecuniary or non-pecuniary assets subject to divestment are to be explained in detail.

- **Non-reacquisition clause:** In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the divested business in whole or in part. This non-reacquisition period may last for more than ten years, especially in new markets.

Behavioral commitments need to be efficient, concrete, and verifiable.

- **Proportionality:** The remedies should not provide any burden higher than what is necessary to overcome the competition concerns.
- **Exactitude of information and documents concerning the submitted commitments:** This is the “keystone” of the system because the CB authorizes operations of concentrations within the framework of the submitted commitments.
- **Implementation period:** In order to reach the expected goal, the commitments will be put into practice within a determined period of time.
- **Monitoring:** A trustee to monitor the correct implementation of the commitments is to be appointed and the trustee’s characteristics, functions, term of office, and appointment method are to be explained in detail.

Conditional Authorization to the Acquisition of Burgaz by Mey*

The Competition Board (hereinafter referred to as the “Board”) authorized the acquisition of Burgaz Alcoholic Beverages Commercial and Economic Union (hereinafter referred to as “Burgaz”) which the Saving Deposit Insurance Fund offered for sale by Mey İçki Sanayi ve Ticaret A.Ş. (hereinafter referred to as “Mey İçki”) under certain conditions. The summarized decision (hereinafter referred to as the “Decision”) was published on the official website of the Competition Authority on July 12, 2010¹.

Decision’s Background

The Board, in its decision dated 18 November 2009 and numbered 09-56/1325-331, unanimously rejected the acquisition of Burgaz by Mey İçki within the scope of Article 7 of the Act on the Protection of Competition No. 4054 (hereinafter referred to as the “Act”)². The Board rejected the acquisition because in case of acquisition:

- The competition would be significantly restricted,
- Mey İçki would have its dominant position strengthened in the raki market and
- Mey İçki would become dominant in the other markets for alcoholic beverages other than the market for raki.

Nevertheless, in its decision, the Board rejected the proposed acquisition without asking the parties to submit their commitments. However, in order to permit the improvement of both the social welfare and the economy, it would be more appropriate if the Board had asked the parties to submit commitments instead of simply rejecting the proposed acquisition. It is also stated in Article 6 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 numbered 2008/C- 267/01 and dated October 22, 2008 (hereinafter referred to as the “Notice”) that the Commission must

* *Article of July 2010*

1 The justified decision of the Board is not published yet. To consult the decision, see the following link: <http://www.rekabet.gov.tr/index.php>.

2 To consult the decision, see the following link. <http://www.rekabet.gov.tr/dosyalar/kararlar/karar3183.pdf>.

inform the parties of the negative effects of the concerned operation on the competition with a view to permit them to submit commitments³.

Commitments Submitted to the Board

Concerning the proposed acquisition, Mey İçki submitted commitments to the Board including principally the condition of the divestiture of the Votka 1967 trademark on June 25, 2010⁴. The submitted commitments are structural commitments and thus include a change of title on the property of the parties which are parties to the acquisition. As also stated in Article 15 of the Notice, structural commitments are preferred because they require short-term monitoring measures and they permit more efficiently the protection of a competitive environment.

Conditional Authorization Decision⁵

The Board decided that, even though the commitments submitted by Mey İçki are in principle capable of preventing the undertaking from obtaining dominance in the vodka market following the acquisition, the ancillary provisions of the commitments raise concerns as to the timely realization of the commitments so as to ensure that the assets will not lose their value and competition will not be restricted. Therefore the commitments fall short of eliminating the infringement of Article 7 of the Act No. 4054. As also mentioned in Article 9 of the Notice, the submitted commitments may eliminate the competition concerns entirely from all points of view⁶. In case of doubt, the Commission will reject the submitted commitments and not authorize the said operation. Thus, the decision of the Board is correct.

Nevertheless, the Board, saving the other conditions of the commitments, decided that the said operation of acquisition will be authorized since it would not result in the creation or strengthening of a dominant position as

3 To consult the Notice, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:FR:PDF>

4 The justified decision being not published yet, other submitted commitments are not examined under this article.

5 The justified decision being not published yet, the content of commitments cannot be entirely observed. For that reason, our comments are generally related not to the content of commitments but to the commitments themselves.

6 As stated in the decision *Cementbouw / Commission of the Court of First Instance* dated February 23, 2006 and numbered T-282/2, commitments shall be “*complete and efficient*”.

described under Article 7 of the Act No. 4054 and thus in significant lessening of competition under the following conditions:

- The statement that “unless” Mey İçki Sanayi ve Ticaret A.Ş. “is able to secure any trademark, patent, and logo relating to the expression of İstanblue, the trademark of Votka 1967 will not be divested, but instead, İstanblue brands will be included in the divestiture,” is omitted from the commitment. The Board should give a decision so that all competition concerns are eliminated. Within this context, the decision given by the Board is correct. Indeed, the Board made amendments in the commitment in order that all competition concerns are eliminated. However, the Board will give the grounds of this decision in its justified decision. Indeed, it is stated in the decision that the Commission will prove that commitments will permit the continuity of effective competition in the market⁷.
- The first divestiture period included in the commitment is limited with (...) and the divestiture period with an expert is limited with (...). As also stated in Article 9 of the Notice, commitments must be implemented within a short period of time “*as the conditions of competition in the market will not be maintained*” until the commitments have been fulfilled. For that reason, the time limitation imposed by the Board is correct.
- The point relating to the executives, officers, employees, advisors, stakeholders, distributors, and capital owners is omitted from the article that is under Article 4.1 of the commitment and sets the conditions for buyers, and this same change is made to Article 1.3 of the “Divestiture Expert Contract”⁸.
- The last subparagraph of Article 1.3. of the “Divestiture Expert Contract” is omitted from the contract⁹.
- Within the duration of the first divestiture period, production under the trademark of Votka 1967 is transferred to Burgaz facilities, and production under the trademark of İstanblue is transferred to Mey İçki facilities. Our comments set forth under point 1 are also valid here.

7 Paragraph 64 of the decision EDP / Commission numbered T-87/05 and dated September 21, 2005.

8 No any comment is made since the commitment article cannot be seen.

9 No any comment is made since the commitment article cannot be seen.

- Votka 1967 is subject to the oversight of the supervision expert. As the Board cannot supervise the implementation of submitted commitments during the transition period and the divestiture, a supervision trustee (or “monitoring trustee” as stated in the Notice) will do it for the Board. Articles 117 et seq. of the Notice also provide that a supervision trustee shall be appointed. Within this scope, the decision of the Board is correct.
- The monthly reporting duty of the commitment party is included in the “Supervisory Expert Contract”. As also stated in Article 118 of the Notice, the supervision trustee will be the Board’s “*eyes and ears*”. Within this scope, the decision of the Board is correct.
- The statement in the “Divestiture Expert Contract” that “the divestiture expert must not cause any damages to Mey İçki in the sale of the assets” is not understood as applying a minimum price. As also set forth in Articles 121 and 122 of the Notice, in addition to the supervision trustee, a divestiture trustee must also be present. This divestiture trustee must also be proposed by the parties.
- The statement that the time limits in the review provision may be extended is omitted. This provision was newly brought by the Notice. This provision intends to permit, upon request by the parties showing good cause, commitments to be modified or extensions of deadlines to be granted. Within this scope, the existence of this provision among commitments clearly shows that the Board acts in parallel with the Commission.
- The budget to be determined within Mey İçki for the Burgaz business is made objectively in a way not to restrict the activities of Burgaz and to include the necessary investment. Our comments set forth under point 1 are also valid here.
- Moreover, the Board, by taking into account the difference between condition and obligation, stated that those provisions of the commitment and the aforementioned conditions relating to the divestiture of raki, gin and liquor businesses and the trademark of Votka 1967 within (...) period of time shall be defined as conditions; whereas the other provisions will be defined as obligations. The Board also decided that the authorization will be deemed invalid if the conditions are not fulfilled within the due period and/or if

the annexed contract provisions are not implemented. The decision of the Board is correct. As a matter of fact, it is clearly stated in Article 20 of the Notice that in case of a breach of a condition the compatibility decision will no longer be applicable and that, in case of breach of an obligation, the clearance decision may be revoked and fines may be applied.

Conclusion

- The decision is parallel with the Commission's decisions. Indeed, both Mey İçki, which is the party submitting commitments, and the Board applied many of the provisions set forth in the Notice. The parties submitted entire and effective commitments and decided on trustees in order to permit the implementation of commitments. As for the Board, with a view to protect the competitive environment, it brought amendments related to the efficiency of commitments, curtailed periods, and differentiated conditions and obligations.

A Draft Communiqué has been prepared in order to replace the Communiqué numbered 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board*

A Draft Communiqué (hereinafter referred to as the “Draft”) was prepared with a view to replace the Communiqué No. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competitions Board¹ (hereinafter referred to as the “Communiqué No. 1997/1” or the “Communiqué”) which had been prepared on the basis of the Regulation ECC numbered 4064/89 and dated December 1989 (hereinafter referred to as the “Regulation No. 4064/89”). The Draft has been submitted to the public opinion² by being published in the official website of the Competition Authority on 15 February 2010.

Why a new Communiqué?

During the process of harmonization with the European Union, the works on the harmonization of the Turkish Law with the Acquis of the European Union continue intensively. Within this scope, it was also intended to integrate in Turkish Law the novelties brought by the Council Regulation (EC) numbered 139/2004 and dated 20 January 2004³ (hereinafter referred to as the “Regulation No. 139/2004” or the “Regulation”) which has abrogated the Regulation No. 4064/89 and which is in force since 1 April 2004. In addition, the Competition Authority’s experience exceeding twelve years and the criticism of the Communiqué in the doctrine have also been taken into account.

What are the innovations brought by the Draft?

Purpose and Scope. Differently from the Communiqué No. 1997/1, the purpose and scope of the Communiqué have been regulated in two different articles. In fact, the Article entitled “Purpose” states that the purpose of the

* ***Article of February 2010***

1 The Communiqué No. 1997/1 has been published in the Official Gazette dated 12.08.1997 and numbered 23078. To consult the Communiqué, see the following link: <http://www.rekabet.gov.tr/dosyalar/teblig/teblig29.doc>.

2 The public may submit its opinion on the Draft until 5 March 2010.

3 The Regulation No. 139/2004 has been published in the Official Journal of the European Union dated 20.01.2004 and numbered L 24. To consult the Regulation, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:en:HTML>.

Communiqué is to determine the mergers and acquisitions to be notified to the Competition Board (hereinafter referred to as the “CB” or the “Board”) by referring to Article 7 of the Act on the Protection of Competition⁴ (hereinafter referred to as the “Act”), the Article entitled “Scope” states how to reach this purpose. In this context, this article states the cases considered and not considered as merger and acquisition (1), those subject to authorization (2) and the notification procedure (3). Nevertheless, the sanctions in case of non-notification are not stated. However, the sanctions are set forth in Article 10 of the Draft and in various Articles of the Act (art. 11-16-17 and 27).

Legal Ground. This provision differing from the Communiqué No. 1997/1 stipulates that the Draft has been prepared on the basis of Article 7 of the Act which regulates the mergers and acquisitions, Article 12 of the Act which provides that the notification shall be full and complete and Article 27 of the Act which states the duties and powers of the Board. The referred provisions are in complete harmony with the Articles entitled “Purpose” and “Scope” of the Draft. Nevertheless, pursuant to the logic of law, this provision pointing out the legal texts on which the Draft is based should be regulated as the first Article of the Draft.

Definitions. The fourth Article of the Draft entitled “Definitions” provides the definition of the frequently used competition terms in the Draft. However, the terms “joint-venture”, “commitments” and “business secret” respectively set forth in Article 5 entitled “Cases Considered as a Merger and an Acquisition”, in Article 10 entitled “Notification of Mergers and Acquisitions” and in Article 15 entitled “Business Secret and Confidentiality” are not defined within this Article.

Threshold System. The 7th Article of the Draft entitled “Mergers and Acquisitions Subject to Authorization” brings, in compliance with the Regulation No. 139/2004, a system different from that based on the total and separate turnover of the undertakings parties to the merger or the acquisition.

Notification. The 10th Article of the Draft entitled “Notification of Mergers and Acquisitions” provides the possibility for the notification to

4 The Act on the Protection of Competition No. 4064 has been published in the Official Gazette dated 13.12.1994 and numbered 22140. To consult the Act, see the following link: <http://www.rekabet.gov.tr/dosyalar/belgeler/belge7/kanun.pdf>.

be submitted on electronic support. Furthermore, the said article also underlines the possibility to submit commitments within merger and acquisition operations.

Announcement of Mergers and Acquisitions. The 11th Article of the Draft which provides that the Competition Authority will announce in its official website the merger or acquisition including also the parties to the operation that it took in evaluation establishes judicial certainty by bringing transparency for the public opinion.

Business Secret and Confidentiality. The 15th Article of the Draft includes a new regulation on the protection of the confidentiality of documents submitted to the Board. However, the relevant Article does not give the definition of business secret.

What amendments need to be made to the Draft?

Joint Venture. The Communiqué No. 1997/1 is intensively criticized in the doctrine because it does not include a detailed provision on joint venture. Nevertheless, despite this, the 3rd Paragraph of Article 5 of the Draft did not take these critics into consideration and brought a parallel regulation with the Communiqué No. 1997/1. However, it shall be explained in the Draft that a joint venture causing the coordination of the competition within the scope of Article 4 of the Act shall not be permitted. In short, the Draft shall include full-functional joint-ventures.

Continuous Control. Although the notion of “control” is stated in the 4th Paragraph of Article 5 of the Draft, no any reference is made to “continuous control”. However, in order to be in compliance with the Regulation No. 139/2004, the notion of “continuous control” shall be included within the framework of the Draft.

Pre-notification. The Draft states that the parties shall submit with the notification a signed agreement. Consequently, the parties have not the possibility to send a notification with a view to receive the pre-opinion of the Board. In fact, the 4th Article of the Regulation provides the pre-notification procedure. The Draft shall include this provision since it simplifies the transactions of Competition Authority and grants to the parties the possibility to know whether or not the articles of the relevant contract are contrary to the Act before that they enter into a binding obligation.

Commitments. The Draft only contents itself to make a simple reference to commitments. In accordance with Article 10 of the Draft, in case the parties submit commitments, the notification is deemed to be made at the notification date of the commitments to the Board. Nevertheless, as also provided in the Regulation No. 139/2004, shall also include details as the signification of commitments, their purposes, etc.⁵

Administrative Fines. In order that administrative fines are dissuasive and achieve their goal, the Draft shall provide in detail the fines and periodic penalty payments as also provided in the Regulation No. 139/2004.

Appreciable Restriction of Competition Test. Although Article 6 of the Communiqué No. 1997/1 is intensively criticized in the doctrine because it provides the dominant position test, the Draft did not bring a novelty to this test. In fact, as in the Regulation No. 139/2004, the criteria of “appreciable restriction of competition” shall be accepted in order to determine the prohibited mergers and acquisitions.

Conclusion

As it can be observed, the Draft which has been prepared with a view to replace the Communiqué No. 1997/1 brought various novelties as the possibility to make the notification on electronic support. However, the Draft does especially not modify the most criticized joint venture and dominant position test. As a matter of fact, practices currently applied will continue to be applied. For that reason, the above-mentioned two practices shall first be modified, and then all the modifications stated above shall also be realized.

Additionally, both in order to be in compliance with the Regulation No. 139/2004 and to prevent the large interpretation of the terms merger and acquisition as in the Turkish Code of Commerce, the term of “concentration” shall be used in lieu of “merger and acquisition”.

5 The proposal on the detailed information to be insert in the Draft related to commitments is not enough. A special Notice shall also be issued on this subject as in European Union Law. To consult the Notice, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF>

New Communiqué on Mergers and Acquisitions*

The Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 2010/4 (hereinafter referred to as the “New Communiqué”) was published in the Official Gazette dated October 7, 2010, and numbered 27222¹ after a long period of work². However, the New Communiqué will enter into force on January 1st, 2011. Therefore, a transition period of approximately three months is granted to undertakings and competition practitioners in order to become familiar with the important amendments made to the Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 1997/1 (hereinafter to be referred to as the “Communiqué No. 1997/1”).

Why a New Communiqué?

Communiqué No. 1997/1, which is still in force, envisages a threshold system involving market shares for the mergers and acquisitions to be subject to authorization. Nevertheless, this system does not provide sufficient legal certainty. In addition to this legal uncertainty, the amount of fines imposed for merger and acquisition transactions subject to authorization that are realized without authorization has also been increased to an important extent *via* an amendment made to the Act on the Protection of Competition No. 4054 in 2008. These successive developments made obligatory the issuance of a new Communiqué to replace Communiqué No. 1997/1.

Furthermore, during the process of harmonization with the European Union, it was also intended to integrate into Turkish Law the novelties brought by Council Regulation (EC) numbered 139/2004 and dated 20 January 2004³, (hereinafter referred to as the “Regulation No. 139/2004”)

* **Article of October 2010**

1 To consult the New Communiqué, see the following link: <http://www.rekabet.gov.tr/dosyalar/teblig/teblig83.pdf>.

2 The first draft of the New Communiqué was submitted for public opinion on February 15, 2010. This first draft was examined in our Newsletter of February 2010. To consult the article, see the following link: http://www.erdem-erdem.av.tr/erdem-erdem.php?katid=12110&id=14456&main_kat=12211. As for the second draft, it was submitted to the attention of competition practitioners during the meeting of the Competition Association on May 7, 2010.

3 To consult the Regulation, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:en:HTML>.

which abrogated Regulation No. 4064/89, which has been in force since 1 April 2004.

Important Amendments Made by the New Communiqué

Full-function Joint Venture. The law, by using the expression “*formation of a joint venture which would permanently fulfil all of the functions of an independent economic entity*”, gives the definition of a full-function joint venture. The New Communiqué, in compliance with the decisions of both the Competition Board (hereinafter to be referred to as the “Board”) and the European Commission, as well as Regulation No. 139/2004, incorporated full-function joint ventures.

Continuous Control. The New Communiqué, by using the expression “*provided there is a permanent change in control*” gives place to the notion of “continuous control”. The incorporation of this notion into the New Communiqué is very felicitous. Indeed, as also mentioned in Regulation No. 139/2004, merger and acquisition operations constitute a concentration only if there is “*a continuous change in the control*”.

Thresholds Making Notifications Obligatory. Thresholds were connected to turnover thresholds both in Turkey and throughout the world. Accordingly, notification is obligatory in case (i) total turnovers of the parties to the transaction in Turkey exceed TRY 100 million and turnovers of at least two of the parties to the transaction in Turkey each exceed TRY 30 million; or (ii) the global turnover of one of the parties to the transaction exceeds TRY 500 million and at least one of the remaining parties to the transaction has a turnover in Turkey exceeding TRY 5 million. Thanks to this new threshold system brought by the New Communiqué, parties to a notification will no longer be obliged to determine the relevant market and to show that the notification is needed.

Affected Market. The New Communiqué obviates the obligation of notification. In accordance with this, except in cases of joint ventures, the authorization of the Board will not be required for transactions if there is no affected market even if the thresholds stated above are exceeded.

For a market to be affected, it is necessary that the relevant market might be affected by the transaction and that (i) two or more of the parties are commercially active in the same product market (horizontal relationship); or (ii) at least one of the parties is commercially active in the

downstream or upstream market of any product market in which another party operates (vertical relationship).

These thresholds will be re-established every two years after this communiqué enters into force.

Commitments. Parties to a notification may submit commitments in order to eliminate any competition problems that may arise out of the operation subject to notification. Commitments may be submitted either during the preliminary examination or during the final examination phases and must be capable of completely eliminating competitive problems. A legal ground is established for commitments and the opportunity of granting conditional authorization used by the Board since 1998. Nevertheless, it is clear that this article is not sufficient. As a matter of fact, similarly in the European Union, a Communication explaining this practice will be issued.

New Notification Form

The new notification form attached to the New Communiqué also includes important amendments.

Long / Short Form. The New Communiqué, by making an exceptional distinction, provides that information requested in Articles 6, 7 and 8 of the notification form is not required (i) in case one of the transaction parties acquires full control over an undertaking in which it had joint control; or (ii) for any affected market within Turkey and in terms of geographical markets if the sum of the market shares of the transaction parties is less than 20% for horizontal relationships and the market share of one of the transaction parties is less than 25% for vertical relationships in relation to the affected markets in question.

However, in case it is discovered that the above conditions are not met for the short form or, in exceptional circumstances, for the purposes of a complete examination of competitive concerns even when these conditions are met, the Competition Authority (hereinafter to be referred to as the “Authority”) may request the notification form be completely filled out.

Electronic Form. The notification and attached documents must be prepared in two hardcopies as well as in electronic form and forwarded to the Authority headquarters in Ankara.

Current Version of the Agreement. A copy of the final or current version of the agreement concerning the notified merger or acquisition should be enclosed with the notification form. So, the attachment of the signed final version of the agreement will not be necessary any more. The notification may also be made by a copy of the current version of the agreement. This provision grants the possibility to the parties to ask the preliminary opinion of the Board before signing a binding agreement.

Conclusion

A parallel way to that of the European Union is pursued by the New Communiqué, and the deficiencies existing under Turkish law are eliminated. Within this context, notions such as full function joint ventures and continuous control were taken into account, a legal ground was established for commitments, and conditional authorization and the possibility of notification with a short or long form was granted.

The New Merger Communiqué Becomes Effective On 1 January 2011*

Article 7/1 of the Act on the Protection of Competition No. 4054 (hereinafter referred to as the “Competition Act”) prohibits mergers or acquisitions of undertakings with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country. The same Article in paragraph 2 grants the Competition Board the authority to declare the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained in order them to become legally valid by issuing communiqués.

In this framework, Communiqué No. 1997/1 on Mergers and Acquisitions Subject to Approval of the Competition Board (hereinafter referred to as the “Previous Merger Communiqué”) was adopted. This Communiqué has served its purpose for almost 13 years due to the developments of EU merger legislation and the requirements that arose during the application of the Previous Communiqué, so the Competition Authority has issued the Communiqué on the Mergers and Acquisitions Subject to Approval of the Competition Board No. 2010/4 (hereinafter referred to as the “New Merger Communiqué”) on October / 2010. The New Merger Communiqué will become effective very soon, as of January 1, 2011.

We would like to mention some of the main changes under the New Merger Communiqué;

- The concept of control is more clearly defined under Article 5 of the New Communiqué.

It is stated that in order for a merger or an acquisition to be considered as a transaction subject to the approval of the Competition Board, first of all a “permanent change in control” must occur. This new regulation is a reflection of the “change in control on a lasting basis” adopted under the EU Merger legislation and also the Competition Board decisions.

* *Article of December 2010*

- Closely-related transactions which are tied to conditions or which are realized rapidly through securities within a short period of time are to be considered as single transactions under the scope of Article 5/4 of the new Communiqué.
- Another main novelty regards the *thresholds for notifications*. The Previous Merger regulation would require both turnover and market share thresholds for determining the requirement of a notification to the Competition Board. However, the New Merger Regulation rescinds the market share thresholds and re-regulates the turnover threshold system:
 - (a) Total turnovers of the parties to the relevant transaction in Turkey to exceed one hundred million TL, and turnovers of at least two of the parties of the relevant transaction in Turkey each to exceed thirty million TL, or
 - (b) Global turnover of one of the parties to the relevant transaction to exceed five hundred million TL, and at least one of the remaining parties to the relevant transaction to have a turnover in Turkey exceeding five million TL.
- There is another very important novelty under the threshold system. The approval of the Competition Board is not be required for transactions without any affected market, even if the thresholds prescribed under the Communiqué are exceeded, except for joint venture transactions.
- Another major novelty which would clearly simplify M&A transactions and avoid the need for the parties to draft condition precedent clauses for the approval of the Competition Board is the prior notification procedure, which enables the notification of the transactions prior to the execution of the final agreement. This procedure was not regulated under the Previous Regulation.
- Article 12 of the New Communiqué provides that the Competition Authority will announce the notified mergers and acquisitions on its website, together with the relevant undertakings and their fields of operation. This announcement provides an opportunity for interested parties to inform the Competition Board about their concerns and objections to the transaction under assessment.

- In practice, the Competition Boards used to accept, in limited cases, the commitments of the parties which aimed to remedy any possible competition restrictions that may arise out of the relevant transactions. However, the concepts of commitment and remedies were not directly regulated under the Turkish Competition Regulation.

Article 14 of the New Merger Regulation provides that in order to eliminate any competition problems, undertakings may give commitments concerning the merger or acquisition. Such commitments by undertakings must be capable of completely eliminating competitive problems.

- The concept of “ancillary restraints” is another issue which was not previously regulated under the Turkish merger legislation and hence found its place in the Competition Board decisions based on the EU Merger Legislation. The New Communiqué deals with this concept under Article 13/5 and states that approvals granted by the Competition Board concerning the merger and acquisition will also cover those limitations which are directly relevant and required for the implementation of the transaction. The principle is that transaction parties should determine whether the limitations introduced by the merger or acquisition exceed this framework.
- One of the major amendments is made to the Notification Forms attached to the Communiqués. The New Communiqué includes long and short forms of notification. If one of the transaction parties acquires full control over an undertaking in which it had joint control, or, for any affected market within Turkey and in terms of geographical markets; if the sum of the market shares of the transaction parties is less than twenty per cent for horizontal relationships, and the market share of one of the transaction parties is less than twenty-five per cent for vertical relationships, in relation to the affected markets in question, the short form can be used.
- As a last point, we would like to mention that the “affected market” is defined under the Notification Form.

We tried to summarize some of the novelties in the Turkish Merger Legislation at a glance. Certainly, there are other novelties introduced by the New Communiqué.

Right of Access to Files and Protection of Trade Secrets in Competition Law*

The Head of the Department of the Competition Authority, taking into account the Council Regulation¹ (EC) dated December 22, 2005 and numbered 2005/C 325/7 (hereinafter referred to as the “Regulation”), issued the Communiqué on the Rules for Access to Files and the Protection of Trade Secrets numbered 2010/3² (hereinafter referred to as the “Communiqué”). The Communiqué entered into force by being published in the Official Gazette dated April 18, 2010 and numbered 27556. The Communiqué only concerns investigations which will be opened after that date.

The Communiqué determines, on the one hand, the procedures and principles related to the use of the right of the parties to gain access to files and, on the other hand, the determination of the trade secret character of information discovered during the application of the Act on the Protection of Competition No. 4054 (hereinafter referred to as the “Act”) and the procedures and principles related to the protection of information and documents classified as trade secrets.

Right of Access to Files

Purpose and definition of the right. It is stated in the General Ground of the Communiqué that the right of access to files has been regulated in order to permit the efficient use of the right of defense (“equality of arms”). However, the definition of the right is neither given in the Communiqué nor in the General Ground of the Communiqué. For that reason, this right should be understood as being similar to what is expressly stated in the Regulation, i.e., the determination of persons who have the right of access to files (§3 of the Regulation).

Use of the right. The parties of the investigation and the managers or employees of the undertaking or association of undertakings against whom an administrative fine has been requested may use their right of access to

* ***Article of April 2010***

1 To consult the Council Regulation, see the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:325:0007:0015:EN:PDF>

2 To consult the Communiqué, see the following link: http://www.rekabet.gov.tr/dosyalar/belgeler/belge504/2010_3.pdf

files upon written request from the time they learned that an investigation has been opened against them until the end of the last written plea period. The parties, if no new evidence is discovered during the investigation, may use their right only once. After examination by the investigation committee, a request for access may be postponed or refused, so that the investigation is conducted in a safe and healthy manner. If the parties' request is accepted, the documents in the file are given to the interested parties by being reproduced *via* photocopy or by being transferred into an electronic medium.

The Communiqué differs from the Regulation on two points. As a matter of fact, it is firstly stated in the Regulation that the right of access to files is granted, in principle, on a single occasion for agreements, concerted practices, and decisions and practices of associations of undertakings (§27 of the Regulation) and at every stage of the procedure for merger and acquisition operations (§28 of the Regulation). Contrary to this, in the Communiqué, in spite of the fact that it is stated that the rules provided for agreements, concerted practices and decisions and practices of associations of undertakings may also be applied by analogy to mergers and acquisitions if appropriate, no distinction is made in terms of frequency of use. Additionally, another distinction is also made in the Regulation between the complainant and the other concerned parties and it is provided that, in principle, the complainant does not have a right of access to files (§30 et seq. of the Regulation). Nevertheless, no distinction is made in the Communiqué.

Information and documents within the scope of the right. It is provided in the Communiqué that the parties of the investigation or the managers or employees of the undertaking or association of undertakings against whom an administrative fine is requested may have access to all kinds of evidence discovered and documents prepared about them within the body of the Competition Authority (hereinafter referred to as the "Authority"). Internal written communications of the Authority and information and documents containing trade secrets and confidential information related to other undertakings, association of undertakings and persons are excluded. Nevertheless, although the definitions of both "internal written communication" and "trade secret" are given in the Communiqué, the definition of "other confidential information" is not given. The definition of "other confidential information" is given in the Regulation (§19 and 20 of the Regulation).

Trade Secrets

Definition of trade secrets. A general definition of trade secrets is given in the Communiqué and it is stated that, fundamentally, information and documents capable of damaging the undertaking if revealed are trade secrets. Following the general definition, information and documents which are trade secrets pursuant to the specifications of the situation and undertakings are listed by way of illustration and, within this scope, criteria such as internal structure of the undertakings, their organizations, financial, economic, credit, and cash situation are given. After this, information and documents which may be considered trade secrets are explained, and the fact that the information and documents have been communicated in whatever manner to the public and the antiquity of the information and documents are taken into consideration. Finally, based on the competition law legislation, it is stated that agreements, concerted practices, or practices which violated this legislation are not considered trade secrets.

Request for confidentiality. It is also provided in the Communiqué that parties may submit a request for confidentiality. Undertakings submit their request in writing to the Authority. If the Authority accepts the request of the undertakings, it will not reveal the information. Furthermore, the Authority may not take into account the requests of confidentiality related to information and documents which will be inevitably used to prove an infringement of competition rules.

If the undertaking does not submit any request for confidentiality, the Authority may either make an evaluation on its own initiative or ask the undertakings to make an evaluation.

Conclusion

The Communiqué stipulates the persons who may obtain information from the files and the definition of trade secrets, as well as their protection. However, the Communiqué, in comparison with the Regulation, does not discuss some important points, such as the definition of “confidential information”. These deficiencies should be cured and, in addition, in order to permit the efficient use of the right of defense, a system more similar to the system of the European Union would be preferable because it would differentiate between agreements, concerted practices, and decisions and practices of associations of undertakings, and merger and acquisition operations.

A New Communiqué for Hearings*

The Communiqué No.2010/2 on Hearings Held Vis-à-Vis the Competition Board (hereinafter referred to as the “Communiqué”) was issued in order to determine the procedures and principles related to hearings held before the Competition Board (hereinafter referred to as the “Board”) set forth in Articles 46 and 47 of the Act No. 4054 on the Protection of Competition (hereinafter referred to as the “Act”).

Moreover, the Communiqué which, in addition to hearings, shall also be applicable in respect of the other meetings for receiving oral opinion/information to be held by the Competition Board to the appropriate extent, entered into force by being published in the Official Gazette dated April 24, 2010 and numbered 27561.

The Communiqué is highly similar to the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (hereinafter referred to as the “Guidance”)¹. There is no doubt that the Communiqué is a reflection of the works realized on the harmonization of the Turkish law with the Acquis of the European Union during the process of harmonization with the European Union.

Goal of the Hearing

The main goal of the hearing is to help the Board in the formation of its final decision. Within this context, the Communiqué permits the parties to repeat the essential claims they deem important which they have already submitted in their petitions before the Board, and the Board may ask questions on these points, as well.

Parties / Participants of the Hearing

The Communiqué provides that those against whom an investigation or a final examination is conducted have a right to oral defense. The party who wants to use its right of oral defense may express this in the petition for defense or reply. However, the Board, in cases deemed necessary for it, may also decide for holding a hearing on its own motion.

* *Article of May 2010*

1 To consult the Communiqué, see the following link: http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf

Furthermore, the Board, in order to permit also the participation of complainants and third persons to the hearing, announces in the web page of the Competition Authority (hereinafter referred to as the “Authority”), on the basis of the principle of transparency, the date, venue and time of the meeting, and the duration of application for complainants and third persons. From that date, the complainant who wants to participate to the hearing shall make a written request. As for the third person, he shall apply to the Board with a petition that involves information and documents putting forward his relation of interest with regard to the subject matter of the hearing.

In addition, the Board, on its own motion or upon request of the investigation committee, may also invite other natural or legal persons from whom it may obtain information on the subject matter of the hearing. The Communiqué, contrary to the Guidance, does not independently mention the associations. Nevertheless, the associations have legal personality as per the Turkish Civil Code².

Furthermore, persons who want to attend the hearing as an audience are also accepted if the physical situation of the hearing hall is appropriate.

Notification of the Hearing

Even though the information on the hearing is announced on the official website of the Authority, the Board shall send to the parties a written invitation for the hearing at least thirty days before the day of the hearing.

The Hearing

Time and Duration. The hearing shall be held in at most five successive sessions³ within thirty days at least and sixty days at most from the end of the investigation phase.

Hearing Hall Equipment. The Authority shall ensure, on the condition that it has been requested in a reasonable period of time beforehand, special

2 The first paragraph of Article 56 of the Civil Code is as follows: “Associations are society of persons which have **legal personality** formed by at least seven real persons for the realisation of a common object other than sharing of profit by collecting information and performing studies for such purpose.”

3 Various meetings held in one day shall be deemed to be one session.

equipment and facilities such as an interpreter, a sign language interpreter and wheelchair. Moreover, a camera system is also installed in the hearing hall.

Parties and Participants' Representation. The parties may attend the hearing through their authorized representatives on the condition that they have notified the Authority of the persons who will represent them at the hearing and submitted the documents showing their authority. It is not required that the representative possess the title of attorney.

Means of Proof. Parties and participants who may use every kind of evidence by means of proof provided in the Code of Civil Procedure, shall, seven days before the hearing at the latest, notify their proofs to the Board by making the annotation “they are confidential” or “they involve trade secrets” on those which are confidential. Furthermore, parties and participants may also have witnesses heard by submitting a list of witnesses to the Board. In addition, parties and participants may also take an opinion from experts.

Principle of Publicity. Contrary to the Guidance, the principle of publicity of hearings is accepted in the Communiqué. Nevertheless, in case of existence of a situation necessitating the protection of trade secrets, the Board may decide, on its own motion or upon the written request of the parties submitted by the parties until the end of the duration as to the presentation of means of proof at the latest. The principle of publicity provided in the Communiqué is correct because this principle also takes place in the Constitution⁴.

Management and Order of the Hearing. The hearing starts under the direction of the Chairman, the roll is called, then, the floor is given to the investigation committee in order to briefly sum up the content of the claims and the file. After the presentation of the investigation committee, the right to have a say is respectively given to the complainants, the third persons, the Ministry of Industry and Trade and to the parties. During all these stages, the Chairman is responsible for the order of the hearing. The Chairman shall take all the measures required to enable that sessions be completed in calmness, impartially and completely. In this context, the

⁴ The first Paragraph of Article 141 of the Constitution is as follows: “*Court hearings shall be open to the public. It may be decided to conduct all or part of the hearings in closed session only in cases where required absolutely for reasons of public morality or public security*”.

Chairman has the right to warn the persons present at the hearing and even, to take them outside of the meeting hall.

Conclusion

This Communiqué which has been issued on the basis of the principles of efficiency, transparency and legal certainty determined the procedures and principles related to the preparation and progress of the hearings. This Communiqué which is very similar to the Guidance provides the possibility to the Board to take just decisions by permitting the parties, the participants and the tribunal to discuss together the most important points already submitted in the petitions.

The Concept of Cartel within the Scope of Competition Law*

Introduction

In a broad sense, the aim of Competition Law is the protection of competition. In this context, agreements, practices, and decisions between undertakings and associations of undertakings which prevent, distort or restrict competition are prohibited pursuant to Article 4 of the Act on the Protection of Competition (hereinafter referred to as the “Competition Act”). Even though an agreement between the undertakings cannot be determined if there are direct or indirect relations that provide a coordination or practical cooperation between undertakings which replaces their own independent behavior resulting in the same preventive manner then these would also be prohibited pursuant to the Article mentioned above.

Many times, undertakings establish an association aiming to deal with their common problems. These sometimes conclude decisions which prevent competition between their members and cause these members to earn higher income. These kinds of decisions violate the competition system and are therefore prohibited.

Agreements that prevent competition can be horizontal or vertical. Agreements concluded in the same level directly between the competitors are horizontal agreements, and they *per se* have anti-competitive effects. Cartels occur within the framework of horizontal agreements.

I. *The Cartel Concept*

Cartels are one of the occurrences of anti-competitive agreements. Pursuant to Article 3/ç of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices, and Decisions Limiting Competition and Abuse of Dominant Position (hereinafter referred to as the “Fines Regulation”) and Article 3/c of the Regulation on Active Cooperation For Detecting Cartels (hereinafter referred to as the “Leniency Regulation”), cartels are defined as competition-restrictive agreements and/or concerted practices between competitors for;

- fixing prices
- allocation of customers, providers’ territories, or trade channels

* *Article of February 2010*

- restricting the amount of supply or imposing quotas, and
- bid-rigging.

Cartels may be established by the explicit will of the member undertakings. However, under certain circumstances, undertakings may indicate their will for establishing a cartel in an implicit way which does not include any communication with each other.

In addition, cartels, which do not have any positive effects on relevant markets, are called “*hardcore*” cartels, and they are definitely prohibited.

II. Fines For Cartels

Pursuant to Article 5 of the Fines Regulation, for cartels, a fine of between two percent and four percent of the annual gross revenues of the undertakings and associations of undertakings or the members of such associations generated at the end of the fiscal year preceding the final decision, or, if that cannot be calculated, at the end of the fiscal year closest to the date of the final decision, will be imposed.

In addition, pursuant to the Regulation mentioned above, any relation to a cartel can have an aggravating cause on fines. Article 6 of the Regulation stipulates that the relevant fines will be increased by 50 to 100% if any undertaking continues to be part of a cartel after the notification of the decision on the investigation. In the same manner, each of the managers and employees of the undertaking who were detected to have decisive influence on the cartel will be separately assessed a fine of between three percent and five percent of the fine given to the actual undertaking, according to Article 8 of the Regulation

III. Active Cooperation (Leniency)

Cartels are considered to be the most significant type of competition restriction. As a result of the price increase caused by cartels, some of the consumers cannot purchase the relevant products and thereby they bear a loss by the lack of such products or services. On the other hand, undertakings who are members of cartels do not reduce the costs and would not be receptive to technological innovation, which they would have done in the effective competition environment. The establishment of cartels increases prices, abolishes effectiveness, reduces entrepreneurship,

and prevents a wide range of consumers from purchasing higher quality products at a lower price.

In comparison to other anti-competitive behaviors, cartels are harder to detect and investigate since they have an implicit nature. Therefore, in order to enable the detection of cartels, the Leniency Regulation, which (i) exempts the undertakings and their employees from fines or (ii) reduces the level of such fines, was adopted.

Article 5 of the mentioned Regulation sets out who will be exempt from such fines and who will benefit from reductions. In this regard,

- The fine to be imposed on the first undertaking which cooperates will be reduced by one-third to one-half. In that case, the fines to be imposed on the undertaking's managers and employees who admit to the cartel and actively cooperate may be reduced by at least one-third or may not be imposed at all
- The fine to be imposed on the second undertaking which cooperates will be reduced by one-fourth to one-third. In that case, the fines to be imposed on the undertaking's managers and employees who admit to the cartel and actively cooperate may be reduced by at least one-fourth or may not be imposed at all
- The fines to be imposed on other undertakings will be reduced by one-sixth to one-fourth. In that case, the fines to be imposed on the undertaking's managers and employees who admit to the cartel and actively cooperate may be reduced by at least one-sixth or may not be imposed at all
- In case it becomes necessary as a result of the evidence submitted for the amount of the fine to be increased because of reasons such as the extension of the duration of the violation, this increase will not be applied to the first undertaking to submit the evidence concerned, and its managers and employees who admit to the cartel and actively cooperate.

Article 6 of the Regulation sets out the conditions and procedures for exemption from fines or reduction of fines in relation to undertakings. Article 9 of the Regulation sets out the conditions and procedures for exemption from fines or reduction of fines for the managers and employees of undertakings. Pursuant to the mentioned Articles, an undertaking or its managers or employees must

- submit information and evidence in respect of the alleged cartel including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations, and participants in cartel meetings
- not conceal or destroy information or evidence related to the alleged cartel
- cease their involvement in the alleged cartel except for cases when it is requested by the Competition Authority
- keep the application confidential until the end of the investigation unless otherwise requested by the Competition Authority
- maintain active cooperation until the Competition Board takes the final decision.

Conclusion

In the light of the legislation mentioned above regarding the cartel establishment, all relevant undertakings, undertaking associations and their employees must raise their awareness and should not establish illegal cartels or prevent their establishment. In this way, the competition culture would be rooted, and the undertakings, associations, and/or their employees would not face astronomic fines.

The Competition Board Decided that Several Chicken Producers and the Association of White Meat Producers and Breeders Union Distorted Competition by Establishing a Cartel and thereby Sentenced them to Pay Fines*

The Competition Board (hereinafter referred to as the “Board”), at its discretion, sentenced nine leading undertakings, namely Abaloğlu, Banvit, Beypi, CP, Erpiliç, Keskinöğlü, Pak Tavuk, Şeker Piliç and Şen Piliç to pay a fine of 0.8% of their gross income as accrued at the end of the year 2008. Moreover, the Board had increased the fine of Pak Tavuk depending on Zuhul Daştan’s- president of Association of White Meat Producers and Breeders Union (hereinafter referred to as the “Besd-Bir”) and president of Pak Tavuk- decisive influence on the violation and warned Besd-Bir to abstain from behaviors which lend themselves to anti-competitive practices.

I. Allegations

The Board has, *ex officio*, made an investigation into the alleged agreements between 27 chicken producers which are restricting the amount of supply and fixing prices, and into the allegations regarding Besd-Bir’s enabling of such agreements.

II. Cartel inspection

In light of the documents found at the premises and information obtained from the parties as a result of the investigation, the Board determined that some of the undertakings (i) agreed on increasing chicken prices, (ii) engaged in activities to restrict the amount of supply, (iii) tried to increase the transparency in the market by sharing confidential information and future price lists with each other, and (iv) tried to restrict the production of other chicken producers by suggesting their dealers make agreements with dealers of other producers. In addition, the Board reached the conclusion that Besd-Bir had acted in a way that enables such anti-competitive practices and the coordination between the relevant undertakings.

The Board stated that these actions by the undertakings are examples of a “cartel” within the scope of the Competition Law. The methods which

* *Article of April 2010*

cartels use to prevent or restrict competition are mentioned in the decision as follows: (i) mutually determining the prices of products of members, (ii) allocation of the market between the members, (iii) restricting the production of member undertakings (controlling the amount of supply), and (iv) bid rigging. Deriving from these points, cartels are prohibited pursuant to Article 4 of the Competition Act.

The investigation determined that the cartel in question sometimes had the character of an export cartel. Additionally, it decided that the aim of the export cartel was to restrict the amount of supply in the domestic market. Therefore, it is also within the scope of Article 4 of the Competition Act.

III. Evaluation of individual exemption

As a result of its exemption evaluation, the Board decided that the undertakings under investigation cannot benefit from an exemption because they do not meet the conditions envisaged under Article 5 of the Competition Act taking into consideration the actual and possible effects of the agreements concluded between them.

IV. General evaluation

The general evaluation states that it is not possible to determine each and every collaboration by the undertakings during the long term that covers all the agreements. Therefore, instead of a static approach, the concept of “*a single continuing and long lasting understanding or cooperation*” that covers the entire process of competition infringement should be taken into consideration for agreements of such long duration. A reference has also been made to previous Board decisions on Yonga Levha 1, Yonga Levha 2, Ceramics ve Iron-Steel. In this case, an integrated approach has been adopted to examine the coordination between the undertakings, and in this way it was determined that Abalıoğlu, Banvit, Beypi, CP, Erpiliç, Keskinoğlu, Pak Piliç, Şeker Piliç and Şen Piliç had actively joined in the practices of supply restriction and price fixing.

It is also mentioned that Besd-Bir, which is the association of undertakings, has a significant role in the sector of chicken producing. It organizes meetings, produces statistics regarding the chicken market through the information it obtains from its members, and shares such statistics with requesting parties and the public. This structure places

Besd-Bir in a position where chicken producers meet under its roof and exchange sensitive information about competition. In these meetings, discussions oriented to the market and such items as seasonal evaluations, sale policies, prices, costs, and sales systems are held. The Board concluded that the Besd-Bir meetings are not solely aiming to deal with sector specific problems, but are also intended to find ways to restrict the amount of supply, which should be balanced by market mechanisms. Moreover, it was determined that during periods when the sector had an economic crisis, Besd-Bir encouraged its members to restrict their supply.

The Board also investigated the effects of agreements on the relevant market. On one hand, the agreements on price fixing have been proved by market outputs. On the other hand, it could not be determined whether the agreements on restricting the amount of supply have been fulfilled or not. However, it was noted that the correspondence between the parties includes statements declaring that the practices as to restricting the supply had been successful in 2005.

The Board stated that although there are many undertakings in the chicken production sector, the market share of the nine main actors who have been active in anti-competitive practices are big enough to have significant effects in the market.

In light of the price analysis and statements of the undertakings, the coordination between the undertakings as regards price fixing and supply restriction has been successful from time to time. However, this coordination could not be consistently maintained, and therefore its effect on the chicken market was limited.

In conclusion, it was determined that Abalıođlu, Banvit, Beypi, CP, Erpiliç, Keskinođlu, Pak Piliç, Őeker Piliç and Ően Piliç had been in active communication, that agreements had been formed in the surroundings of these undertakings, and that the other undertakings with minor market shares had been informed about the agreements from time to time by the major undertakings.

V. Fines

Pursuant to the Fines Regulation Article 5, the Board determined the basic fine as 2% since the nine undertakings taking part in anti-competitive practices had been involved in the cartel from time to time during a period

between the years 2005 to 20008 and since the total duration of each undertaking's involvement in the cartel had not exceeded one year. The basic fine was decreased by a ratio of 3/5 because of the external economic shocks to the chicken market during the last five years.

VI. Dissenting opinion

One of the Board members, namely Reşit Gürpınar, declared his dissenting opinion. He stated that (i) due to the hard times in the chicken sector, the undertakings held meetings and communicated with each other to conclude agreements; (ii) however, their efforts never evolved beyond the planning stage and were not fulfilled; (iii) there is no decisive and sufficient evidence to prove the establishment of cartels; (iv) moreover, the essential element of a cartel, which is the sanction envisaged if the members do not obey cartel agreements, do not exist in this case. Therefore, the dissenting Board member is of the opinion that there was not a cartel between the chicken producers, but that, nevertheless, the undertakings' attempts to engage in anti-competitive practices are in violation of Article 4 of the Competition Act.

The Impartiality Principle in Competition Law*

Since its beginnings, the Competition Board has investigated and prepared reports on whether parties have violated the Act on the Protection of Competition numbered 4054 under the presidency of one board member. These reports would be signed by the investigating board member as the “President of the Investigation Council”.

In many lawsuits initiated before the 10th and 13th Chambers of the State Council, parties alleged that the Competition Board, which imposes administrative sanctions with significant effects on interested parties, does not comply with the principles of “independence and impartiality”¹. In addition, the parties sought the nullification of relevant Board decisions by claiming that including the signatures of the investigating board members on Competition Board decisions violates the principle of impartiality.

Both the 13th Chamber and the Board of Administrative Affairs of the State Council have examined these allegations and established a precedent by the decisions it has granted from 2005 until today.

First of all, the State Council decided that pursuant to Article 20 of the Competition Act, the Competition Authority has a public legal personality and administrative and financial autonomy; was established to ensure the formation and development of markets for goods and services in a free and sound competitive environment; has an obligation to implement this Act; and is to fulfill the duties assigned to it by the Act. Accordingly, it is also stated that the Authority is independent in fulfilling its duties and that no authority or person may give commands or orders to influence the final decision of the Authority.

In evaluating the relevant provisions of the Competition Act, the State Council determined that the Competition Board is a body charged with evaluating competition in a relevant product or service market according to the Competition Act and with imposing administrative sanctions of significant impact for violations of the competition regulations. Therefore, the State Council emphasized that the Competition Board’s duty to comply

* *Article of September 2010*

1 The awards of the State Council 13th Chamber 2005/1703P-2005/3396D.; 2005/5534P-2005/3339D.; 2005/5535P-2005/3340D, the State Council Board of Administrative Affairs 2008/275P-2010/590D.; 2007/724P-2010/591D.; 2008/329P-2010/593D, State Council 13th Chamber 2009/4592P-2010/5125D.; 2009/4593P-2010/5126D.;2010/310P-2010/5128D.

with the principles of “independence and impartiality” is an obligation deriving from both the Competition Act and general legal principles.

As acknowledged, the practice of the Competition Board before the year 2005 was that all the information and the documents as to alleged violation of the Competition Act were gathered and a report was prepared by a committee established by the investigating board member and the other inspectors. Moreover, upon the receipt of the defense of the parties in response to this report, the committee used to prepare an additional written opinion and notify this to other board members and the interested parties.

The State Council evaluated this practice and stated that the board member handling the investigation had previously prepared a report containing the decision and any proposed sanctions. Therefore, the State Council is of the opinion that the final verdict must be rendered based on an objective discussion and evaluation of the issues. In this regard, the investigating board member’s participation in this meeting violates the impartiality principle. Consequently, the State Council stated that the Competition Board decisions given in the manner described above are not in compliance with the law, and it annulled many decisions for this reason². Moreover, the State Council specified that this situation is an explicit violation of the law and accepted many applications for the suspension of executions on this basis³.

Pursuant to the Act Amending Various Provisions of the Act on the Protection of Competition numbered 5388 published in the Official Gazette dated 13 July 2005 and numbered 25874, Article 43 of the Competition Act has been amended. In this way, the practice of the Competition Board has been brought into compliance with the established precedent of the State Council.

2 The awards of the State Council 13th Chamber 2005/1703E.-2005/3396K.; 2005/5534E.-2005/3339K.; 2005/5535E.-2005/3340K. sayılı kararları, Danıştay İdari Dava Daireleri Kurulu’nun 2008/275E.-2010/590K.; 2007/724E.-2010/591K.; 2008/329E.-2010/593K. sayılı kararları, Danıştay 13.Dairesi’nin 2009/4592E.-2010/5125K.; 2009/4593E.-2010/5126K.;2010/310E.-2010/5128K.

3 The awards of the State Council Board of Administrative Affairs, Suspension Application No: 2005/65, 2005/75, 2005/130, 2005/131, 2005/163, 2005/165, 2005/166, 2005/167, 2005/170, 2005/271, 2005/272, 2005/278, 2005/281, 2005/305, 2005/307, 2005/324.

Electricity Privatizations of 2010 and Competition Board's Approvals*

The document on Electric Energy Sector Reform and Privatization Strategy drafted by the State Planning Organization in 2004 regulated the harmonization of the electric energy sector with the European Union Legislation on the one hand, and the privatization of electric energy production and distribution companies by restructuring publicly held electricity enterprises, on the other hand. Within the scope of this regulation, the privatization of 100% of the shares of Türkiye Elektrik Dağıtım A.Ş. (hereinafter referred to as “TEDAŞ”) in Boğaziçi Elektrik Dağıtım A.Ş. (hereinafter referred to as “BEDAŞ”), Dicle Elektrik Dağıtım A.Ş. (hereinafter referred to as “Dicle Elektrik”), Gediz Elektrik Dağıtım A.Ş. (hereinafter referred to as “Gediz Elektrik”) and Trakya Elektrik Dağıtım A.Ş. (hereinafter referred to as “Trakya Elektrik”) is without any doubt among the most important privatizations completed in 2010.

As can be remembered, several companies and joint ventures took part in these privatizations. The privatization process was contentious.¹

The Role of the Competition Board on the Privatization Process

Concerning Mergers and Acquisitions via Privatization, there is a two-stage notification to the Competition Board. The aforesaid notifications are regulated under the Communiqué No. 1998/4 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid (hereinafter referred to as the “Privatization Communiqué”).

* **Article of December 2010 – Prof. Dr. H. Ercüment Erdem**

1 Cengiz Elektrik, Kolin İnşaat, Park Holding, Limak İnşaat, Enerjisa, Eti Gümüş-Söğütsen OG, İş-Kaya-MMEKA OG, KCETAŞ-AYEN OG, Aksa Elektrik, IC İċtaş took part in Boğaziçi Elektrik tender; and Karavil-Ceylan OG, Cengiz Elektrik, Kolin İnşaat, Çalık Enerji, Limak İnşaat, Eti Gümüş-Söğütsen OG, İş-Kaya-MMEKA-Rosse OG, Aksa Elektrik and IC İċtaş took part in Dicle Elektrik tender. Park Holding, Cengiz Elektrik, Kolin İnşaat, Limak İnşaat, Enerjisa Eti Gümüş-Söğütsen OG, İş-Kaya-MMEKA OG, KCETAŞ-AYEN-REL-PETCO OG, Aksa Elektrik ile IC İċtaş took part in Gediz Elektrik tender; and Park Holding, Cengiz Elektrik, Kolin İnşaat, Limak İnşaat, Eti Gümüş-Söğütsen OG, İş-Kaya-MMEKA OG, KCETAŞ-AYEN-REL-PETCO OG, Aksa Elektrik, IC İċtaş and Palmet Enerji took part in Trakya Elektrik tender.

- **Pre-Notification:** Article 3 of the Privatization Communiqué stipulates that the Board shall be consulted before the announcement of tender conditions to the public. Concerning the acquisitions via privatization, in case (i) the market share of the undertaking to be privatized or the unit aiming at producing goods and services in the relevant market exceeds 20% or where the turnover of the same undertaking or unit exceeds 20 trillion Turkish Liras, or (ii) even if these limits are not exceeded, but where the undertaking to be privatized does have judicial or de facto privileges, it is necessary to make a pre-notification to the Competition Authority. With this notification, the results of the privatization in the relevant market and the condition of judicial or de facto privileges - if any - of the undertaking to be privatized after privatization are evaluated. The Competition Board's opinion on the relevant subject is taken into consideration for the preparation of the tender conditions document.
- **Final Notification:** Article 5 of the Privatization Communiqué stipulates that in acquisitions via privatization where pre-notification to the Competition Authority is compulsory in accordance with this Communiqué, and in cases where the total market shares in the relevant product market of the parties to the acquisition via privatization fall within the scope of this Communiqué although not subject to pre-notification, exceed 25% or their turnover exceeds 25 trillion Turkish Liras, it is compulsory to receive the authorization of the Competition Board in order for acquisition to gain legal validity. Mergers and acquisitions which are not permitted by the Board are invalid. Pursuant to Article 6 of the Privatization Communiqué, Presidency of Privatization Administration (hereinafter referred to as the "PPA") files the application for authorization with the Competition Authority after the tender has been concluded but before the decision regarding the final transfer of the undertaking. This application is prepared in the form of independent files for each bidder to take place in the draft resolution of the Privatization High Board. As per Article 7 of the Communiqué, the provisions of Communiqué No. 1997/1 which are not contrary to this Communiqué continue to be applied for acquisitions via privatization.

Competition Board's Decision on Electricity Privatizations

PPA notified the winning undertakings of tenders of TEDAŞ, BEDAŞ, Dicle Elektrik, Gediz Elektrik and Trakya Elektrik to the Competition Authority for its approval. The Competition Board has given its decision concerning the notifications of PPA (hereinafter referred to as the “Summary Decision”) in its session dated December 16, 2010 and published it on the official web site of the Competition Authority. However, the full decision has not yet been published.

In its Summary Decision, the Competition Board, while reviewing the applications filed within the scope of the privatizations of BEDAŞ, Gediz Elektrik, Trakya Elektrik Dağıtım A.Ş. and Dicle Elektrik Dağıtım A.Ş., conducted separate evaluations in terms of each undertaking. The Board, in its evaluation, handled the tenders in which each undertaking submitted a bid all together, in terms of their effects on competition in the relevant market.

In the Summary Decision, while the relevant product market is not specified, taking into consideration the Competition Board's decision on Çoruh Elektrik Dağıtım A.Ş., Yeşilirmak Elektrik Dağıtım A.Ş., Osmangazi Elektrik Dağıtım A.Ş., Fırat Elektrik Dağıtım A.Ş., this market appears to be the “electricity distribution services” and “retail sales made to consumers composed of small-sized industrial, commercial and household”. The relevant product market is the market concerning the goods and services within the area of activity of the undertakings taking part in the merger or acquisition transaction. In determination of the relevant product market, the market composed of goods and services which are considered the same by customers, in terms of price, intended use and qualifications, is taken into consideration and other factors that could have an effect on the determined market are also evaluated.

In respect of İŞ – Kaya - MMEKA OG, İŞ-Kaya MMEKA- Rosse OG and Aksa Elektrik

The Competition Board decided that İŞ-Kaya-MMEKA OG and Aksa Elektrik, the highest bidders on the privatizations of BEDAŞ, Gediz Elektrik and Trakya Elektrik, are under the same economic entity and therefore these two undertakings are to be regarded as one and the same undertaking under the scope of Article 3 of Act No. 4054 on the Protection of the Competition (hereinafter referred to as the “Competition Act”).

As a justification for its decision, the Board indicated that Mehmet Kazancı, Esin Kazancı, Begüm Kazancı and Mustafa Kurnaz, shareholders of MMEKA, are under the same entity as Kazancı Holding A.Ş., and consequently, as Akxa Elektrik Perakende Satış A.Ş. (hereinafter referred to as “Akxa Elektrik”).

In accordance with the information available to the public, Kazancı Holding A.Ş., with its publicly held participations in Akxa Elektrik Üretim A.Ş., Akxa Elektrik Toptan Satış A.Ş. and Akxa Elektrik, appears to hold a substantial market share in the electricity production and distribution market. On the other hand, it can be understood, from several decisions of the Competition Board, that Kazancı Holding A.Ş. also holds a substantial market share in the natural gas distribution market. As a matter of fact, the Competition Board, in its decisions of Çoruh Elektrik Dağıtım A.Ş., Osmangazi Elektrik Dağıtım A.Ş., Fırat Elektrik Dağıtım A.Ş., Vangözü Elektrik Dağıtım A.Ş., concerning the acquisitions of these undertakings by Akxa Elektrik, and its decisions of Yeşilirmak Elektrik Dağıtım A.Ş. and Çamlıbel Elektrik Dağıtım A.Ş., concerning the acquisition of these undertakings by Anadolu Doğalgaz Dağıtım A.Ş., discussed the fact that the same undertakings hold an electricity and natural gas distribution within the same territory in terms of “convergent market integration” and permitted these acquisitions by majority of votes. Dissident members underlined that, on one hand, the integration on the convergent markets creates a dominant position, and on the other hand, the necessary precautions to prevent the superposition were not taken. Therefore, whether OG, the winning undertaking, is under the same economic entity as Kazancı Holding A.Ş. or not, is crucial.

In its Summary Decision, the Competition Board emphasized that the acquisition of all three of Boğaziçi Elektrik Dağıtım A.Ş., Gediz Elektrik Dağıtım A.Ş. and Trakya Elektrik Dağıtım A.Ş. by İş-Kaya İnşaat Sanayi ve Ticaret Ltd. Şti.-MMEKA Makine İthalat Pazarlama ve Ticaret A.Ş. Joint Venture Group and/or Akxa Elektrik Perakende Satış A.Ş. would result in creating a dominant position and decreasing competition significantly in the relevant markets with respect to Kazancı Holding Inc, according to Article 7 of Act No. 4054. Based on this evaluation, the Board decided that the acquisition of all three of Boğaziçi Elektrik Dağıtım A.Ş., Gediz Elektrik Dağıtım A.Ş. and Trakya Elektrik Dağıtım A.Ş. by İş-Kaya-MMEKA OG and Akxa Elektrik will not be authorized according to Article

6 of Communiqué No. 1997/1 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board. However, if only two of these three undertakings are acquired by the parties, the transactions would be regarded as permissible.

Concerning the acquisition of Dicle Elektrik Dağıtım A.Ş. by İş-Kaya –MMEKA-Rosse OG, the Board indicated that this transaction is permissible as it would not result in creating a dominant position or strengthening an existing dominant position in the relevant markets.

In respect of Eti Gümüş – Söğütsen OG

The Board decided that the acquisition by Eti Gümüş A.Ş.-Söğütsen OG of all four companies, Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik will not be authorized since the transaction would result in creating a dominant position and decreasing competition significantly in the relevant markets. In the Summary Decision, the Board stated that if only three of these companies are acquired by Eti Gümüş-Söğütsen OG, the transactions would be regarded as permissible.

In respect of the Other Bidders

The Board, in its evaluation concerning the other bidders, indicated that the acquisition of Boğaziçi Elektrik by Park Holding, the acquisition of Gediz Elektrik by Enerjisa, the acquisition of Trakya Elektrik by IC İçtaş or KCETAŞ-AYEN-REL-PETCO OG and the acquisition of Dicle Elektrik by Karavil-Ceylan OG or Çalık Enerji would be permissible.

Conclusion

In the Summary Decision of the Board, the material evidence on which the evaluations of the Board concerning İş-Kaya -MMEKA OG or Aksa Elektrik are based is not clear. The justification of the Board while assuming the winning undertakings are the same economic entity as Aksa Elektrik and consequently as Kazancı Holding A.Ş. is crucial; since the Board, based on this justification, indicated that Kazancı Holding would be in dominant position in the electricity distribution market and competition would be significantly decreased.

The aforesaid acquisitions which are subject to notification are not valid unless they are permitted by the Competition Board. The Competition

Board, on the other hand, permitted the acquisition of only two of BEDAŞ, Gediz Elektrik and Trakya Elektrik by İş - Kaya - MMEKA OG, the highest bidder. Therefore, unless the decision is annulled by the Council of State, following an annulment action brought after the publication of the justified decision, or unless the Competition Board gives a different decision based on the commitments that will be made, İş - Kaya - MMEKA OG shall make a choice on the acquisition of only two of BEDAŞ, Gediz Elektrik and Trakya Elektrik.

The End of an Era in the Liquid Fuel Sector: September 18, 2010*

The Competition Board, by its decision No. 09-09/186-56, dated 05.03.2009, reviewed the distribution agreement and the related usufruct agreement between Pol-Pet Petrol Ürünleri Tur. Konaklama ve Din Tesisleri Ltd. Şti. (hereinafter referred to as “Pol-Pet”) and M-Oil, and decided that the parties can benefit from an exemption whose requirements are specified in the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (hereinafter referred to as the “Communiqué”) until 18.09.2010, and that it is impossible to benefit from the exemption after the specified date. The Pol-Pet and the Barbaros Liquid Fuel decisions (decision No. 09-09/187-57, dated 05.03.2009), dubbed “the usufruct decisions” by the sector, have created wide reactions and have become the target of both negative and positive commentators. The Pol-Pet decision and the earlier decisions have been reviewed in my article titled, “The Competition Board Brought a New Order to the Liquid Fuel Sector” published in the May 2009 edition of the Newsletter.

Pol-Pet Decision

Concerning the decision stated above, there was a distributorship agreement between Pol-Pet and M-Oil, and a usufruct right was established on the immovable of Pol-Pet for fifteen years in exchange for the distributorship.

According to the Communiqué, that also applies to distributorship agreements, for the non-competition to be in the scope of the Communiqué, it has to be anticipated for at most five years. Pursuant to the Article 5/a of the Communiqué, “*the non-competition clause for an indefinite period or for more than five years on the purchaser*” does not fall within the scope of this Communiqué and does not benefit from the exemption.

The Competition Board, while reviewing whether the duration of five years has been exceeded concerning the non-competition regulated by the distributorship agreement, takes into consideration personal or real rights such as loan contracts, equipment contracts, long-term leasing contracts, or granting long-term usufruct, which are related to the distribution agreement

* *Article of August 2010 – Prof. Dr. H. Ercüment Erdem*

between the parties. According to the Board, these agreements or rights cannot be used to expand, *de facto*, the duration of the non-competition obligation. Consequently, in such cases, the exemption conditions granted by Communiqué No. 2002/2 will be removed with respect to durations exceeding five years.

The Board stated that the transition period for making non-competition provisions laid down in vertical agreements comply with Article 5 of the Communiqué No. 2002/2 started on 18.09.2003 and ended on 18.09.2005. However, the Board decided that the agreements which were concluded before 18.09.2005 and whose duration exceeds five years will benefit from the exemption laid down in the Communiqué until 18.09.2010 according to the “*reducing to the maximum limit*” principle applied by the Competition Board.

In the present case, the Board decided that the agreement concluded by Pol-Pet and M-Oil and accordingly the official deed related to the usufruct will benefit from an exemption until 18.09.2010 as per Communiqué No. 2002/2. However, the Board emphasized that if distributors are obliged to remake agreements within the framework of the usufruct as of this date, a transaction must be initiated within the scope of Article 4 of the Act No. 4054.

The findings in the Total-Akdağ decision of the Council of State dated 13.05.2008 were determinant in these decisions. In its decision, the Council of State stated that even though the exploitation contract is limited to one year, it will expire with the leasing contract due to leasing contract’s impact on the exploitation contract and that it will turn into an indefinite period contract. In this case, pursuant to the Communiqué provisions, imposing non-competition obligations on distributors through indefinite period contracts or contracts whose duration exceeds five years might take the agreement out of the scope of the Communiqué, and the exploitation contract is subject to an investigation within the scope of Article 4 of the Act No. 4054.

Legal proceeding

Petrol Ofisi initiated an action for nullity based on the plea of unconstitutionality before the Council of State for the Pol-Pet decision and the decision No. 09-09/187-57 in this direction, the announcement made by the Competition Board in accordance with these decisions, and

the Article 5/II of the Act No. 4054. In this case, the 13th Chamber of the Council of State rejected the motion for stay. The appeal concerning the motion for stay was also rejected by the Council of State, Assembly of the Chambers for Administrative Cases. The 13th Chamber of the Council of State, in its decision No. 2009/3044 E., 2010/5458 K., rejected the plea of unconstitutionality with a reprise of the findings of the Total-Akdağ decision.

The action for nullity initiated by Opet Petrolcülük A.Ş., on similar legal grounds was also rejected by decision No. 2009/5164 E., 2010/5457 K., dated 28.06.2010 of the 13th Chamber of the Council of State, based on the same justification. Consequently, the principles put forward by the Competition Board in the Pol-Pet decision were subject to judicial review.

Concerning the actions initiated by Shell & Turcas Petrol A.Ş., the 13th Chamber of the Council of State rejected the motions for stay. The appeals against these rejections before the Council of State, Assembly of the Chambers for Administrative Cases were also rejected.

What is next?

In accordance with the Pol-Pet decision of the Competition Board, the liquid fuel distributorship agreements which were concluded before 18.09.2005 and the vertical agreements composed of the related usufruct and leasing agreements registered in the official deed have to be terminated no later than 18.09.2010, in case they include a non-competition clause whose duration exceeds five years, a usufruct right, or a leasing agreement, or the necessary changes in the agreements have to be made in accordance with the provisions of the Communiqué. The President of the Competition Board, in his statement published on the Competition Board's website, emphasized that there is not any work on the agenda of the Competition Board to amend entirely or in part the Communiqué or to postpone its enforcement. Therefore, postponement is not possible with respect to the date September 18, 2010.

Pursuant to Article 56 of the Act No. 4054, an agreement not having the conditions of exemption is subject to sanctions for invalidity. This invalidity affects not only the clause in violation of the competition law legislation, but also the agreement in its entirety. Consequently, if the necessary changes in the distributorship agreements composed of the usufruct and

leasing agreements whose duration exceeds five years are not made, not only the clauses concerning the usufruct right or leasing agreement, but also the distributorship agreement will be affected in its integrity. Considering the fact that distribution activities cannot be performed without a valid distributorship agreement according to the provisions of petroleum market legislation, this means that distributors cannot carry on their distribution activities. Therefore, it is extremely important that the relevant distribution companies and distributors take the necessary measures before September 18, 2010, in order not to suffer losses in terms of competition law legislation as well as of petroleum market legislation.

European Commission Clears Proposed Acquisition of Cadbury by Kraft Foods*

The European Commission cleared the acquisition of Cadbury PLC of the United Kingdom (hereinafter referred to as “Cadbury”) by Kraft Foods, Inc. of the United States (hereinafter referred to as “Kraft”) contingent upon the divestment of Cadbury’s Polish and Romanian chocolate confectionary businesses.

Parties, Operation and Preliminary Investigation

Kraft¹ is a worldwide food and beverage company which is active in more than 150 countries. The Commission emphasized that Kraft has a significant market share in most of the member states² of the European Union, except the UK and Ireland. The Commission stated that customers in the UK and Ireland still strongly prefer traditional chocolate and that Kraft’s brands do not match the customers’ preferences.

Cadbury³ is also a worldwide producer and seller of chocolate and sugar confectionery products and is active in over 60 countries. In contrast to Kraft, Cadbury⁴ is the market leader in the UK and Ireland because of its traditional brands.

Kraft sought to acquire control of Cadbury by announcing a public bid on 9 November 2009.

On preliminary examination, the Commission determined that the notified transaction falls within the scope of Regulation (EC) No 139/2004⁵.

* *Article of January 2010*

- 1 The business activities of Kraft are the manufacture and sale of packaged food and beverages, in particular snacks, beverages, dairy and cheese, grocery, and convenience meals, including chocolate confectionary.
- 2 Especially with its main chocolate brands Milka, Côte d’Or and Toblerone.
- 3 The business activities of Cadbury are the manufacture and sale of chocolate confectionary, sugar confectionary, and chewing-gum.
- 4 Especially with its brand Dairy Milk. Cadbury is also active in France, Poland, Romania and Portugal through local brands that it previously acquired.
- 5 Prior notification of a concentration, Case COMP/M.5644 — Kraft Foods/Cadbury, 2009/C 272/12.

Relevant Market

After considering the activities of the parties to the transaction, the Commission stated that the relevant product market is the chocolate confectionary market.

As to the geographical market, the Commission determined that it covers the “European Union”. The Commission, in light of the customer preferences in the UK and Ireland mentioned above, stressed that this geographical market should be divided into “UK and Ireland market” and “European Union with the exception of UK and Ireland market”.

Commission’s Investigation

The Commission found that Cadbury has a significant market share in the UK and Ireland. However, in the same geographical market, Kraft has a very low market share. Thus, the Commission concluded that the operation would not cause strengthening of a dominant position in the UK and Irish market and thus would not raise any competition concerns. However, the Commission determined that the operation may cause the creation of a dominant position in the chocolate confectionery market in Poland and Romania where the total market share of both parties is very high. After investigating, the Commission concluded that the divestiture commitments mentioned would remedy the competition concerns and ensure the maintenance of effective competition⁶.

Remedy Proposed by the Parties to the Operation

In order to remedy the competition concerns in the relevant markets, the parties proposed to make the following commitments:

- Divestment of Cadbury’s confectionery business in Poland - marketed under the Wedel brand and
- Divestment of Cadbury’s domestic chocolate confectionery business in Romania.

⁶ In accordance with the Commission Notice, the commitments have to eliminate competition concerns entirely and have to be comprehensive and effective from all points of view. Please see. Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 numbered 2008/C-267/01 and dated October 22, 2008 (hereinafter referred to as Notice”),

The parties' objective in submitting these commitments was to prevent any increase in the aid relevant market shares⁷.

Conclusion

Upon examination of the divestiture commitments submitted by the parties regarding the Polish and Romanian markets, the Commission concluded that the operation would not significantly impede effective competition in the European Economic Area or any substantial part of it and authorized the operation.

⁷ Please see Notice.

Commission Accepts Microsoft Implementation of its Undertakings*

The European Commission has accepted the implementation by Microsoft of its undertakings to provide European consumers with the opportunity to choose from a variety of browsers to access the Internet.

Commission's Investigation and Statement of Objections

The European Commission, on 21 December 2007, decided to initiate antitrust proceedings¹ against Microsoft under case COMP/C-3/39530 (Microsoft - Tying)². The European Commission sent Microsoft a Statement of Objections (hereinafter referred to as the "SO")³ on 15th January 2009. In the SO⁴, the Commission underlines its preliminary conclusion that Microsoft's practice of tying⁵ Internet Explorer to the Windows operating system restricts the competition between competing web browsers, reduces consumer choice, and infringes the EC Treaty rules on abuse of a dominant position under Article 82 of the Treaty⁶.

Microsoft's Reply to the SO and Commission's Examination

Microsoft replied to the SO⁷ on 28 April 2009 and declared proposals

* ***Article of March 2010***

- 1 Please be informed that the initiation of proceedings does not imply that the Commission has proof of an infringement. It only signifies that the Commission will further investigate the case as a matter of priority.
- 2 The proceedings concern alleged infringements of Article 82 EC by Microsoft Corp. through the tying of a range of products to sales of Microsoft's dominant operating system.
- 3 A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it which are relevant to its defense against the objections raised by the Commission.
- 4 The SO is based on the principles stated in the judgment of the Court of First Instance of 17 September 2007 (case T-201/04), in which the Court of First Instance supported Commission's decision of 2004 declaring that Microsoft abused its dominant position (in PC operating system market) by tying Windows Media Player to Windows PC operating system.
- 5 Internet Explorer is available on 90% of the world's PCs. This fact distorts competition between competing web browsers and also provides Internet Explorer with an artificial distribution advantage that other web browsers may never reach.
- 6 All references to Art 82 EC should be understood as references to the current article 102 of the Treaty on the Functioning of the European Union (as renamed by the Treaty of Lisbon, which entered into force on 1 December 2009).
- 7 In its reply to the SO, Microsoft requested an Oral Hearing which was subsequently arranged for 3, 4 and 5 June 2009. However, it later declined to be heard on these dates and applied on 15 May 2009 to postpone the Oral Hearing.

to solve the pending antitrust case. According to the Microsoft's proposals, Windows 7 would include Internet Explorer, but the consumers would be given a free and effective choice of web browser. In parallel, the original equipment manufacturers would also be able to install competing web browsers.

The Commission examined Microsoft's proposals and declared in June 2009⁸ that it would shortly decide on these undertakings consisting of Windows 7 and the separation of Internet Explorer from Windows. Meanwhile, Microsoft - in order to satisfy the Commission's concerns on the applicability and effectiveness of the proposed undertakings⁹ - made additional proposals on the interoperability between third party products and Windows and Windows Server.

Commission's Market Test and Decision

On 9 October 2009, the Commission¹⁰ invited the consumers, software companies, computer manufacturers, and other interested parties to make their comments on the proposals of Microsoft to provide present and future users of the Windows PC operating system a greater choice of web browsers.

On 16 December 2009, the Commission made the above-stated proposals binding upon Microsoft. The Commission stated in its decision¹¹ that in view of the commitments made binding upon Microsoft, there were no longer grounds for action by the Commission. The Commission stipulated that the decision would be binding on Microsoft for five years from the date of adoption.

The Commission is allowed to review Microsoft's commitments in two years, and Microsoft is required to report regularly to the Commission on the implementation of the commitments.

8 For further information, please also see MEMO/09/272 of the Commission.

9 The Commission considered - at first sight - that the proposed commitments would not necessarily have achieved greater consumer choice in practice and would not be considered as effective remedies.

10 Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C-3/39.530 — Microsoft (Tying).

11 Commission Decision of 16 December 2009 (Case Comp/C-3/39.530 – Microsoft (Tying)). For further information please see. Article titled “Commission accepts Microsoft's commitments to prevent eventual abuse of its dominant position” published in our Law Journal of December 2009.

Implementation of Commitments and Conclusion

From the beginning of March, Microsoft started implementing its commitments. The Commission declared the implementation of these commitments on 2 March 2010 in a press release¹².

It is expected that the browser Choice Screen will be displayed on over 100 million personal computers (PCs) in Europe till mid-May¹³. Therefore, the users of Windows PCs with Internet Explorer as their default web browser benefit from a browser Choice Screen and have the possibility of choosing between Internet Explorer and competing web browsers¹⁴.

12 For further information please see Commission's Press Release no. IP/10/216, dated 2 March 2010.

13 The central page of the choice screen is also available to any internet user at <http://www.browserchoice.eu>. The Choice Screen will contain information on the 12 most widely-used web browsers that run on Windows. It will allow users to easily download and install one or more of these web browsers. The list of browsers included on the Choice Screen will be updated every six months on the basis of several independent sources of market share information. The actual list of browsers contains: Apple Safari, Google Chrome, Microsoft Internet Explorer, Mozilla Firefox, Opera, AOL, Maxthon, K-Meleon, Flock, Avant Browser, Sleipnir, and Slim Browser.

14 For further information on the new system, please see the Citizen Summary provided on the official website of the European Commission.

British Airways, American Airlines, and Iberia Commitments on Transatlantic Passenger Air Transport Markets have been Approved by the Commission*

The Commission has approved the commitments offered by British Airways, American Airlines, and Iberia, members of the Oneworld Airline Alliance.

Facts

Antitrust Proceedings

In April 2009, the European Commission opened two formal antitrust proceedings in relation to cooperation between certain airline companies. This cooperation concerns transatlantic routes. The first investigation relates to the cooperation between Air Canada, Continental, Lufthansa, United¹, and the second to proposed cooperation between three members of the Oneworld Alliance, American Airlines, British Airways, and Iberia. This summary concerns the second investigation.

Anti-competitive Agreements

The agreements between airline companies consider commercial, marketing and operational coordination on transatlantic routes, principally routes between the EU and North America. This coordination involves revenue-sharing and joint management of schedules, pricing, and capacity on all routes between North America and Europe.

Statement of Objections

In September 2009, the Commission sent a Statement of Objections (hereinafter referred to as the “SO”) to American Airlines, British Airways, and Iberia². The SO underlined that the extensive cooperation between the aforementioned airlines may breach EU competition rules on restrictive

* ***Article of August 2010***

1 Current and prospective members of Star Alliance.

2 A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it which are relevant to its defense against the objections raised by the Commission. The party may also request an oral hearing to present its comments on the case.

practices (Article 101 of the Treaty). The Commission assessed whether these agreements between airlines may lead to restrictions of competition on transatlantic routes and focused on consumer harm on six transatlantic routes, namely London-Dallas, London-Boston, London-Miami, London-Chicago, London-New York, and Madrid-Miami.

Proposed Commitments

During the investigation and in response to the Commission's concerns, the parties offered some slot limiting commitments in relation to the aforementioned six transatlantic routes. American Airlines, British Airways and Iberia also undertake to provide access to their frequent flyer programs on the relevant routes, allowing passengers of new entrants to accrue and redeem miles on the parties' frequent flyer programs.

They also agree to submit data concerning their cooperation to the Commission at regular intervals, which will facilitate an evaluation of the alliance's impact on the markets over time. The commitments will be binding for ten years, and a trustee will be named to monitor their implementation³.

Invitation to Third Parties

The European Commission has invited comments from interested parties on commitments proposed by the airlines.

Third parties welcomed the commitments as a means of lowering the barriers to entry. They also made detailed comments concerning the scope and functioning of the commitments. Some of these comments led to changes in the final commitments package after the market test.

Decision

The Commission considers that the commitments proposed by the parties enable competing airlines to start operating or increasing their service on the affected routes by lowering or eliminating barriers to entry⁴.

3 In accordance with Article 27(4) of Regulation 1/2003, a summary of the proposed commitments was published in the EU's Official Journal on 10 March 2010 (OJ C 58).

4 The Commission decision, based on Article 9 of Regulation 1/2003 on the implementation of the EU competition rules, takes into account the results of the market test launched on 10 March 2010.

Cooperation with US Authorities

During the investigation, the Commission cooperated closely with the US authorities, in particular the US Department of Transportation and the U.S. Department of Justice.

The Commission Approved the Acquisition of Sara Lee's Air Care Unit by Procter&Gamble and Opened an in-depth Investigation into the Acquisition by Unilever of the Company's Body and Laundry Care Businesses*

Acquisition Procter&Gamble/Sara Lee

The European Commission accepted the request by five EU competition authorities to assess the proposed acquisition of Sara Lee Air Care by Procter&Gamble and authorized the acquisition¹.

Operation

The operation concerns the acquisition of the air care unit of the Sara Lee Corp. by Procter&Gamble. The deal was submitted for regulatory clearance in Germany and in some other European Union countries because the turnover of the merging parties did not meet the EU thresholds.

Parties

Procter&Gamble (USA) is active in the manufacture, development, distribution, and marketing of household care, beauty care, and health care among other consumer products. Sara Lee Air Care (USA) is a company specializing in the manufacture and marketing of various types of air fresheners.

Commission's Examination under Article 22/1 of the Merger Regulation²

The national competition authorities of Germany, Belgium, Spain, Portugal, Hungary, and the United Kingdom submitted a referral request pursuant to Article 22(1) of the Merger Regulation to the European Commission and called for the Commission's examination on the impact of the operation on their territories³.

The Commission accepted the referral requests and asked Procter&Gamble to officially notify them of the operation.

* ***Article of June 2010***

1 The two procedures are independent of each other.

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

3 According to this provision, Member States have the right to request the Commission to examine a concentration that does not have a Community dimension but affects trade between member States and threatens to significantly affect competition within the territory of the Member States making the request.

Commission's Decision on the Proposed Acquisition

The Commission examined the effects of the operation in the home air freshener market, especially in the electrical air fresheners market, where the parties have high market shares in Belgium and the UK. The Commission also analyzed whether the operation would eliminate a potential competitor in the car fresheners or fabric fresheners markets. The Commission observed that the operation will continue to face several strong, effective competitors with significant market shares. Thus, the European Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (hereinafter referred to as the "EEA") or any substantial part of it and cleared the proposed acquisition under the EU Merger Regulation.

Acquisition Unilever/Sara Lee

Operation

The operation concerns the acquisition of Sara Lee Household and Body Care International by Unilever NV and Unilever Plc. The deal was notified to the European Commission on 21 April 2010 for clearance.

Commission Initial Investigation

During its initial investigation, the Commission observed that the operation would bring together a number of important competing brands in the personal care and in the home care markets. In addition, the merger would lead to high market shares in some member states and create a market leader. The operation would remove a strong alternative supplier in the deodorant, bath and shower, and fabric care markets. The Commission emphasized that the operation would create potential competition concerns in several of the product markets mentioned above.

The Commission decided to open an in depth-investigation in order to carefully examine the anti-competitive effects of the operation on these markets⁴.

In-Depth Investigation Procedure

The Commission now has 90 working days, until 5 October 2010, to make a final decision on whether the concentration would significantly impede effective competition within the EEA or a substantial part of it.

⁴ The decision to open an in-depth inquiry does not prejudice the final result of the investigation.

The Court of Justice re-specified the Limits of the Attorney-Client Privilege in Competition Law*

By its judgment rendered within the case *Akzo and Akcros v Commission* on 14 September 2010¹, the Court of Justice of the European Union (hereinafter referred to as the “Court”) decided that internal company communications with in-house lawyers were not covered by attorney-client privilege.

Judgment’s Background

On the basis of the decision ordering the investigation², Commission officials, assisted by representatives of the Office of Fair Trading³, carried out on 12 and 13 February 2003 an investigation at the premises of Akzo Nobel Chemicals Ltd (hereinafter referred to as “Akzo”) and Akcros Chemicals Ltd (hereinafter referred to as “Akcros”) in the United Kingdom in order to seek evidence of possible anti-competitive practices.

During the investigation, Commission officials took copies of a considerable number of documents, including communications between lawyers and their clients⁴ and, upon examination of these communications, decided that these communications definitely were not protected by attorney-client privilege⁵.

General Court’s Decision

Akzo and Akcros filed an action before the General Court for the annulment of the Commission decision ordering the investigation and the return of the communications seized in the course of the investigation.

The General Court, within the examination of the case, referred to the *AM & S Europe v. Commission* decision which states two cumulative

* **Article of September 2010**

1 To consult the judgment, see the following link: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07>.

2 Commission decision C(2003) 5594 of 10 February 2003 amending the Commission decision C(2003) 85/4 of 30 January 2003.

3 The Office of Fair Trading is the British competition authority.

4 It is question of two e-mails exchanged between Akcros’ general manager and Mr. S., Akzo’s coordinator for competition law. The latter is enrolled as an Advocate of the Netherlands Bar and, at the material time, was a member of Akzo’s legal department and was therefore employed by that undertaking on a permanent basis.

5 Commission decision C(2003) 1533 of 8 May 2003.

conditions for the protection of written communications between lawyers and their clients⁶. The conditions set forth in the decision are as follows:

- The communications should be made for the purposes of and in the interests of the client's rights of defence and
- The communications should emanate from independent lawyers who are not bound to the client by a relationship of employment.

Finally, the General Court dismissed the action as unfounded on 17 September 2007⁷ by stating that the second condition was not fulfilled.

Parties' Appeal and Court's Findings

Akzo and Akcros filed an appeal on 30 November 2007 before the Court against the decision of the General Court principally on the following grounds:

Principles of Independence and Equal Treatment

Akzo and Akcros submitted that the General Court gave a "literal and partial interpretation" of the second condition mentioned above by excluding in-house lawyers and emphasized that an in-house lawyer enrolled at a Bar or Law Society is, simply on account of his or her obligations of professional conduct and discipline, just as independent as an external lawyer. Akzo and Akcros also alleged that the General Court violated the principle of equal treatment by that interpretation.

The Court, on those points, held that the in-house lawyer, despite his or her enrolment with a Bar or Law Society or any additional professional ethical obligations, does not enjoy a level of professional independence comparable to that of an external lawyer by reason of the lawyer's economic dependence upon and close ties with the employer. In addition, the Court, by referring to the settled case-law on the principle of equal treatment⁸,

6 To consult the decision, see the following link: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61979J0155&lg=en.

7 To consult the decision, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>

8 In accordance with the settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. See Case C-344/04 IATA and ELFAA [2006] ECR I-403 § 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, § 56 and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, § 23.

also stated that in-house lawyers can be treated differently in the application of attorney-client privilege because they are not in situations comparable to those of independent lawyers.

Evolution of National Legal Systems and European Union Law

Akzo and Akcros submitted that the General Court should have “reinterpreted” the aforementioned second condition set forth in the *AM & S Europe v. Commission* decision by taking into account the evolution of national laws towards an assimilation of in-house lawyers and lawyers in private practice. Akzo and Akcros also submitted that the General Court disregarded the relevance of the development of European Union law, particularly the entry into force of the Council Regulation (EC) No 1/2003 of 16 December 2002 (hereinafter referred to as the “Regulation”) which increased the need for in-house legal advice.

On those points, the Court considered on the basis of the comparative examination conducted by the General Court in legal systems of Member States of the European Union that the legal situation in the Member States has not evolved since the judgment in *AM & S Europe v. Commission* to an extent which would justify a change in the case-law and recognition for in-house lawyers of the protection of attorney-client privilege. As for the Regulation, the Court stated that the Regulation does not aim to require in-house and external lawyers to be treated in the same way as far as the attorney-client privilege is concerned, but aims to reinforce the extent of the Commission’s powers of inspection, in particular with regard to documents which may be the subject of such measures⁹.

Court’s Judgement

The Court finally disagreed with all the arguments submitted by Akzo and Akcros and decided that communications between in-house lawyers and other employees of the same business should remain outside the scope of attorney-client privilege under European Union law on the one hand, and ruled, on the other hand, that the application of this privilege at the European Union level requires independence, which means the absence of any employment relationship between the lawyer and the client.

9 The Court referred to Recitals 25 and 26 in the Preamble to the Regulation regarding the detection of infringement of competition rules. To consult the Regulation, see the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

Conclusion

The Court, by its judgment, re-confirmed the longstanding European Union position as laid down in the *AM & S Europe v. Commission* decision. So, this judgment can be seen to bring a degree of certainty to the privileges attached to the role of in-house lawyers in the European Union¹⁰.

This judgment is also critically important for Turkey because of the process of harmonization with the European Union. As a matter of fact, the Turkish Competition Authority will certainly conform to the principle of attorney-client privilege set forth in that judgment for in-house lawyers at the time of investigations realized in undertakings to seek evidence of possible anti-competitive practices.

10 Comments from SJ BERWIN, "ECJ rules out legal professional privilege for communications with in-house lawyers", Community Week, Issue 489, 20 September 2010. For the article, see the following link: http://www.sjberwin.com/Contents/Publications/pdf/46/9f7e3789_fc19_40ff_9a0f_07a27f3e85d7.pdf

Commission Fines LCD Panel Producers for Price Fixing Cartel*

The European Commission fined six Liquid Crystal Display (hereinafter referred to as “LCD”) panel producers a total of 648.925.000 EURO for operating a price fixing cartel affecting the European market¹. However, one received full immunity in accordance with the Commission’s leniency programme.

Facts

The six LCD producers, Korean producers Samsung Electronics (hereinafter referred to as “Samsung”), LG Display (hereinafter referred to as “LG”) and Taiwanese producers AU Optronics (hereinafter referred to as “AU”), Chimei InnoLux Corporation (hereinafter referred to as “Chimei”), Chunghwa Picture Tubes (hereinafter referred to as “Chunghwa”) and HannStar Display Corporation (hereinafter referred to as “Hannstar”), have agreed-upon prices in the market. The agreement between the companies also includes the setting of price ranges and minimum prices. They also exchanged information on their future production planning, capacity utilization, pricing, and other commercial conditions².

LCD panels are made of a lower glass plate and an upper glass plate with liquid crystal injected in between placed in front of a light source to serve as a screen on an electronic device. They are mainly used for the manufacturing of monitors for PCs, laptops, and televisions, and for mobile displays such as mobile phones, digital cameras, handheld devices, and mp3.

Statement on Investigation (SI) and Statement of Objections (SO)

The Commission sent formal requests for information to the abovementioned LCD producers on 8 December 2006. The SI contains information concerning an investigation of a cartel agreement and related practices concerning price fixing³.

* *Article of December 2010*

- 1 The cartel agreement is an illegal and secret agreement concluded between competitors in order to fix the prices, restrict the supply, and/or divide up markets. Such an agreement may take a wide variety of forms, but often relate to sales prices or price increases, restrictions on sales or production capacities, sharing-out of product or geographic markets or customers, and collusion on the other commercial conditions for the sale of products or services.
- 2 The companies called these meetings “Crystal meetings”. They held a total of 60 monthly meetings during a period of 4 years in hotels in Taiwan
- 3 Article 101 of the EU Treaty prohibits price-fixing and other practices restrictive of competition.

In fact, the Commission did not carry out any investigations in the EU. Thus, all the target LCD panel producers were operating outside of the EU. In fact, the meetings between them were held in hotels outside the EU. However, documentation has been provided proving the cartel formation by the companies active in the relevant market, including the companies subject to investigation. The Commission has been provided with a document, “requesting from each company to take care of security and confidential matters”, and also “to limit written communication”⁴.

The Commission sent an SO under the EU antitrust rules to the above-stated companies concerning their alleged participation in a cartel in violation of the Treaty rules in May 2009⁵.

The investigation clearly exposed that the companies were conscious of their violation of competition rules. The Commission also observed that the companies tried to hide their meetings and the conclusions resulting from these meetings.

Fines and Leniency

The Commission fined the six producers of LCD panels mentioned above a total of 648,925,000 EURO for operating a cartel between October 2001 and February 2006. The Commission’s determination of fines took into account the companies’ sales of the products concerned in the EU, the serious nature of the infringement, and its duration.

As it was the first to provide information to expose the cartel, Samsung received full immunity from fines under the Commission’s leniency programme. The fines of LG, AU and Chunghwa were also reduced as a result of their cooperation with the Commission during the investigation procedure.

4 The Commission, in its press communication, underlined the DRAM investigation which started in 2002 and concluded in May 2010. The decision concerns a cartel case involving 10 producers of memory chips or DRAMS used in computers and servers. The companies, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya were fined a total of 331,273,800 million EURO, including a reduction of 10% for the companies’ acknowledgement of the facts. Micron, however, was not fined because it received full immunity since it was the first to inform the Commission.

5 A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them.

ENERGY LAW

Turkish Energy Law*

Introduction

Energy consumption has increased both globally and domestically because of population growth. Activity in the energy sector has accelerated in our country, as well as in the world, in order not to have difficulties in energy supplies as a result of this increase in demand.

Since the exploration, use, generation, and consumption of these energy sources are each discrete activities, it became necessary to regulate these activities with some provisions, and these rules were enacted in various pieces of legislation. As a result, a new branch of law was created under the name of “*energy law*”. Both in the European Union (hereinafter referred to as the “EU”) and in our country, many legislative efforts have been attempted in this area

Two of the three Founding Treaties of the European Community, namely the Treaty establishing the European Coal and Steel Community dated 1951 (hereinafter referred to as the “ECSC”) and the Treaty establishing the European Atomic Energy Community dated 1957 (hereinafter referred to as the “EAEC”) concerned energy. Provisions relevant to the free flow of goods, the right of company establishment, the right of the free flow of capital and services, harmonization in domestic law and governmental aid regulated in the Founding Treaties applied to the energy sector.

Although there were many provisions regarding energy policy in the Founding Treaties, there is not an individual and detailed energy section in any of these treaties. Therefore, energy law is structured by arranging secondary legislation such as regulations, directives, communiqués, resolutions, and recommendations in relation to the EU energy law.

To achieve EU membership for our country, new arrangements were made in energy law by following the EU regulations as a result of

* *Article of July 2010 – Prof. Dr. H. Ercüment Erdem*

harmonization with the *Acquis Communautaire*. For instance, the Electricity Market Code numbered 4628 and the Natural Gas Market Code numbered 4646 show important similarities to the Electricity and Natural Gas Directives that correspond to the EU *Acquis Communautaire*.

A. Institutional Structuring in Energy Sector

In Turkey, the energy sector was under the control of a monopoly, TEK, for a long time. TEK was a public corporation established for electricity energy generation, transmission, distribution, and trade. TEK, pursuant to the legal regulations concerning the contribution of the private sector to the electricity market was restructured in 1993 as the Turkish Electricity Generation and Transmission Corporation (hereinafter referred to as the “TEGTC”) for electricity generation and transmission and the Turkish Electricity Distribution Corporation (hereinafter referred to as the “TEDC”) for electricity distribution.

Afterwards, the codes numbered 4628 and 4646 entered into force in order to provide for the supply of electricity and natural gas freely in the energy sector. In this frame, TEGTC’s activities as to electricity generation, transmission, and wholesale activities were differentiated. Thereby, three public economic enterprises were established as the Electricity Generation Corporation (hereinafter referred to as the “EGC”) for electricity generation, the Turkish Electricity Transmission Corporation (hereinafter referred to as the “TETC”) for transmission

These actions were intended to place activities other than transmission activities into the competitive market and to have the natural monopolies regulated by the Energy Market Regulatory Authority (hereinafter referred to as the “EMRA”). To form the intended market structure, the privatization of electricity distribution and generation was considered an important element in the reform, and the Directorate of the Privatization Administration was assigned this responsibility.

B. The Legal Frame

The Turkish Energy Law is mainly composed of four sections: i) Electricity Market; ii) Natural Gas Market; iii) Petroleum Market; iv) LPG Market.

Various regulation and communiqués have been published besides many fundamental laws in relation to Energy Law. Natural gas and electricity are accepted as commodities in these regulations. An independent regulatory institution, EMRA was created to regulate tariffs and activities, such as the transmission, distribution, and storage for transporting these commodities to consumers.

The most important fundamental laws are stated as herein below:

1- Code Number 3096. The Code in relation to the Authorization of the Enterprises other than Turkish Electricity Administration to Conduct Electricity Generation, Transmission, Distribution, and Trade numbered 3096 (hereinafter referred to as the “Code Number 3096”) was enacted in order to open the energy sector to private enterprise in 1984. This code regulates the Build-Operate-Transfer (hereinafter referred to as the “BOT”) model, which provides services such as electricity generation, transmission, and distribution based on the concession agreement signed by and between the private corporations and the Ministry of Energy and Natural Resources (hereinafter referred to as the “Ministry”). In the frame of this BOT model, the facility and the field of electricity generation remain the province of the government, and at the end of the authorization term stated in the concession agreement, the facility and the field again pass to the possession of the government. Code Number 3096 also regulates the transfer of operating rights as to the generation, transmission, and distribution facilities owned by the government to private enterprises.

2- Code Number 3996. In 1994, the Code in Relation to the Construction of the Services and Investments in the frame of Build-Operate-Transfer Model numbered 3996 (hereinafter referred to as the “Code Number 3996”) is accepted. Code Number 3996 extended the BOT model applied in the energy sector in the frame of Code Number 3096 to other infrastructure projects and services which require high technology and important material sources. The agreements in the scope of this Code are subject to private law and thereby may be subject to arbitration. Agreements in relation to electricity generation, transmission, distribution, and trade are within the scope of this Code. Code Number 3096 remains in effect.

3- Code Number 4283. According to the Constitutional Court decision which entered into force in 1996, agreements subject to Code Number

3996 are not within the scope of private law, and the court decided that the subject of these agreements is public service and must adhere strictly to the public interest. The Code in Relation to the Establishment and Operation of Electricity Energy Generation Power Plants and the Sale of Energy by BOT Model numbered 4283 (hereinafter referred to as the “Code Number 4283”) was enacted in 1997 in order to solve the problems caused by the Constitutional Court decision.

4 - Code Number 4446. The Constitution was amended by Code Number 4446 as Code Number 4283 was considered to be inefficient. By this amendment i) the services or investments to be conducted by the administration could be transferred to or conducted by private corporations subject to private law ii) it is foreseen that disputes arising from agreements and licenses in relation to public service bearing a foreign element can be referred to national or international arbitration and iii) the function of the Council of State regarding concession agreements is changed from investigating to providing an opinion. Furthermore, many amendments to the law were enacted following the amendment of the Constitution. First of all, the agreements subject to Code Number 3996 were again placed within the scope of private law.

5 - Code Number 4501. The other important law in relation to the energy sector is the Code in relation to the Rules to be Followed while Referring Disputes Arising from Concession Licenses and Agreements related to Public Service to Arbitration numbered 4501 (hereinafter referred to as the “Code Number 4501”). This code grants the right to those involved in concession agreements bearing a foreign element to refer their disputes to international or national arbitration. In addition, the provisions of this code apply to the projects and work commenced pursuant to the related concession conditions and agreements about the public services before the entering into force of this code, excluding those cancelled by binding court decisions in accordance with this code. For this purpose, a competent company should apply within one month of the publication of this code, and, upon application of the relevant administration, the Council of Ministers should issue a decision. This code did not grant the Ministry the right to review agreements. However, the Ministry in practice had to review some of the essential provisions of the agreements as a condition precedent for the companies to make the relevant applications. The

Ministry refrained from dealing with companies that refused its demand to review agreements, and this caused problems in practice.

6 - The Electricity Market Code numbered 4628. In anticipation of liberalization in the electricity market, the Electricity Market Code numbered 4628 was approved and entered into force on 03 March 2001. The aim of this code is to set forth the rights and obligations of corporations which will conduct activities regarding electricity generation, transmission, distribution, and wholesale export and import by creating a competitive and stable electricity market. Additionally, the code anticipated the need to determine the procedures for the privatization of electricity generation and distribution. In relation to this procedure, EMRA was established as a new authority.

Communiqués related to the regulation on license, tariffs, export and import, free consumer, distribution, network, customer services, and free consumer entered into force pursuant to this code.

This code envisages a bilateral agreements market complementing the “Market Financial Settlement Center”. The system for operating in the market was also termed “*licensing*”.

7 -The Natural Gas Market Code numbered 4646. This code includes natural gas importation, transmission, distribution, storage, marketing, trade and export and rights and obligations of the real persons and legal entities related to these activities.

8 - The Petroleum Market Code numbered 5015. This code regulates the guidance, supervision and inspection activities in order to make the market activities transparently in an equitable and a stable manner. This code aims to submit the petroleum from national and international sources to the users directly or by processing, in a competitive environment, safely and economically.

9 - The Liquefied Petroleum Gas (LPG) Market Code numbered 5307. This code regulates the market activities concerning the liquefied petroleum gas supplied from national and international sources to the users. The distribution, transportation, storage, marketing and trading of liquefied petroleum gas and rights and the obligations of real persons and legal entities that are related to these activities are also included in this code.

Conclusion

In line with the EU and legislation common in the world, our energy legislation is constantly updated. By employing attractive policies and creating a favorable environment by using incentives, credits, tax/investment discounts, and exemptions for certain energy applications, particularly of domestic renewable energy sources, Turkey is trying to be in conformity with the EU and the new understanding dominant in the world. The activities of EMRA, which has administrative and financial autonomy, are intended to establish a stable and transparent environment investors trust without making distinctions between equal parties.

The Regulation Concerning the Competition of License Applications for the Installation of Wind Power Generation Plant (“WPGP”) entered into force on 22 September 2010*

The regulation numbered 27707 (hereinafter referred to as the “Regulation”) stipulating the guidelines for the competition and tender process among the license applications made for building a WPGP within the same region or transformer center entered into force by being published in the Official Gazette on 22nd September 2010.

The Regulation sets forth the procedures and principles with regard to the tender to be realized in order to determine who will connect to the system if more than one license application to build a WPGP within the scope of the Electricity Market Law numbered 4628 for the same region (convergent or crossing region) and/or same transformer center has been submitted. The Regulation also regulates the calculation and payment rules and procedures of the contribution fee to be paid by successful bidders and the other rights and obligations of bidders. The bidders will undertake to pay a contribution fee per kWh on an annual basis to TEİAŞ starting from the temporary acceptance of the first unit of the generation plant for a period of 20 years after the temporary acceptance of the whole facilities. The total contribution fee will be calculated by multiplication of the undertaken contribution fee per kWh with annual electric energy generation and the annual consumer price index. The total contribution fee will be paid to TEİAŞ yearly.

According to Article 5 of the Regulation, the list of WPGP projects which may participate in the tender process is published on the web site of TEİAŞ, and the list includes the name of the projects, installed power, and bearing capacity. The Regulation provides that applicants must be eligible to make an offer and attend the tender only for one transmission center and for either high voltage busbar (above 36kV) or medium voltage busbar (equal to or below 36 kV). Those applicants who have installed capacity of medium voltage busbar can only apply for the medium voltage busbar capacity, whereas others which have high voltage busbar capacity are eligible to apply for the medium voltage busbar capacity or the high voltage busbar capacity.

* *Article of September 2010*

Information regarding the companies which became entitled to participate in the tender, their installed power, bearing capacity, and tender date are published on the web site of TEİAŞ, and invitation letters will be sent to these companies. The applicants are to submit their bids in a sealed envelope at the address and on the date to be determined and announced by TEİAŞ, together with the information of their installed power, bearing capacity, and a performance bond for an indefinite period whose amount will be calculated by the multiplication of the rounded up relevant MW's number by 10,000 Turkish Liras. If any of the required documents or information is missing, invalid, or in contravention of the competition requirements declared by TEİAS, the bid will be considered invalid at the initial review of the documents and the letter of bid will not be opened.

The tender is to be conducted by a commission formed by TEİAS. The commission, in the presence of the representatives of the participants, will determine and register the eligible bidders by opening the envelopes, including WPGP contribution fee bids. The registered bids will be ranked on the basis of same region and/or same transmission center. If it is necessary to make a choice between the bidder companies because of identical bids, the relevant companies will be requested to submit once again a bid, which cannot be lower than the first bid at the same session. The commission will take the new bids into consideration and make a decision. The Regulation does not allow the bidders to have more installed power than the WPGP connectivity capacity. Therefore, the bidder who has given the highest bid having more installed power than the WPGP connectivity capacity will be asked by TEİAS to lower the project installed power to the level of WPGP connectivity capacity without an adjustment to the bid. TEİAS will assess the following bid if the reduction is refused by the preceding bidder. TEİAS will keep the further assessment until it finds a bidder who submitted the installed power equal to or less than the WPGW connectivity capacity. As result of the competition, the successful bidder gains the right to enter into a Wind Power Generation Contribution Fee Agreement with TEİAS and will be entitled to connect to the system.

The performance bonds of the companies which cannot be entitled to connect to the system in consequence of the tender are returned. The performance bonds of the companies entitled to connect to the system are returned if they submit a new bond, the amount of which must be 20% of the multiplication of the contribution fee by the per kWh of an average

annual generation amount (to be calculated based on 3,000 working hours annually of the relevant wind power Project).

The performance bond submitted to TEİAŞ is recorded as revenue when the WPGP license is terminated or revoked before the provisional acceptance in cases not deemed appropriate by EMRA or by reason of force majeure.

Draft Law Amending the Mining Law*

Introduction

The mining sector supplies the basic materials for all the other sectors of industry, and therefore it is a very significant sector for a country's economy. The mines supply the raw materials for many industrial products, which provide foreign currency. Thus, the mining sector is the trigger for economic development. Moreover, this sector also has a huge impact on the development of infrastructure investments, modern technology, methods of marketing, and finance.

On the other hand, mines are formed naturally over millions of years in a limited quantity and cannot be reproduced by humanity. Therefore, every country must detect, extract, and consume their mine reserves in an economic manner and within a strategic plan.

In light of the above referred facts, the importance of mining legislation under Turkish law is apparent.

Mining Law No. 3213 (hereinafter referred to as the "Mining Law") was amended by Law No. 5177, which came into effect on 05.06.2004. Pursuant to the mentioned amendment, the permits required for mining activities which would be carried out in licensed areas were regulated by the Regulation Regarding the Permits for Mining Activities.

However, the Constitutional Court has annulled Articles 7/1, 7/8 and 10/6 of the Mining Law, stating that the relevant provisions must be regulated directly by law, not by regulation. Moreover, the Constitutional Court decided that stipulating these matters through a Regulation issued by the Council of Ministers would be a violation of the Constitution. Meanwhile, the State Council suspended the application of the above referred Articles and the Regulation Regarding the Permits for Mining Activities

The annulment and suspension decisions created a legal gap and vagueness regarding the necessary permits for the mining activities. Therefore, the Draft Law Amending the Mining Law (hereinafter referred to as the "Draft") has been prepared.

* *Article of March 2010*

The Draft

The introduction of the Draft states that the legal regime which establishes the legal and corporate structure of the mining sector must be distinct and genuine.

Summary information regarding the significant points of the Draft is given below:

Article 1

Article 1 introduces new definitions. The most significant definition is the one regarding the new “Council” to be established.

Article 1 defines the tasks of the “Council” as follows:

- determining the areas where mining activities would be limited, and
- determining the priority and significance of the intersecting mining activities and other investments from the point view of public interest.

Article 2

Pursuant to Article 2, the Council is composed of five members, namely; the Undersecretary of the Prime Ministry as the president, the Undersecretary of the Energy and Natural Resources Ministry, the Undersecretary of the State Planning Organization, the Undersecretary of the Ministry related to the institution which approved the investment, and the General Manager of the Mining Activities Directorate. In addition, if required by the Council, the investor or the permit holder may also attend the meetings.

The most important issue here is that the Council’s decisions are to be considered as **public interest issues**.

Article 2 is the main pillar of the Draft and stipulates important issues regarding the permits.

It is stipulated that only mining activities which have environmental effects that can be eliminated through relevant precautions, should be permitted. The Council, by taking into consideration the provisions of the Mining Law, may introduce limitations on the areas to be licensed, as long as already acquired rights are reserved.

Article 2 provides that (i) the sensitive zones, such as environmentally protected areas, wildlife protection areas, protected forests, areas protected pursuant to coastal legislation, military zones, etc., within the prospective mining area, should be determined, (ii) these sensitive zones should be registered in the computer system of Mining Activities General Directorate, (iii) the license owners should obtain permits relating to these sensitive areas from the relevant authorities. Pursuant to the provision in question, providing the necessary permits relating to sensitive areas would be a condition precedent for obtaining the mine detection permits.

Article 2 envisages a provision parallel to the Forests Law Article 16 designating the Forests Administration as the competent body for granting permits regarding mine detecting and operation activities and infrastructure facilities and other facilities that are compulsory for such mining activities within the forests and arbor zones.

Moreover, Article 2 states that the permits should only be granted in wildlife zones if the principles determined in the relevant environmental impact assessment report are met.

The licenses for starting a business place and work permits relating to mining activities and facilities on mining sites should be granted by the relevant Provincial Administration pursuant to Article 2.

If mining activities and activities for investments with a public interest such as highways, railroads, airports, ports, dams, energy facilities, pipelines of petrol, natural gas and geothermal energy, intersect with or impede each other, and if mining activities could not be continued for this reason and moreover if there is no other alternative, then the Council will decide on the activity and/or investment to be carried out in that specific area.

Article 3

Draft Article 3 raises the auditing and recording responsibilities of the technical supervisors during the realization of the mining activity. The mentioned Article also delegates the above mentioned responsibilities between license holders and supervisors.

Article 5

Pursuant to Article 5 of the Draft, if the area specified in the production permit during the detecting permit stage changes after the

actual production stage, a coherence guarantee has been stipulated in order to adapt the changing area with environmental requirements. The amount of the guarantee would be equal to the amount of yearly permit charges.

Article 7

Draft Article 7 states that any license holder whose relevant license or permit has expired or been cancelled, should also take necessary safety precautions in their pits and adapt their pits to be in compliance with environmental requirements.

Conclusion

Our country is rich in natural resources. Our natural resources need to be protected. However, the impediments against mine detecting and development activities should be abolished.

Therefore, in order to fill the current legal gap, the Draft should be discussed and finalized before the Turkish Parliament as soon as possible.

Cases against Turkey*

The Energy Charter Treaty (hereinafter referred to as the “ECT”) was signed on 17 December 1994 in Lisbon and entered into force on 16 April 1998. Turkey signed the ECT on 17 December 1994, and it was ratified on 6 February 2000. Part V of the ECT provides for a unique and detailed method of dispute resolution. The ECT stipulates an Investor-State arbitration for any investment disputes.

In the event that an investor chooses to submit the dispute to arbitration, the ECT provides for three options (Art. 26/4):

(a) (i) The International Centre for the Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for the Settlement of Investment Disputes, under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as the “UNCITRAL”); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

As can be seen, the ECT provides a wide scale of arbitration options to the investor. It provides for ICSID and Stockholm Chamber of Commerce Arbitration Rules as institutional arbitration on the one hand, and UNCITRAL arbitration rules as *ad hoc* arbitration, on the other hand.

There are four ICSID cases initiated against Turkey by foreign investors. Two of them are pending, and two of them have been concluded. These are:

* Article of May 2010 – Prof. Dr. H. Ercüment Erdem

1. *Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey*;
2. *Alapli Elektrik B.V. v. Republic of Turkey*;
3. *Cementownia “Nowa Huta” S.A. (Poland) v. Republic of Turkey*;
4. *Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey*

1. *Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey.* Libananco brought expropriation claims under the ECT based on its majority stake in two utilities, Cukurova Elektrik Anonim Sirketi (CEAS) and Kepez Elektrik Turk Anonim Sirketi, once controlled by the controversial Uzan family that operate 11 Turkish dams and power plants. The case was registered in ICSID on 29 April 2006. The value of the case is USD 10 billion. Turkey seized the shares of these utilities in 2003 for political reasons, according to the claimant, and for financial reasons, according to the respondent. Turkey suspects Libananco of ties to the Uzans and questions its status as a foreign investor. Arbitrators convened in March 2010 to hear several jurisdictional objections raised by Turkey. The case is still pending.
2. *Alapli Elektrik B.V. v. Republic of Turkey.* This is a case in which a Dutch company has claims against Turkey under the Energy Charter Treaty and the Netherlands-Turkey Bilateral Investment Treaty in connection with a power plant that was never constructed. The value of the case is USD 100 million. The Tribunal was constituted in March 2009. The claim relates to electricity generation concession agreements. Lastly, on May 19, 2010, the Tribunal issued a procedural order concerning the procedural calendar. The case is still pending.
3. *Cementownia “Nowa Huta” S.A. (Poland) v. Republic of Turkey.* Cementownia was another of international claimants to come forward after Turkish authorities seized assets owned by two of Turkey’s largest hydroelectric companies and terminated two long-term electricity concessions held by the companies, Cukurova Elektrik Anonim Sirketi (CEAS) and Kepez Elektrik Turk Anonim Sirketi (Kepez). The value of the case is USD 4 billion. While the Turkish government considers the companies to be owned by members of the Uzan business empire,

Cementownia alleged that they came into ownership of shares just prior to Turkey's actions. In its decision of September 2009, the Arbitral Tribunal considered that the Claimant has not produced any persuasive evidence that could prove either its shareholding in CEAS and Kepez at the relevant time or that it was an investor within the meaning of the ECT. The Arbitral Tribunal is of the opinion that the Claimant had intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process. In addition, the Tribunal decided that the Claimant was guilty of procedural misconduct: once the arbitration proceeding commenced, it caused excessive delays and thereby increased the costs of the arbitration. The Claimant was sentenced to pay the arbitration costs; however, Turkey's request for moral compensation was denied.

4. *Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey*. The Europe Cement case mirrors the Cementownia case. Turkey says that there is no jurisdiction because the Claimant has not shown, and indeed could not show, that it owned shares in CEAS and Kepez. The evidence supporting ownership submitted by the Claimant consisted of copies of share transfer agreements dated 30 May 2003 and copies of bearer share certificates issued on 10 January 2005 purporting to show that Europe Cement was a shareholder in the Turkish companies CEAS and Kepez. The authenticity of these documents was challenged by the Respondent, and the Tribunal ordered the Claimant to produce the originals of these documents and other documents that would be relevant in proving their authenticity and in proving whether the Claimant did own shares in CEAS and Kepez at the relevant time. However, the Claimant did not produce the relevant documents ordered by the Tribunal. This is enough to show that the Claimant cannot prove that it had an investment in Turkey at the relevant time. In short, it is an admission that the Claimant cannot prove the jurisdictional basis required under Article 26(1) of the Energy Charter Treaty. Thus, the Arbitral Tribunal denied its jurisdiction in August 2009. The Claimant was sentenced to pay the arbitration costs; however, Turkey's request for moral compensation was denied.

In conclusion, the claimants requested investment arbitration in accordance with the ICSID Convention in all of the four cases explained above. However, two of the concluded cases were dismissed because the claimants could not prove that they were investors within the meaning of the Convention. I believe that the main reason the investors chose ICSID arbitration is that awards resulting from ICSID arbitration can be executed in the host state without recourse to any enforcement formalities.

CAPITAL MARKETS LAW

New Principles of Mergers Entered into Force*

Communiqué with Serial: I, No: 41 on Amendment to the Communiqué Concerning Principles of Mergers (hereinafter referred to as the “Communiqué with Serial: I, No: 41”) has been prepared by the Capital Market Board and entered into force by being published in the Official Gazette dated 08.05.2010 and numbered 27575. This Communiqué aimed to remove the problems which occur during merger transactions in practice, to simplify the procedures, and to clarify some of the issues.

Essential amendments have been made, and new provisions have been regulated in the Communiqué with Serial: I, No: 31 Concerning Principles of Mergers by the Communiqué with Serial: I, No: 41 (hereinafter referred to as the “Communiqué with Serial: I, No: 31”).

In the Communiqué with Serial: I, No: 31, it was stipulated that the time period between the date of financial statements which is considered in the merger transaction and the date of general assembly meeting where the merger agreement is to be finally approved, shall not exceed 6 months. On the other hand, in the Communiqué with Serial: I, No: 41, if this time period is exceeding 6 months but within 9 months period, then, corporations which are party to mergers and are listed on the Istanbul Stock Exchange must prepare and announce to the public as an annex of the announcement text recent financial statements that have to be announced to the public as of the publication date of the announcement text.

Article 5 of the Communiqué with Serial: I, No: 31 has been amended. According to the amendment, if any developments result in an amendment of the merger ratio or affect the financial statements and equity capital upon which the merger ratio is calculated before the date of the approval of the announcement text and the merger agreement by the Capital Market Board, it is accepted that an independent auditing firm which audits the

* *Article of May 2010*

financial statements used for the merger will prepare a report demonstrating the effects of these developments on the mentioned financial statements. The report prepared by the expert institution will be revised in view of the developments.

Article 10/A has been included in the Communiqué with Serial: I, No: 31. According to this Article, merger transactions can be concluded without an independent auditing report, an expert institution report, or a board of directors' report if it is not necessary to grant shares of the transferee to the transferred partnerships shareholders in a merger transaction where one or more of the partnership's shares are acquired by another partnership with 95% or more of the shares. Thereby, merger transactions are simplified if certain conditions are met.

Pursuant to the amendment made to Article 12 of the Communiqué with Serial: I, No: 31, the effects of the profit distribution will be taken into consideration in the calculation of the merger ratio if the general assembly decisions concerning the profit distribution of the partnerships party to the merger are adopted after the date of the financial statement that is to be considered in the merger transaction.

By the Communiqué with Serial: I, No: 41 the obligation to publish the announcement text and the merger agreements in the gazettes has been annulled, and the announcements to the public through the web sites of the partnerships concerned and through public disclosure platforms are allowed. The circular prepared by partnerships not listed on the stock exchange and which consists of the summary of the merger transaction and which of its essentials are determined by the Capital Market Board will be announced to the public by publication in at least one local gazette at least thirty days before the general assembly meeting in which the merger agreement will be approved.

Pursuant to Article 20/A which has been included in the Communiqué with Serial: I, No: 31, it is obligatory for new partnerships or partnerships' share certificates to be notified to the Capital Market Board if such partnerships are established by dissolution of a legal entity or by establishment of new partnerships through the allocation of at least 15% of the last balance sheet's total asset value of the public companies including companies in the scope of privatization. In addition, if the share

distribution between the shareholders of the partnership or partnerships to be established differs from the capital structure of the public partnership, the approval of the Capital Market Board is required before adopting the decision of division by the competent bodies. The annexes numbered 5, 6, 8/A and 8/B are excluded from the Communiqué with Serial: I, No: 31.

Amendments in the Communiqué Regarding the Principles on Venture Capital Investment Companies by the Communiqué Serial: VI, No: 28*

- Founders and natural or legal persons who directly or indirectly held 10% or more of a corporation's shares could not have outstanding tax debts in the original legislation. In the amended regulation, this condition is only imposed upon legal person founders and the disposition concerning the shareholders is repealed.
- Founders who held 10% or more of corporation's shares provide the necessary sources free of collision, in the original legislation, in the amended regulation, leading shareholders are added to them and the said persons should have the financial strength to pay the subscribed capital. In addition to these, it should be noted that the said persons should have the required reputation for a shareholder of a capital investment trust.
- The requirements for the natural person shareholders are listed in two articles in the former text. These are not to be personally insolvent, not to be unlimitedly responsible partners in insolvent institutions, and they shall not announce concordat, and the reference done to the requirements listed at sub article (d) of first paragraph of Article 9 of the Communiqué Regarding Intermediary Activities and Intermediary Institutions. In the amended text, these conditions are required for the natural person founders and the conditions in the communiqué are included in the article with two differences. The first of these differences is that, while being contrary to legislation concerning lending activities was mentioned in the former text, in the latter one, the Capital Market legislation and the Banking Law are also added. The second difference is that the condition of not to be forbidden to make transactions pursuant to the Capital Market Law was required for the founders during the foundation and transfer of shares. In the latter text, there is no such limitation. However, it must be noted that the word "partners" is replaced by "founders".
- The requirement of satisfaction of financial competence by leading shareholders of public institutions and of public legal persons

* *Article of August 2010*

and the legal persons serving for public interest is subject to their own legislation. However, it is also stated that financial tables and certified public accountant report will be taken as a base for evaluating the financial strength differently for the natural and legal persons. And finally, it is stated that in case of existence of several leading shareholders, the aforementioned conditions will be sought separately for each leading shareholder.

- A sub-article was added to the 7th article titled Foundation and Conversion Procedures. According to this sub-article, in foundation affairs, the registration of the Articles of Association with the trade register must be made no later than 1 month following the issuance of related Board permission; in conversion affairs, holding of the general assembly meeting, where the modification of articles of association will be approved, latest within 1 month following the issuance of related Board permission and registration of general assembly resolution to trade register latest within 15 days following the general assembly meeting are obligatory.
- In the 9th article titled Application for Registration, it is an obligation to apply to the Board for registration of all shares and for public offering of the shares which represent at least 20% of the issued capital of corporations of which issued capital is less than 20 million TRY and the shares which represent at least 10% of the issued capital of corporations of which issued capital is 20 million TRY or more.
- The communiqué also states that, “The corporations can be shareholders of venture firms within the framework of the provisions in this Communiqué” and that the founders must notify the agreements relating to investments and transactions, articles of associations of companies’, internal regulation and offering circular of funds and other documents shall be notified to the Board within six business days following investment.
- The members of Board of Directors, the general director, and the auditors must fulfill the conditions required of real person founders.
- The possibility of investment in money market for shareholders is accepted in order to diversify their portfolios. “*In condition that the venture capital is limited to portfolio management activity it is*

possible to be engaged in portfolio management activity provided that they have license and related provisions in articles of associations; they may provide service as a market consultant in Istanbul Stock Exchange Emerging Institutions Market; the shareholders can not give securities, provide guarantee, and place pledge on the assets in the portfolio in favor of third parties.”

- The investments, done on condition that the risk resulting from investments done directly or indirectly to corporations established abroad with purpose of collective investment for investments on venture firms defined in the communiqué, shall be limited to capital amount directed, should not be more than 10% of portfolio value of investment date in former text, whereas in the latter text this rate is 30%.
- Investment restrictions are re-determined by considering various circumstances.
- The title of “Obtaining Consulting Service” was changed to “Procurement of Consulting Services and Portfolio Management Activity” and accordingly, the expression of portfolio management activity is included in the article.
- In the first sub-article of the 20th article of the Communiqué, the statement of “in the aforementioned agreement the possibilities of partial or total exit of corporation from the venture firm, preemptive right, joint sale, participation to sale, dividend politics, the options for sale and purchase of shares may be included” is inserted. As the third sub-article, “*even the public companies may be accepted as venture firms on the condition that they satisfy the requirements of the second article. However, only the investments made to their shares which are not traded on the stock exchange may be considered as venture capital investment*” is added.

Sales of Foreign Capital Market Instruments and Depository Receipts in Turkish Capital Markets*

Preamble

The “Communiqué Regarding the Sale and Registration with the Capital Markets Board of Foreign Capital Market Instruments and Depository Receipts Serial: III, No: 44 (hereinafter referred to as the “Communiqué”), which regulates principles regarding registration with the Capital Markets Board of Turkey (hereinafter referred to as the “CMB”) of public offerings and sales of foreign capital market instruments and depository receipts, came into effect upon publication in the Official Gazette dated 23.10.2010 and numbered 27738. By this Communiqué, the previous Communiqué regarding the Sale and Registration with the Capital Markets Board of Foreign Capital Market Instruments Serial: III and No: 20 published in the Official Gazette dated 20.03.1996 and 22586 was abolished (hereinafter referred to as the “Abolished Communiqué”).

A brief summary of the changes brought by the Communiqué and its differences from the abolished Communiqué are given below:

Changes, Differences

The Communiqué regulates and sets forth the rules regarding a) public offerings of foreign capital market instruments and depository receipts, b) allocations or sales of these foreign capital market instruments and depository receipts to qualified investors, c) the issuance of shares of foreign companies which are listed on the Istanbul Stock Exchange (hereinafter referred to as the “ISE”).

The substantive change in the Communiqué is that the public offering of foreign stocks in Turkey is no longer required to be conducted within the framework of depository receipts.

Foreign capital market instruments to be offered to public: (1) a) must be listed on at least one stock exchange in the issuer’s country (the provision regarding the stock exchange which must be acceptable to the CMB is abolished) b) if they are not listed, the application of such issuer must not have been rejected in order to protect the investors’ rights or

* *Article of December 2010*

for any similar reason. (2) Foreign capital market instruments must be denominated in Turkish Lira or in foreign currencies whose daily exchange rates are announced by the Central Bank of the Republic of Turkey, (3) There must be no restriction on the sale of such instruments, on their financial and administration rights to be used and payments to be made in Turkey, the country where such capital markets instruments are issued, (4) There must be no restriction on their transfer or their issuance or there must be no encumbrance on them, (5) The company which issues foreign capital markets instruments must have a recent rating that at least suggests “an investment can be made” rating other than a “at least middle grade” rating. (6) The CMB may require and set additional conditions in order to protect the investor’s rights. It must be noted that the Communiqué does not cover offerings of foreign investment fund shares, and the issue has been left to the Communiqué on Principals Regarding the Registration of Foreign Investment Fund Shares Serial: VII No: 14.

By this Communiqué, the conditions for the foreign companies of (i) a minimum two-year operating period, (ii) having made profits according to a recent annual financial statement prepared in accordance with internationally accepted accounting rules, and (iii) a minimum one (1) year stock exchange listing together with a minimum hundred (100) day stock exchange trading are no longer required.

In addition, the provision regarding the capital of the foreign company to be not less than the capital requirement for Turkish investment corporations on the date of application was abolished.

Representative is a newly used term in the Communiqué. The abolished Communiqué only uses intermediary institutions (meaning banks and intermediary institutions) whereas the Communiqué uses the representative definition. According to the Communiqué, “the representatives” means intermediary institutions and banks (which do not accept deposits in Turkey) having both public offering and investment consultancy licenses from the CMB. Such representatives must have an agreement with the foreign companies¹ requesting registration of their foreign capital markets instruments with the CMB or will hold a proxy.

¹ The companies or investment corporations which are not deemed to be resident in Turkey (legal or real persons) and which issue capital markets instruments in accordance with their legislation.

The application regarding the request to register foreign capital markets instruments and depository receipts with the CMB can be made by the foreign companies and depository institutions in addition to representatives.

The foreign companies must execute an agreement with the depository institutions² or the representative in the event of a public offering of depository receipts or foreign capital market instruments. There is no change in the Communiqué with respect to the term of the agreement; the term of the agreement must be at least until the maturity date of the foreign capital markets instruments.

According to the Communiqué, the foreign companies and representatives will be jointly liable if the information in the prospectus and the circular have errors and do not give accurate information to the investors³.

The preliminary CMB filing process granting foreign issuers and their representatives the opportunity to obtain a CMB opinion before the actual registration as to whether the foreign capital markets instruments or depository receipts and the issuers are appropriate was abolished.

The representatives are no longer required to announce the general assembly date and agenda of the foreign company and the actions to be performed by the persons who have the depository receipts, in two (2) different newspapers and to submit such newspapers to the CMB. In addition, a depository institution can no longer in its capacity or as a proxy holder use the voting rights of foreign stocks by stating it is for the benefit of the investors.

The application to ISE by the foreign companies for their listing will be made simultaneously with the application for the registration to the CMB, not within fifteen (15) days after the sale term as stipulated in the abolished Communiqué.

The website of the foreign companies can be referenced for their financial statements and for similar issues in case of public offerings.

2 Depository institutions are the banks which issue depository receipts and which are members of Central Registry Agency.

3 Prospectus is a legal document (can be used as legal evidence) whereas circular is a commercial document. A circular is prepared to give information to the investors. In any case, there may not be any difference between the prospectus and circular.

Conclusion

We believe that the Communiqué promotes the public offering of foreign stocks that are issued by the foreign companies, in Turkey and the entrance of foreign capital markets instruments into Turkish capital markets.

Now all Information, Documents and Explanations are Available through Technology!*

Communiqué Serial: VIII, No: 61 (hereinafter referred to as the “Communiqué”) concerning the Principles of Electronic Signatures and the Delivery of Information, Documents and Explanations to the Public Disclosure Platform was published by the Capital Markets Board in the Official Gazette dated 30 May 2009 and numbered 27243. This Communiqué enables corporations whose capital market instruments are listed on the Istanbul Stock Exchange (hereinafter referred to as the “ISE”), intermediary institutions, and the founders of funds whose shares are listed on the ISE to send their information, documents and explanations by electronic signature to the Public Disclosure Platform.

Also in accordance with this Communiqué, independent auditing firms may electronically sign their independent auditing reports and send them electronically to corporations, intermediary institutions and funds.

Electronic Signature, which is a new development provided by Electronic Signature Law no. 5070, enables the following to be signed electronically:

- Independent auditing reports,
- Public Disclosure of Material Events,
- Circulars and other notifications,
- Notifications required by the Capital Markets Board in accordance with regulations regarding corporations and funds,
- General Assembly Minutes of corporations and Lists of Assembly Attendees,
- Articles of Associations of corporations and internal regulations of funds,
- Other notifications required to be sent electronically by the Capital Markets Board and/or the ISE.

These notifications should be signed electronically by corporations, intermediary institutions and the founders of funds and sent electronically to the Public Disclosure Platform.

* *Article of April 2010*

In accordance with the principles and procedures of the Capital Markets Board regarding public disclosure, all public disclosures of corporations, intermediary institutions, funds and independent auditing firms will be deemed to have been transmitted to the Public Disclosure Platform as of the execution date of the Communiqué.

Signatories should sign the Undertaking of Certificate Owner annexed to the Communiqué prior to obtaining the electronic certificate and submit it to the electronic certificate service provider.

All corporations making an initial public offering and funds applying to register shares for listing should apply for the electronic certificate. Obtaining the electronic certificate is mandatory in order to receive a decision regarding a quotation or listing.

Intermediary institutions and independent auditing firms should also apply to the electronic certificate service provider in order to obtain the electronic certificate within 15 days after authorization is given by the Capital Markets Board.

If it is impossible for corporations, intermediary institutions and the founders of funds to make notifications electronically to the Public Disclosure Platform or for independent auditing firms to send notifications electronically to corporations, intermediary institutions and the founders of funds, the most efficient delivery method should be used to send notifications.

Notifications made to the ISE should be transmitted to the Public Disclosure Platform as soon as possible. If the notifications are made by a method other than electronic submission even though there is no impediment to an electronic transmission the relevant persons or legal entities will be liable.

The existence of any situation which prevents electronic transmission must be demonstrated by the corporation, intermediary institution, founder of fund, or independent auditing firm. All information and documents proving the existence of this unavoidable should be sent to the Capital Markets Board and the ISE within 3 business days following the occurrence of the situation.

The purpose of the Communiqué is to inform investors and disclose all changes and material events regarding capital market instruments in the fastest and most effective way.

A New Era for Public Offerings*

A new communiqué called “Communiqué on Principles of Sale Techniques on Public Offerings of Capital Market Instruments” (Serial: VIII, No: 66) (hereinafter referred to as the “Communiqué”) was published in the Official Gazette dated 3 April 2010 and numbered 27541 by the Capital Market Board. This is the beginning of a new era for public offerings.

The fees for the shares, sale, and distribution principles of capital market instruments are freely defined in the circular by the issuer and/or shareholders with the leader of the consortium.

The percentage of allocation to be provided to investor groups should be defined in detail in the circular. Provided that the principles are determined in the circular, the amount of capital market instruments can be restricted minimally or maximally by the board of directors of the issuer or the shareholders. This means that since the minimal restriction was fixed, the maximum restriction is not required.

At least 10 percent of any capital market instrument to be publicly offered shall be allocated to onshore personal investors and at least 10 percent shall be allocated to onshore corporate investors, except the additional sale right. These restrictions are not applied to public offerings regarding the sale on the stock exchange.

Without exceeding the minimal restrictions, the allocated amounts should be replaced between the groups subject to the clear explanation in the circular regarding this subject.

During the term of the public offering, the issuers and/or shareholders are responsible for the accuracy of all information, the presentation and other explanations of other meetings, and equal disclosure of all information to all investors. Intermediary institutions are also liable for any malfeasance as to acts expected from them.

During the allocation, except for the qualified investors, the treatment of other investor groups should be equal and fair without discriminating their intermediary institutions.

* *Article of May 2010*

The term for book building may begin at the earliest following the second business day of the announcement of the circular. The term for book building must be at least 2 business days and can be no more than 30 days.

On book building, if there is more than one investor, the highest amount will be taken into consideration and others will be revoked.

Investors wishing to buy the book should deposit the amount in the bank account mentioned in the circular and within the period mentioned therein. They should also fill in and sign the book building form. Moreover, corporate investors might deposit the amount following the end of the term of book building provided that the responsibility of nonpayment risk is borne by intermediary institutions.

Sales Methods:

- 1) Book building: All demands regarding the offered shares are collected and these demands are evaluated in accordance with the circular and they are allocated

Sale can be done by:

- Fixed Fee,
- Quotation of a price,
- Price Range.

- 2) Sale without book building: The sale by public offering without book building of the shares of public entities whose shares are not registered in Istanbul Stock Exchange and the companies which are outside the scope of the Communiqué.

Subject to the terms defined by the Capital Markets Board, cash or non-cash incentives can be given to certain investor groups in public offering.

LABOR LAW

Disciplinary Regulation within the Frame of Labor Law*

The endeavors for the establishment of a corporate structure in companies with shared management responsibilities require the management function, which is concentrated in the hands of executive managers, to be distributed and shared with middle management and other employees. The disciplinary regulations and the disciplinary councils established in accordance with these regulations can be given as examples of this approach in Labor Law.

The aim of the disciplinary regulations is to provide for disciplinary processes within companies and to create a peaceful and secure working environment. In this context, employees who are well informed about the working conditions and the sanctions that may arise out of violation of these conditions will fulfill work requirements better. On the other hand, disciplinary regulation would protect the employees from facing outrageous sanctions which are not proportionate to the action subject to discipline at the discretion of a sole manager.

From the employers' point of view, there is a lower possibility for a sanction given by a disciplinary council at the end of a detailed investigation which is held in accordance with the discipline regulation, to result in a law suit. Even if such a law suit were initiated, the possibility that the employers would face a court verdict requiring them to re-employ the employees depending on the job security provisions or to pay compensation would also decrease.

The discipline regulations and discipline councils are not directly regulated under the Turkish Labor Law. Nevertheless, the sanctions envisaged by the discipline regulations are taking place within the Labor Law. Therefore, while drafting the discipline regulations, the provisions of the labor law should be taken into account. We would like to explain the major provisions as follows:

* *Article of January 2010*

- The first issue to be considered is that the disciplinary regulation must be effective for and applied to all employees in an equal way pursuant to the “equal treatment principle “as prescribed under Article 5 of the Labor Law.
- The provisions required to be respected during the termination of the labor contract by the employer without any earlier notice and compensation, are Articles 19, 25 and 26 of the Labor Law.

In this scope, Article 25 of the Labor Law limits the justified grounds for immediate termination of the labor contract by employer to specific health reasons, actions in violation of ethics and goodwill, force majeure events preventing the employee from working for a period more than a week, and arrest of the employee. It is not possible for the employer to immediately terminate the labor contract in a justified way based on reasons other than those mentioned above.

Another provision relevant to the termination of labor contract is Article 19 of the Labor Law prescribing the procedures for termination. Pursuant to paragraph 2 of the said Article, the indefinite termed labor contract of an employee cannot be terminated on grounds regarding the behavior or efficiency of that worker without obtaining his/her defense against such claims. Therefore, the discipline regulation should provide for the obtaining of the employee’s defense in such cases.

Pursuant to Article 26 of the Labor Law, the authority to terminate the labor contract granted to the employer based on the employees’ actions in violation of ethics and goodwill as prescribed under Article 25, can-not be exercised after six business days of the employer’s awareness of the relevant actions of the employee and one year after the realization of the subject action. However, the term of one year will not be applied if the employee has materially benefited from the actions in subject.

In practice, the employer who acknowledges the employees’ action in violation of ethics and goodwill which requires a disciplinary sanction has to convey the case to the disciplinary council and the disciplinary council then initiates an investigation. In general, it is observed that the duration of such an investigation expires after the six business days envisaged under Article 26 of the Labor Law. In principle, it is obligatory to meet this time period of six business days. However, the time of the knowledge of the employer of the relevant actions of the employee should not be

interpreted as a mere time for learning. First of all, it is advantageous for the employee when a detailed investigation of the whole case is conducted. In such cases, the date of the disciplinary council's decision could be considered as the awareness date. Notwithstanding, it should be emphasized that the employer who learns about the suspected action of an employee should act immediately without losing any time to convey the case to the disciplinary council and the disciplinary council should right away initiate the investigation lest the period of six business days expire during this process.

Accordingly, if it is stipulated in a disciplinary regulation that an action requires a disciplinary sanction of the termination of the labor contract without any earlier notice and compensation, then such a stipulation must be in conformity with the above referred provisions of the Labor Law. In the contrary case, the disciplinary regulation and the sanction of termination of the labor contract concluded pursuant to such a regulation would be unlawful.

- Article 38 of the Labor Law includes the wage deduction sanction. Pursuant to the mentioned Article, the employer cannot exercise the wage deduction sanction for reasons other than those specified in the collective or individual labor contract. The deductions to be made from the wage as a sanction should be notified to the employee. The mentioned deductions from the wages of the employees cannot exceed two daily wages in a month or two days' earnings of the employee in wages paid against piece-work or the amount of work performed. These issues must also be considered while drafting the disciplinary regulation.

As a last point, we should note that the actions requiring a disciplinary penalty and consequently the sanctions to be applied under a disciplinary regulation, should not be ambiguous. On the contrary, they should be drafted as precisely as possible and in compliance with the Turkish Labor Legislation. Moreover, they should be applied to all employees on equal terms.

The Equal Treatment Principle in Labor Law*

The equal treatment principle can be defined as “treating people equally who are in similar circumstances”.

This principle is rather significant for the labor environment; therefore it is regulated in Article 10 of the Constitution under the heading, “Equality Before the Law”. Moreover, the equal treatment obligation of employers to employees is regulated under Article 5 of Labor Law No. 4857, which is founded on the International Labor Organization’s Constitution, to which Turkey is a party. Pursuant to this legislation, the disparate treatment of employees in equal situations, for example as to information, career, etc., is not justified and is prohibited.

Pursuant to Article 5 of the Labor Law, (i) employers must not discriminate against employees due to their language, race, gender, political opinions, philosophical beliefs, religion, religious sect, or similar reasons, (ii) unless there are principal reasons for different treatment, employers must not make any distinction between a full-time and a part-time employee or an employee working under an employment contract for a definite term and one working under an employment contract for an indefinite term, (iii) except for biological reasons or reasons related to the nature of the job, employers must not make any distinction, either directly or indirectly, against employees as to the conclusion, conditions, execution and termination of their employment contracts due to the employee’s gender or pregnancy, (iv) different remuneration for similar jobs or for work of equal value is not permissible, (v) application of special protective provisions due to employees’ gender does not justify paying them a lower wage.

In order for Article 5 of the Labor Law to be applied, these conditions should be met:

- The employees should be working at the same work place.
- There should be a comparable group of employees within the work place.
- The treatment applied within the work place should concern all employees.

* *Article of August 2010*

- The behaviors of the employer should be compared within close time intervals.
- There should be a legal relationship between the employer and the employee.

The employer should comply with the equal treatment principle as to the hiring of an employee, field of management, fee applications, social pay, usage of fundamental rights, and the termination of the employment contract.

Violation of the “equal treatment principle” has both legal and punitive sanctions. Pursuant to Article 5 of the Labor Law, if an employer violates the equal treatment principle, an employee may demand compensation of up to four months’ wages together with other claims which they have been deprived of under Article 31 of the Trade Unions Law. The employee bears the burden of proof under Article 20 of the Labor Law. However, if the employee displays a strong proof of such a violation, the burden of proof that the alleged violation has not been made can be shifted to the employer.

According to Article 99/a of the Labor Law, if an employer violates the duty to comply with the equal treatment principle, the employer can be sanctioned with monetary fines and with imprisonment for from six months to one year or with forensic monetary sanctions pursuant to Article 122 of the Turkish Penal Code.

In conclusion, the equal treatment doctrine is a constitutional principle which must be adhered to at all times from the establishment of the employment relationship until the termination of the employment contract. The precedent decisions of the Supreme Court are in line with the legislation in force.

New Criteria for Granting Permission to Work to Foreigners Have Been Applied Since 2 August 2010*

In order to ensure objective and efficient processing of requests by foreigners for permission to work certain criteria have been established pursuant to the Regulation on the Application of the Law on Working Permissions for Foreigners article 13. Those criteria, to be applied beginning on 2 August 2010, are as follows:

1- The recruitment of at least five Turkish nationals in the business place where the foreigner requests permission to work is mandatory. If the foreigner asking for permission is a shareholder of the company, the condition of the recruitment of at least five Turkish citizens must be fulfilled for the last six months of the one year permission period to be granted by the Ministry. If more than one foreigner requests permission to work in the same business place, the recruitment of at least five Turkish citizens is necessary for each foreigner.

2- The paid-in capital of the business place must be at least 100.000 TL; its gross sales must be at least 800.000 TL; or its amount of imports must be at least 250.000 USD.

3- The second paragraph for the working permissions of foreigners who will work for associations and foundations and the first and second paragraphs for the foreigners who will work at the Turkish representations of foreign state airlines, in the education sector, and house works do not apply.

4- The capital share of the foreigner who is a shareholder of the company must be at least 20% and cannot be less than 40.000 TL.

5- The monthly salary to be paid to the foreigner must be appropriate for the position and sufficiency of the foreigner. Accordingly, based on the current amount of the minimum wage on the date of the application, the monthly salary to be paid to the foreigner must be at least:

- a) 6.5 times the minimum wage for executive managers, pilots, civil engineers, and architects who apply for preliminary permission,
- b) 4 times the minimum wage for unit or branch directors, civil engineers, and architects,

* *Article of July 2010*

- c) 3 times the minimum wage for those who will work at jobs which require expertise and proficiency including teachers,
- d) 1.5 times the minimum wage for those who will work at housework services and other occupations

6- Only requests for masseur, masseuse, and SPA therapists by at least four star tourism enterprises and certified holiday villages that can prove the existence of permitted massage salons with a certification obtained from the Ministry of Culture and Tourism will be evaluated. Such requests by other enterprises and business places will be denied.

7- For foreigners who will be recruited for work which requires expertise and proficiency or for work in the entertainment sector and tourism-animation organization companies, no other quota will be necessary if at least ten Turkish citizens are recruited.

Emotional Abuse in the Workplace According to Turkish Labor Law (Mobbing)*

Emotional abuse (hereinafter referred to as “Mobbing”) is a new concept for Turkish law which may be defined as putting pressure on the employee by aiming systematically at the personal rights and “honor and dignity” of the employee, which are protected within the framework of personal rights. The following acts may be defined as mobbing: to interrupt, to call out, to criticize unjustly, to assign menial work, to bother, to ignore, to question, to humiliate, to make fun of, and to sideline the employee constantly. Employees facing such treatment become mentally depressed and lose their self-confidence. As a result, employees may resign from their jobs, which would affect the costs to the employer. Therefore, if employees and employers recognize the importance of mobbing and decrease instances of it, the negative effects of mobbing on employees and employers could be eliminated, thus increasing productivity.

The most definite and distinctive provision of an employment agreement is the commitment to perform properly and under the employer’s authority. This commitment and authority bring out a hierarchical structure. The employer will look after the employee who is committed economically and personally to this hierarchical structure in the frame of equality, good faith, and equity principles arising from civil law and the employment agreement.

According to the Turkish Code of Obligations article 332, the employer must take precautions to prevent dangerous effects of the work and provide a healthy and appropriate work environment in accordance with “equity principles” by considering the private conditions of the employment agreement and the nature of the work. According to Turkish Labor Code article 77/1, *“Employers must take all precautions in order to provide healthy and safety at work and maintain all tools and equipment fully.”*

Therefore, the Code of Obligations and the Labor Code impose on employers the duty to respect their employees and treat them fairly.

However, Labor Code article 77 expands the obligation that is limited in the frame of the “equity” basis pursuant to the Code of Obligations article 332 and obliges the employer to take all precautions required by science

* *Article of January 2010*

and technology. Therefore, if an occupational accident or an occupational illness occurs and that accident could have been prevented by taking all the necessary precautions at the latest level which science and technology have reached, the employer will be responsible for not having taken all necessary precautions¹. Supreme Court decisions also emphasize that the employer's obligation to take necessary measures will be evaluated by objective measures².

According to the Code of the Approval of European Social Condition Ratification numbered 5547 which entered into force on October 03, 2006, parties accept to take steps to heighten consciousness of workplace sexual abuse and to prevent such acts in order to provide an effective and honorable respect for the employment rights of the employees. This is aimed at protecting employees from all attacks including mobbing by protecting the personal rights in the workplace under the rubric of "honorable employment rights".

Besides the regulations mentioned above with respect to mobbing, the personal rights of employees have begun to be protected by court decisions. As a matter of fact, it has been accepted in the Ankara 8th Labor Court's decision dated 20/12/21006 with the principle number 2006/19 and decision number 2006/625 that the employer must respect the personal right of the employee by stating, "*mobbing includes all acts such as every kind of abuse, threat, violence, humiliation etc. which is carried out against employees systematically by the managers, workers at the same level, or subordinates at the workplace*".

Mobbing also constitutes a tortuous act pursuant to article 96 of the Code of Obligations and is a violation of obligations arising from employment agreement. In other words, the employee may allege that such acts are against the employment agreement and the obligations of the employer within the frame of the referred articles while mobbing continues.

The employer must also prevent attacks by other employees damaging the honor and respect of the employee in the workplace within the frame

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- 1 Süzek, Work Safety Law, page 180; Uluşan, page 48; Economy, page 155; Çenberci, Labor Code Explanation, 5th edition, Ankara, 1984, page 968 directly from TINAZ, Pınar/BAYRAM Fuat/ ERGİN Hediye, directly from Working Psychology and Emotional Abuse In The Frame of Law (Mobbing).
 - 2 TINAZ, Pınar/BAYRAM Fuat/ ERGİN Hediye, Working Psychology and Emotional Abuse In The Frame of Law (Mobbing), 1st edition, İstanbul, 2008, page 88.

of the protection of personal rights of the employees. In this respect, Code of Obligation article 332 and Labor Code article 77 should be applied. Also, tortuous liability may arise from emotional abuse of the employee. However, if the abuser is an employee who is the representative of the employer, then the employer will also be held liable directly by article 2/4 of Labor Code. If the abusive employee is not the representative of the employer, the employer will be held liable according to article 96 of Code of Obligation.

According to article 24/2 of Labor Code, the employee may terminate the employment agreement immediately if, “*the employer acts or speaks against the honor and integrity of the employee or a member of the employee’s family or abuses the employee sexually*”. As shown in this article, sexual abuse of the employee is expressly regulated within termination for just cause in article 24 of the Labor Code. However, emotional abuse of the employee is not regulated in this article expressly despite the fact that expands the opportunities for application. However, as the Labor Code comprises regulations for the protection of employee’s rights, Labor Code article 24 also provides protection of the employee from such acts regardless of the fact that it is considered ineffective.

The employee need not witness the actions or speech of the employer that damages his or her honor and integrity in the workplace in order for these things to be evaluated within the scope of article 24 of Labor Code³. It is also settled that such activity gives the employee the right to terminate his or her employment agreement immediately if the employer acts or talks against the honor and integrity of the employee in the workplace even though the employee does not witness this abuse⁴.

Lastly, the employee whose personal rights are infringed by mobbing has the right to initiate legal proceedings. Legal proceedings may take the form of lawsuits; (i) to avoid the attack, (ii) to prevent the danger of attack, (iii) to determine the attack contravenes the law, (iv) to demand moral and material compensation and (v) to seek a judgment arising from acting without authority. Also, in these lawsuits the employee may request that

3 TINAZ, Pınar/BAYRAM Fuat/ ERGİN Hediye, Working Psychology and Emotional Abuse In The Frame of Law (Mobbing), 1st edition, Istanbul, 2008, page 138.

4 Ferit Hakkı Saymen, Turkish Labor Law, İstanbul 1954, page 572 directly from TINAZ, Pınar/ BAYRAM Fuat/ ERGİN Hediye, Working Psychology and Emotional Abuse In The Frame of Law (Mobbing).

the court censure the employer, force the employer to apologize to the employee in the frame of the general provisions, order the publication of the decision, or order the notification of the decision to third parties.

In lawsuits initiated in order to prevent unlawful attacks, to remove the danger of attack, or to classify the attack as a contravention of the law, it is sufficient that the attack unjustly harms the personal rights of the employee; the fault of the employer need not be considered.

It is sufficient in lawsuits for moral and material compensation that the act is unlawful, that a moral or a material damage has been born, that a causal relationship between the damage and the act exists, and lastly that the fault of the employer (or the employer's strict liability) is present in the case.

Overtime Work and Working with Extra Periods*

According to the Labor Code numbered 4857 (hereinafter referred to as the “Code”), the weekly working period must not exceed 45 hours. Unless otherwise agreed, this period may be allocated into equal portions per day within a week. The purpose of limited working hours is to protect the health of the employees. However, besides this purpose, the Code has provided flexibility in this principle taking into account economic, social, and technologic developments.

Nevertheless, the Code determined that normal weekly working hours may be allocated in the workplaces differently by mutual understanding of the parties, but in no case exceeding 11 hours per day. In this case, the employees may work less than the normal working hours to balance the periods of overtime, and, thus, the total working hours are balanced in a way so that they do not exceed the normal working hours. The balancing of total working hours must be completed within two months, but this period may be increased to four months by collective bargaining agreement.

The Code permits overtime work for the general interest of the country and to increase the quality of work and production. Overtime work is work exceeding 45 hours of work per week within the frame of the conditions set forth in the Code. However, in cases where the principles of balancing are applied, if the employees’ weekly average working hours exceed 45 hours during some weeks, such working times will not be counted as overtime provided that they do not exceed normal weekly working hours overall.

According to Code article 41, the wage payable for each hour of overtime is calculated by increasing the normal hourly wage by 50%.

In cases where the weekly hours are determined as below 45 hours through an agreement, then the work times exceeding the average weekly working hours applied within the above mentioned principles up to 45 hours are working with extra periods. In working with extra periods, the wage payable for each hour of extra period will be paid by increasing the amount of the normal hourly wage by 25%.

If an employee who is working overtime or with extra periods agrees, he or she may use one hour and thirty minutes for each hour of overtime

* *Article of October 2010*

and one hour and fifteen minutes for each hour of extra periods as free time instead of receiving an increased wage.

The employee may use the free time he or she is entitled to within six months, during work periods, and without any deduction from wages.

The total overtime period may not exceed two hundred and seventy hours a year.

The written approval of the employee is required for overtime work and working with extra periods. The approval of the employee is not required when there are obligatory reasons or extraordinary conditions for overtime work and working with extra periods.

This written approval is to be taken from the employee at the beginning of each year by the employer and kept in the employee's personnel file according to the "Regulation on Overtime Work and Working with Extra Periods Pursuant to the Labor Code" published in the Official Gazette dated 06.04.2004 and numbered 25425 (hereinafter referred to as the "Regulation").

The employer must also issue documents showing overtime hours or working with extra periods of the employee and must keep a signed copy in the personnel file pursuant to the Regulation. The wages of overtime work or working with extra periods must be paid together with the wages of the normal working hours. These payments are shown clearly on the payrolls and on the wage accounting roll that is to be submitted to the employee.

Wage Deduction Penalty*

The wage deduction penalty, which is among the disciplinary punishments inflicted by employers on employees, is stipulated under Article 38 of Labor Code numbered 4857. The article envisaged limitations on the wage deduction penalty since wages are the main source of living for employees. In Article 102/b of the Labor Code, it is stipulated that employers who fail to comply with these limitations will be subject to criminal fines.

The first limitation set out in Article 38 of the Labor Code regards the grounds for imposing fines. Only the reasons specified in collective bargaining agreements or labor agreements are acceptable grounds for imposing wage deduction penalties on employees. It is illegal to levy a wage deduction penalty for reasons other than those specified in collective bargaining agreements or labor agreements. In addition to that, any wage deduction penalty must be promptly notified to the employee together with the reasons for the penalty.

The second limitation regards the amount of the penalty. It is stipulated under the referred article that such deductions from employees' wages cannot exceed two days' wages in a month or two days' earnings if wages are paid at a rate pursuant to piece work or the amount of work performed.

Another issue stipulated in the article is the usage of money as a result of the wage deduction penalty inflicted by the employer. Accordingly, the deducted money will not stay in the possession of the employer. Such deductions must be deposited within one month following the deduction into the account of the Ministry of Labor and Social Security at a bank specified by the Ministry, established in Turkey, and entitled to accept deposits. These funds are used for employee training and social services. Every employer is obliged to keep a separate account of such deductions at the place of business.

The places for and the amounts of the allocations of the collected deductions will be decided upon by a board presided over by the Minister of Labor and Social Security with the participation of employees' representatives. The composition of this board, its manner, and working essentials are indicated in the "*Regulation on Working Essentials and*

* *Article of September 2010*

Composition of the Board Assigned to Use the Money Deducted as Penalty from the Employees' Wages" dated 05.03.2004 and numbered 25393 regulated by Ministry of Labor and Social Security.

Pursuant to Article 22 of Labor Code No. 4857, Change in Working Conditions and Termination of Employment Contract*

If there is a provision in an employment contract which says the employer is entitled to make changes in working conditions where it is necessary, then there is an expanded management right of the employer. In such circumstances, the employer has a permanent right to make changes in the working conditions of the employees provided that the changes are within the limits of the employment contract and the management right is not abused. If, for example, there is a provision stating that the employee can be transferred to another working place of the employer where it is necessary, then the employer's right of change with respect to this matter is reserved. This right must be used in an objective manner. If the provision is applied to obtain the termination of the employment contract, then there is an abuse of management right.

Basically, changes in working conditions and terminations of employment contracts are regulated under Article 22 of Labor Code No. 4857. The aforesaid article is as follows:

“Any material change by the employer in working conditions based on the employment contract, on the personnel regulation which is annexed to the contract, and on similar sources or workplace practices, may be made only after a written notice is served by him or her upon the employee. Changes that are not in conformity with this procedure and not accepted by the employee in written form within six working days do not bind the employee. If the employee does not accept the proposed change within this period, the employer may terminate the employment contract by respecting the prior notice periods, provided that he or she indicates in written form that the proposed change is based on a justifiable ground or there is another justifiable ground for termination. In this case the employee may file a lawsuit according to Articles 17-21.

* Article of July 2010

By mutual agreement the parties may always change working conditions. Changes in working conditions may not be made retroactive.”

As may be understood from the quotation, Article 22 of Labor Code applies if changes made by the employer are material. Pursuant to the article, the employer can make material changes in working conditions only after a written notice is served upon the employee. Changes that are not in conformity with this procedure and not accepted by the employee in written form within six working days shall not bind the employee.

According to the doctrine, the employer cannot inform the employees of the proposed changes by a general announcement such as a bulletin. The employer must serve a written notice to each employee.

The article is based on the opinion that any material change in working conditions can be made with the consent of the employee. According to the doctrine, it is obvious from the article that an employee's silence cannot be construed as acceptance because it is stated that changes not accepted by the employee in written form within six working days do not bind the employee. However, in the decision of the Court of Appeal General Assembly of Civil Chambers with the principle number 2009/9-416, decision number 2009/474 and dated 04 November 2009, if an employee does not consent in writing but the employee engages in behavior which can be definitely construed as an acceptance, then the changes in working conditions will be deemed to be have been made by mutual agreement.

It is stipulated in Article 22 of the Labor Code that if the employee does not accept the proposed change within six working days, the employer may terminate the employment contract. However, in such circumstances the employer must indicate in writing that the proposed change is based on a justifiable ground or that there is another justifiable ground for termination of the employment contract, and the employer must abide by the prior notice periods designated in Article 17 of the Labor Code. In other words, the termination will be by prior notice. The employee has the right to file a lawsuit according to Articles 17-21.

Pursuant to the decision of the Court of Appeal General Assembly of Civil Chambers with the principle number 2009/9-416, decision number 2009/474 and dated 04 November 2009, the existence of justifiable grounds are determined in two stages. At the first stage, the existence of justifiable

grounds is determined according to Article 18 of Labor Code. Justifiable grounds may arise from the sufficiency of the employee or the acts of the employee or the necessities of the management. The Code does not define justifiable grounds, and thus leaves to the courts the determination of justifiable grounds for each occasion. Loss of employee's ability to perform the work specified in the employment contract is an example of justifiable grounds arising from the sufficiency of the employee. Fighting in the workplace with another employee is an example of justifiable grounds arising from an act of the employee. There are other examples. However, in order to evaluate the grounds arising from the sufficiency or the act of the employee as a justifiable reason, the employment relationship will face serious problems, and it will not be reasonable for the employer to continue the employment relationship. A justifiable ground arising from necessities of the management is not based on an employee, but it is based on the employer. The management decisions must not constitute an abuse of rights. If by applying management decisions, there is no longer an opportunity for the employee to work or there is excess of personnel, then it is accepted that there is a justifiable ground arising from the necessities of the management. At the second stage, it is determined whether the proposed change in working conditions conforms with the code, the collective labor contract, and the principle of proportionality and whether it is fair to expect the employee to accept the proposed changes.

An employee who is within the scope of employment security legislation (an employee working with an indefinite term of contract for at least 6 months at a workplace that employs more than 30 employees) can file a lawsuit for reemployment by alleging that the termination was not based on a justifiable ground. The employer must prove that the termination is based on a justifiable ground. As stated above, the existence of justifiable grounds will be determined in two stages. If the employer cannot prove that the termination is based on a justifiable ground, then the termination will be deemed ineffective and the employer will be obliged to reemploy the employee. If the employer does not reemploy the employee, then the employee will be entitled to an indemnity, severance, and notice pay provided that the relevant requirements are met. Whether the employee is reemployed or not, he or she will be entitled to wages and other rights for up to four months.

According to the doctrine, Article 22 of Labor Code will also apply to

employees who are not within the scope of employment security legislation. However, an employee who is not within the scope of employment security legislation cannot file a lawsuit for reemployment by alleging that the termination is not based on a justifiable ground. The employee can claim severance and notice pay, indemnity for bad faith, and material and moral compensation provided that the requirements are met.

On the other hand, according to the doctrine, since Article 22 of the Labor Code stipulates that the termination will be by prior notice and such termination is envisaged for only terminating an employment contract with an indefinite term; the aforesaid article will not apply to employees who are working under employment contracts with definite terms.

Release Agreements in Labor Law*

Debts and receivables are extinguished directly and definitely by release. While the total amount of the debt is terminated in full release, the released part of the debt is terminated in case of partial release. Thus, the debtor is discharged of his or her debt wholly or partially.

The release agreement has an important application in labor law practice even though it is not set forth by the Labor Law or the Code of Obligations. The doctrine and jurisprudence of the Court of Appeals consider the release agreement as an event which terminates the debt.

Although the Court of Appeals does not define the release, it emphasizes that the release is a document abolishing a right. The relevant document is issued in different titles such as quittance, acquittance, certificate of receipt, and release agreement in practice even though it has the characteristics of another agreement, waiver, settlement agreement, negative acknowledgement of debt, or receipt of payment.

It is an important oversight that the release agreement is not regulated by law while its importance is incontestable in labor law. As this agreement is significant in labor law practice, the precedents form an important source in this field.

The release agreement is frequently used in labor law practice. It is generally entitled as quittance and regulated as a document which is signed unilaterally by the employee and granted to the employer.

The Court of Appeals admits that the employee makes a living for or her family and himself with the wage earned in exchange for his or her labor and other pecuniary rights. In this framework, the release of the employer by his or her employee for no reason cannot be considered ordinary. The release agreements must be interpreted strictly in labor law, and performance must be considered as the principal cause of termination of the debt. Therefore, because the debt is not terminated by performance in release agreements, the relevant agreements should have a limited value in labor law.

We should emphasize that the subject matter of the release agreements concerns the past. A future right does not constitute the subject of release

* *Article of November 2010*

agreements. Thus, the conclusion of a release agreement regarding a receivable in the future is not possible.

The quittances provided in the course of the employment agreement are deemed null and void as a consequence of the principle of protection of the employee in labor law.

The quittance provided in the course of service does not render invalid any rights of the employee which arise subsequent to the quittance, pursuant to the uniform jurisprudence of the Court of Appeals. In this framework, the decision should be made by comparing and evaluating evidence presented by the parties.

According to a recent decision of the Court of Appeals, release agreements concluded in the course of the employment relationship are null and void. This is because the employee is completely dependent upon his or her employer during this period and despite the dispositions of labor protection, the employee concludes the release agreement either in order to continue the employment relationship or for the immediate obtainment of some rights.

As the release agreement is a means of termination of incontestable debts, it is not possible for a contestable debt or a debt whose existence is questionable to be terminated by means of a release. Therefore, if an employer alleges that the employee is not entitled to a receivable, it cannot be the subject of a release. The Court of Appeals has a uniform jurisprudence about the invalidity of release agreements in contradicting defense evidence.

In release agreements which contain an amount, the debt is terminated by performance in case the receivable is completely paid. On the other hand, in cases of partial payment, a release is not valued by the Court of Appeals, and it is considered that the payment effectuated has the same effect as a receipt.

Finally, the effect of termination of a debt arising out of release agreements which do not contain an amount should be mentioned. While the Court of Appeals accepts that release agreements among merchants should be clear and precise and it should be determined which debt they are related to, it has not recognized the fact that they do not contain an amount as reason for invalidation. However, it is not possible to resolve the problem in a similar way in labor law. Taking into consideration that

an employee who makes a living from his or her labor would not release the employer for no reason, it is not right to value a release which does not contain an amount, and the principle of interpretation in favor of the employee in labor law requires that. The precedents of the Court of Appeals do not value releases which do not contain an amount.

Against the objection that the release does not reflect the truth, the employer should prove the accuracy of the release by written proof. In the contrary case, as the validity of the release is not proven, the employee is entitled to rights whose amount is undisclosed.

As a result, considering the fact that the employee is always protected in labor law and in view of the consistently strict interpretation of release agreements by the Court of Appeals, a number of issues that should be taken into consideration by the employer while issuing a release are stated below:

- Releases should be in hand-written form, in other words handwritten by the employee; and “date, amount, name-surname” blanks should be filled in by the employee in releases written by typewriter, handwritten by another person, or printout releases, and there should not be an empty space between the release text and the signature.
- Debts subject to release should be included clearly in the release, and matters which are not the subject of the release should be excluded. The inclusion of clauses in releases issued for employees who have resigned such as “I received my severance and notice compensation” which are considered as contradiction, in practice, and which can result in invalidity of the release, should be avoided.
- The amount should be stated in the releases obtained concerning claims arising from the employee’s services (such as wages, overtime, bonus, vacation payment, social aid, etc.)
- In case the employee does not wish to receive payment of his or her rights directly from the employer, these rights and receivables should be sent via wire transfer to the bank account in which the employee’s wage is deposited, or in cash on delivery form *via* PTT, as of the date of termination of the employment relationship.

Managerial Decisions and an Employer's Burden of Proof in Re-Employment Lawsuits*

An employer may terminate a labor agreement pursuant to Article 18 of the Labor Law (hereinafter referred to as the "Law") for a valid reason arising out of *the requirements of the enterprise, the workplace or the business*. In the first instance, a managerial decision is sought for a valid termination due to the requirements of the enterprise, the workplace, or the business. Article 18 of the Law refers to the concept of "*requirements of the enterprise, the workplace, or the business*", but it does not define the concept of "*managerial decision*". The contents of the "*managerial decision*" can be derived from judicial precedents. In particular, the Court of Cassation has dealt in detail with the managerial decision concept in its recent judicial decisions and specified the employer's burden of proof relating to this issue.

1. Managerial Decision

All decisions made by the employer in its own discretion within the scope of management rights, including termination of its employees' labor agreements, are considered managerial decisions.

The employer may make managerial decisions for reasons arising within or outside the business.

- ***External reasons***

Reasons shown by the employer to justify a termination, where the business does not have a direct influence are considered external reasons. The Court of Cassation has given examples for this concept, such as decreases in orders, difficulties in marketing, decreases in sales and demand, a lack of raw materials, an energy shortage, meteorological reasons, or, in case of public enterprises, exclusion from a governmental budget. Moreover, the Court of Cassation states that these reasons do not prove valid terminations by themselves unless these reasons result in a surplus of staff.

- ***Internal reasons***

The precautions taken by the employer through its rights of

* Article of May 2010

reorganization of the organizational and production structure and management in order to realize the targets of business policy are considered internal reasons.

Examples of internal reasons are found in doctrine and in German jurisprudence. In this respect, organizational changes, such as continuous improvement processes; cessation or alteration of production; reduction of costs; introduction of new methods of work, manufacturing, and production; conversion of part time work to full time work; conversion to shift procedures; reduction of work hours; increases in work loads; merging of work departments or areas; offshore outsourcing production, domestic outsourcing, and subcontracting; decreases in production capacity; closing of all or a part of the enterprise; maximization of profits; introduction of lean-management and team work; and the decision of the employer to decrease the number of employees for an unlimited time in order to eliminate activities which do not produce net income are taken into consideration as internal reasons.

2. The Employer's Burden Of Proof

A re-employment lawsuit initiated by an employee alleges that termination of a labor contract is invalid. In such a case, Article 20/2 of the Law lays the burden of proof regarding the validity of the termination on the employer's shoulders. Thus, the employer is obliged to both prove that (i) he or she has met the requirements as to the form of the termination and (ii) the termination is based on valid reasons in context.

- ***Burden of proof as to form***

Pursuant to Article 19 of the law, employers must meet the formal requirements of (i) termination to be notified by a written notice and (ii) the mentioned notice to contain the reasons of termination in an explicit and decisive way. The termination notice must also explicitly state the intention to terminate the labor agreement and the termination date. Moreover, the termination notice must be signed by the employer.

Noncompliance with these formal requirements causes the termination to be considered invalid.

- ***Burden of proof as to context***

An employer is bound by the reasons shown in the termination notice. Thus, in case of a re-employment lawsuit, an employer may not introduce or rely on reasons other than those shown on the termination notice.

In order to prove the validity of the termination, the employer must first show the managerial decision. Moreover, he or she must prove that the managerial decision is consistent and is not gratuitous within the scope of *bona fide principle* as stipulated under Article 2 of the Civil Law.

It must also be proven that the termination decision is the last remedy that can be applied. In other words, if there is another way to reach the business targets other than by terminating labor contracts, the allegation on the validity and justness of the termination is not taken into consideration by the courts. For example, if the employee whose labor contract is being terminated can be placed in another department rather than being terminated, then the termination would not be considered valid.

As the matter of fact, both the local courts and the Court of Cassation seek an on-site examination at the work place and an expert report regarding the work tasks and definitions of all other employees, business operation charts, personnel files of the employees, and social security declarations in addition to the managerial decision in order to find out if the termination was inevitable as the last possible remedy or not.

Conclusion

As acknowledged by everyone, re-employment lawsuits are very common and labor legislation aims to protect employees. In this respect, a significant burden of proof is laid upon employers. Therefore, diligent employers must take into consideration the criteria mentioned above regarding the termination of labor contracts due to managerial decisions in order to avoid any future conflicts.

Work Injuries within the Scope of Social Security*

The concept of “work injury” can be defined as damages arising out of the non-attainment of necessary precautions in a workplace. From this point of view, under Turkish Law this concept is related to both individual labor law and social security legislation. For this purpose, it is regulated under Labor Law and Social Insurance Legislation.

Article 13 of the Social Insurance and General Health Insurance Law No.5510 (hereinafter referred to as the “SIL”), which is in force, defines work injury as follows:

“a work injury is an event which hinders the insured party in body or mind immediately or later on and which occurs;

a) when the insured party is at the workplace,

b), b) if the insured party is working independently in his or her own name and account because of the work assigned by the employer, during the conduct of work,

c) if the insured party is working committed to an employer and is sent somewhere other than his or her own place, during the time he or she was not conducting essential work.

d) d) if the insured party is a breastfeeding woman under the scope of Article 4 first sub article paragraph (a), then during the times reserved for breastfeeding the baby,

e) during the transportation of the insured party to or from the workplace by a vehicle allocated by the employer.”

1. Work injuries occurring when the insured party is at the workplace

The “workplace” is defined under Article 11 of the SIL as a place where the insured parties conduct their work with material or non-material elements. In the same way, the places connected to the workplace in terms of products manufactured or services provided, the places for resting, breastfeeding, dining, sleeping, washing, examination and care, sports or professional education, other auxiliary areas such as courtyards, offices,

* Article of July 2010

and vehicles are considered as a part of the workplace. Accordingly, if the employee is injured while at one of these places, it would also be considered as a work injury. It is not necessary for the employees to suffer an injury during the conduct of his or her work, the existence of a causal relation between the events occurred and the damage is sufficient.

2. Work injuries occurring during the conduct of work if the insured party is working independently in his or her own name and account because of the work conducted by the employer

The important issue herein under is the occurrence of the injury due to work assigned by the employer. Whether the injury has happened in or outside the workplace is not a significant issue. For instance, an injury suffered by an employee while he was making electrical repairs at a client's house would be considered a work injury.

3. Work injuries occurring during the time the employee was not conducting essential work if the insured party is working committed to an employer and is sent somewhere other than his or her own workplace

The employer may occasionally send the insured parties to some other places for work. In this case, the insured party is still under the authority of the employer. Therefore, any injuries occurring during this time period would also be considered as work injuries.

If the insured party is injured while performing his or her work, the paragraph b herein above would be applicable. On the other hand, if the injury has happened during the spare time of the insured party, the paragraph c would be applicable. The general aim of the jurisprudence of the Supreme Court is also along these lines. For instance, when the employer sent the employee to another place and a bomb exploded when he was chatting with his friends, this event was considered a work accident.

4. Work injuries occurring during the times reserved for breastfeeding the baby pursuant to labor legislation

If an insured woman would bear an injury when she has left the workplace for breastfeeding her baby within the time period prescribed

under the Regulation for Working Conditions of Pregnant and Breastfeeding Women, Breastfeeding Rooms and Child Care Centers. For example, a car crash that happened to a woman while she left work for breastfeeding would be considered a work injury.

5. Work injuries occurring during the transportation of the insured party to or from the workplace by a vehicle allocated by the employer

As can be understood from this Article, a traffic accident taking place during the transportation to or from a workplace by a vehicle allocated by the employer would also be considered a work injury. In order to apply such a provision, the vehicle should be allocated by the employer and the accident should take place on the way to or from the workplace. The ownership of the vehicle does not have an impact in this case. The transportation could be made by a vehicle belonging to a third party. The significant issue here is the vehicle to be provided for the transportation of the insured parties to the workplace. The previous wording of “collective transport” which took place under Social Insurance Law no.506 was deleted from the contents of the SIL; thereby the condition of collective transport has been eliminated. Therefore, there is no difference between collective transport for social purposes and allocation of individual transport.

Conclusion

Any incident other than the ones prescribed under the legislation mentioned above as a work injury would not be considered within this context.

A major amendment has been made by the social security report as to notification and investigation of work injuries by the employers. Thus, if an employee suffers a work injury, the employer must immediately inform the competent police or gendarmerie forces and must inform the Social Security Institution within three days. If the work injury occurs at a place other than the places under the employer’s control, the prescription time for informing the relevant authorities starts from the acknowledgement of the work injury by the employer. It is obligatory to submit the work injury or professional disease declaration to the Social Security Institution either directly or by return receipt post. In cases where the necessary notifications

have not been made by the employer in due time, the provisional pay for disability which would be paid to the insured party until due notification has been made would be collected from the employer.

The Notification Requirement in Collective Redundancy*

According to article 29 of the Labor Act (hereinafter referred to as the “Act”), an employer is obliged to notify in writing the workplace labor union representatives, relevant regional directorate, and Turkish Employment Organization at least thirty days in advance before making a collective redundancy as a result of economic, technologic, structural, or similar undertaking, workplace, or requirements of work.

The fifth paragraph of the article states that these notices will enter into force thirty days after the intention to have a collective redundancy is notified to the regional directorate.

Due to ambiguity in the relevant article, different opinions in doctrine arose as to whether “after thirty days” means the commencement of termination notices or the expiration of an agreement.

In the doctrine, the dispositions of the Act literally mean that the termination notices, being unique to collective redundancy, are fixed at thirty days. However, the consideration of the collective redundancy article, other articles, and the purpose of the Act lead to the position that the termination notices will enter into force by the end of thirty days.

It is possible to agree on that opinion taking into consideration the following: The idea of application of same period of time to employees with different working durations is contrary to the purpose of the Act. Consequently, any act regarding the termination of agreements is performed during the thirty days that commence with the notice to the regional directorate, such act and its consequences will be effective at the end of thirty days.

According to another opinion, if the employer notified the termination to employees before the notice to regional directorate, the notice periods will not run until thirty days following the notice to the regional directorate.

As an opposite opinion, it is expressed that the termination notice periods are assumed to overlap and for the employees whose notice periods are less than thirty days, these periods will be extended to thirty days. And according to another opinion, the agreement of the employer whose notice period ended within thirty days will terminate, but the consequences of termination will arise following these thirty days.

* *Article of August 2010*

The legislature aimed to prevent or to reduce the consequences of the collective redundancy by negotiation with the labor unions and not to modify the termination notice period of thirty days. Even the appropriate applicability of this thirty-day period may be discussed since it is thought that the mentioned opinions are not suitable for the aim of providing additional security against collective redundancy.

Consequently, pursuant to the fifth paragraph of art. 29 of the Labor Act, the termination notices of collective redundancy, being different from personal redundancy, will take effect after an additional period of thirty days. The expression of “will take effect” in the relevant article proves that the labor contract does not terminate until the end of thirty days.

The intention is to give an active role to the regional directorate in notifications, and therefore the notices need to be notified to the regional directorate to be effective. In case of a failure to realize this notice, the thirty-day period for validity of termination will not run, and the termination will not have any effect and the termination notices periods will not run. In other words, since the terminations will be effective after the end of thirty days following the notices, the notice period will run from this date. The employer could also terminate the agreements by paying the fees for the notification period. Even if the employer chooses to pay these fees in advance, the termination will be effective and bear consequences at the end of thirty days.

Due to the fact that the termination notices will be effective after the end of thirty days following the notification to the regional employment directorate, the employer should determine the date of termination by adding at least thirty days to the date of notification. The thirty-day period will expire on the thirtieth day after notification. If the notification is not made, the termination will not occur. In other words, the notice periods that must be respected in terminations according to article 17 of Labor Law will not run during the notice period which is made to regional directorate thirty days before and will run after the end of these thirty days.

However, it does not mean that the thirty days in the fifth paragraph will start at the end of the thirty days in the first paragraph. It is necessary to accept that the period in the first paragraph which will run from the notification to relevant authorities and the time of affecting in the fifth paragraph are the same, and it is the thirty-day period which is based on

the moment of notification to the regional directorate. In this regard, in conformity with the legislature's purpose, it is necessary to accept that these two paragraphs are based on the same periods and that there is no second thirty-day period.

For example, if the agreements of 20 workers in a workplace with 50 workers will be terminated on April 1, 2005, the termination must be notified to the regional directorate no later than March 1, 2005. If the employer notifies the situation on February 1, 2005, the notices will be effective thirty days later, on 3 March, 2005. Even the termination date is determined as April 1, 2005. Because of early notification, the termination notices will have effect by March 3, 2005, and the agreements will be assumed to be terminated on this date. In that case, if the date of termination of labor agreements is later than the date of the notification to the regional directorate, it is necessary to accept that the agreement will be terminated on this date.

As seen above, if a notification is sent to the regional directorate thirty or more days before the date of termination by the employer, the agreements will be terminated on the determined date and the date of expiration will be determined by adding the notification period.

Regulation of Consumer Rights in the Electronic Communications Sector*

“Regulation of Consumer Rights in the Electronic Communications Sector” (hereinafter referred to as the “Regulation”), which was prepared based on the “Electronic Communications Law” numbered 5809 and dated 5/11/2008, was published in the Official Gazette of 28 July 2010, numbered 27655. The objective of the regulation is, as demonstrated in its first article, to determine the procedures and principles regarding the protection of consumers that benefit from electronic communications services. The Regulation mainly consists the procedures and principles of subscription agreements signed by the consumers and operators, the rights of consumers using the electronic communications services, and the liabilities of the operators.

It is also indicated in article 25 of the Regulation that the “Regulation of Consumer Rights in the Telecommunications Sector” (hereinafter referred to as the “Former Regulation”) which had been published in the Official Gazette of 22 December 2004 numbered 25678 was abrogated with the Regulation and all the references made to the Former Regulation are deemed to be made to the “Regulation of Consumer Rights in the Electronics Communication Sector”.

The newly adopted Regulation and the Former Regulation are different in many respects.

Whereas the Former Regulation is based on the amended article 7 of “Wireless Law” no. 2813 dated 5 April 1983, the Regulation was prepared based on the “Electronic Communications Law” no. 5809 dated 5 November 2008. As a result, the scope is extended by the Regulation to those “who benefit from the electronic services” while the Former Regulation only includes those “who benefit from the telecommunication services”. That puts computer users within the scope of the Regulation. In line with this extension, there are stipulations about the use of the internet in the Regulation, and internet services operators have liabilities for secure use of the internet. Furthermore, in article 19 with the title “Change of Operator”, there are also stipulations about the internet service operators, and the extension of the scope is supported. However, the stipulations

* *Article of July 2010*

on the services called “Operator Support and Phone Book Service” and “Telephone Message Service” are replaced by “Services with Special Context” in the Regulation which is more general and indicates that the scope of the Regulation is not limited to telephones.

The Regulation specifies the rights and the obligations of consumers and operators in detail, and the operators are held liable for many cases in order to prevent the complaints due to unjust treatment of consumers. The right to demand that personal information exist in public phone books; the right to demand detailed invoices; the right to be informed about changes in charges before they enter into force; the right to cancel services, including services with special context, by SMS, call center, internet, or another similar method; the right to refuse to receive unwanted messages and notifications; and the right to limit their invoices are some of the consumer rights that come with the Regulation. Besides these rights, in order to protect consumers, the operators have responsibilities as to notification and transparency. In this scope, the operators have the obligation to inform the consumers about the dispute resolution methods and the standard agreement clauses without being specifically requested for such information and to ensure easy access to all this information.

The rules concerning the campaigns and the tariff changes are stipulated in more detail in the Regulation than the former one. Pursuant to the Regulation, operators are obliged to inform consumers about campaign conditions, the campaign’s duration, its target group, and similar issues clearly and comprehensibly and in a detailed way by publications and advertisements or similar methods using the media organs or internet sites. Besides, indicating that the rights of consumers will remain acquired rights, the Regulation stipulates that the consumers will be informed before the campaign changes enter into force. The operators are liable for declaring changes in campaign conditions either with the same method that they declared the campaign or in another effective way to inform all the relevant consumers. The Regulation, which brings also to consumers the obligation to respect the campaign conditions, authorizes the “Information Technologies and Communication Institution”(hereinafter referred to as the “Institution”) to determine the procedures and principles about application of the campaign and tariff changes including the number of the campaign, its duration, and conditions.

“Dispute resolution methods” and “limiting and suspending the

services” issues are also regulated in the Regulation while there is no disposition in the Former Regulation. The Regulation, which stipulates that service should be uninterrupted, indicates that the operators can limit or suspend the service in case of force majeure, in case of finding out an unusually high level of use in order to protect the interests of consumers and in case of existence of justified suspicions regarding the existence of illegal or fraudulent activity.

According to the Regulation, the operators are liable for forming a transparent, fast, and easily applicable method for dispute resolution with the consumers. Furthermore, the consumers need to apply to operator for their claims resulting from the services. If no solution can be reached within the dispute resolution method set up by the operator, the consumer can apply to the Institution.

The Regulation also stipulates with details the conclusion and breach of subscription agreements, unfair clauses, and how they will be interpreted. There are detailed articles in the Regulation as to which font size will be used in the agreements and which clauses are compulsory. It is also indicated that the agreements may always be examined by the Institution either on its own or upon a request. The position of the Regulation against unfair clauses is similar to the “Law Concerning the Protection of Consumers”. As a result, according to the Regulation, unfair clauses are invalid, and it is indicated that “interpretation in favor of consumer” is the basic principle in the interpretation of the agreements.

In addition to this, the Regulation has explanations concerning contravention of the good faith principle. According to article 17 with the title of “unfair clauses and interpretation of an agreement”, a clause in a subscription agreement is going to be accepted against the interests of consumer and contrary to the good faith principle if the relevant clause is contrary to the underlying rationale of the legal regulations from which it differs or if the clause limits the rights and the obligations of the consumer to the extent that it jeopardizes the aim of agreement. Furthermore, these clauses will be considered invalid if they have an unusual character according to the conditions and appearance of the contract to the extent that they are so unusual that the consumer cannot be expected to obey them. In addition, in Attachment-1 of the Regulation, some samples for unfair clauses (not limited to those mentioned) are cited.

The Regulation in question gives the right to the consumers to terminate the contract by written notice at any time. The conditions concerning addressing the demand of cancellation of subscription are specified in the Regulation. According to this, the service will be suspended within 24 hours after the delivery of the cancellation demand. That disposition is different from the system of Law Concerning the Protection of Consumers (the “Law”). Because in article 11/A of the Law concerning the cancellation of subscription contracts, the operator has 7 days to suspend the service. In the Regulation, 7 days is the period to notify consumers that service is being suspended. If the service is not suspended in this period, the consumer cannot be held liable. Besides, all the authorized agents to conclude subscription agreements are also authorized to receive the cancellation demands and are liable for initiating the cancellation procedure pursuant to the Regulation. The demands made to these agencies will be deemed to be made to the operator. So, the Regulation aimed to prevent possible representation problems during the cancellation procedure.

INTELLECTUAL PROPERTY LAW

Trademark Decision Criteria*

Decree Law No. 556 on the Protection of Trademarks (hereinafter referred to as the “Decree Law”) aims to protect the trademarks which are registered in accordance with the provisions of the Decree Law. The Decree Law covers the principles, rules, and provisions regarding the protection of trademarks.

Pursuant to Article 5 of the Decree Law, a trademark, provided that it is capable of distinguishing the goods and services of one enterprise from those of another, may consist of all kinds of symbols, such as words including the personal names, figures, letters, numbers and shape of goods or their packaging, which are eligible to be represented graphically or by similar means and eligible to be published and reproduced by printing. The symbols will not be contrary to Article 7 and 8 of the Decree Law.

Article 7 of the Decree Law stipulates the preemptory reasons for refusal, and Article 8 stipulates the relative reasons for refusal. In case of an application to the Turkish Patent Institute (hereinafter referred to as the “TPI”) for the registration of a trademark, the TPI especially considers ex officio whether the application complies with Article 7 of the Decree Law. Pursuant to Article 7:

“The following symbols are not to be registered as trademarks:

- (a) symbols which do not conform with the provisions of Article 5;*
- (b) trademarks, identical or confusingly similar to a trademark which is registered or its application conducted previously for being identical or the same in terms of product or service;*
- (c) trademarks which exclusively and substantially include symbols and names specifying type, nature, quality, number, purpose, value, geographical origin, or indicating manufacturing date of goods and services or indicating other characteristics of goods and services;*

* *Article of February 2010*

(d) trademarks which exclusively and substantially include symbols or names which are under common use in the field of commerce and used to distinguish the members of a specific group of professions, crafts or trades;

(e) symbols, which include the shape of a good originating from its nature, or which are to be used to obtain a technical result, or which give substantial value to the good;

(f) trademarks which are likely to mislead the public as to the quality, characteristic, production site or geographical origin of the good or service;

(g) trademarks which are not permitted for use by the relevant authorities and, accordingly are to be rejected under Article 6 ter of the Paris Convention;

(h) trademarks which include armorial bearings, emblems or marks not covered by Article 6 ter of the Paris Convention, but are historically and culturally in the public interest;

(i) trademarks, which are well-known pursuant to Article 6 bis of the Paris Convention and which are not permitted for use by their proprietor;

(j) trademarks which include religious symbols;

(k) trademarks which are contrary to the public order and general rules of morality.

If a trademark is used before the registration date and therefore, has gained a distinctive feature, then the registration will not be prohibited in accordance with the subparagraphs (a), (c) and (d)."

The TPI, when considering applications within the scope of Article 7 of the Decree Law, also takes into account the "trademark decision criteria", designated for providing the uniqueness of the decisions and to be updated at various time intervals.

The limited content of the trademark decision criteria to be taken into account by the TPI is as follows.

- ***Slogans:***

Slogans will be deemed distinctive if their registration is not prohibited under the provisions of Article 7, if they are not descriptive of the goods or services, if they do not define quality, and if the essential elements of the slogans are not identical or

similar to another trademark. Slogans or phrases which are in daily use by people will not be considered as distinctive.

- ***Non-Latin characters:***

In case of an application including non-Latin characters, the translation of such characters must also be submitted along with the letter of application. In this way, the meaning will be determined, and the application will be assessed accordingly.

- ***Identical or similar phrases along with the figures:***

In case of a trademark application where the trademark includes a word with a figure, the word will be taken into account for the assessment of distinctiveness of the trademark. If the trademark includes a complete trade name with a figure, then the trade name will be taken into account for the assessment of distinctiveness.

- ***Figure similarities:***

In addition to figure similarities, if there is also similarity of goods or services, then the application will be refused in accordance with Article 7/1-(b).

- ***Assessment in accordance with Article 7/1-(d):***

The relevant sector will be taken into account when making an assessment as to the phrase in accordance with Article 7/1-(d). The application will be refused in accordance with article 7/1-(d), if the phrase is related to the goods or services; and the phrase or the name is commonly used by the people in the sector. If a profession's name or a symbol or a name is not related to the goods or services, subject to registration, then the application will not be refused. Applications beneath the dignity of the professions will be refused by taking into account the public order when making an assessment as to the profession names and titles.

- ***Assessment in accordance with Article 7/1-(f):***

If the trademark includes the name of the good or service, then the restriction will not be imposed within the framework of Article 7/1-(f). The applications will be refused for misleading the public as to quality (1) if the goods are dangerous and hazardous; (2) if the trademarks can mislead the public as to the geographical origin; or

(3)if the trademark application is filed with the packaging along with the name of the good, the application will only be refused for the other goods on the list.

- ***Province Names***

The names of the provinces in Turkey cannot be solely registered as trademarks and such trademark applications will be refused in accordance with Article 7/1-(a). However, province names, having different meanings are exceptions to this rule. The applications including a province name along with the name of the good or service or the sector or the trade name will be refused. A trademark, including a distinctive phrase along with a province name, can be registered. In case of an application for a trademark such as “ANKARA CHAMBER OF XXXXXXXX” or “ISTANBUL UNION OF XXXXXXXX”, the trademark will be assessed as a whole.

The application will be refused in accordance with Article 7/1-(c), if the province name is identified with the good or the province name is used for referring to the geographical origin.

- ***Names of the cities and capital cities of the foreign countries:***

Applications for registration of names of the cities and capital cities of the foreign countries as trademarks will be refused if they have a reputation for the goods or services or they evoke the goods or services. The names of countries cannot be registered as trademarks in the name of third persons. If a trademark does not include a distinctive item along with the name of a country which is a party to the Paris convention, then the name of the country will be protected within the scope of Article 7/1-(g).

- ***The phrases of “TÜRKİYE, TÜRK, TURKA, TURCA, TURC”:***

“TÜRKİYE” cannot be solely registered as a trademark nor can it be the essential element of a trademark. However, it can be the secondary element of a trademark. The phrases which mean Türk, Turco, Turca, Turka, Turkish and Türk cannot be solely registered as trademarks, either. However, if they will be distinctive when registered with other phrases, then the applications will not be refused. In such a case, the assessment of the phrases will be made by taking into account the list of goods and services.

- ***The phrase of “Euro”:***

An assessment similar to the above paragraph will be made. However, an application for sole registration of the phrase “euro” will also be refused in accordance with Article 7/1-(g). If a trademark includes another phrase which can be registered as a trademark for the relevant goods and services classification, then the application for such a trademark can be published. The assessment of the phrase will be made by taking into account the list of goods and services.

- ***Turkish Flag and Turkey Map:***

Trademarks including the Turkish flag as an essential or a secondary element can- not be registered, and the applications will be refused in accordance with Article 7/1-(g). The applications filed by organizations which are entitled to use the flag in accordance with the law can be published.

Applications for a trademark including only a map of Turkey as an essential element will be refused. However, applications for trademarks which include the map of Turkey as a secondary element can be published.

- ***Internet domain names:***

Applications for trademarks including internet domain names will be assessed if it does not include characters such as “www” or “com”.

Attachment of a Trademark*

Article 19 of Decree-Law No. 556 pertaining to the Protection of Trademarks (hereinafter referred to as the “Decree-Law No. 556”) and article 21 of Implementing Regulation of Decree-Law No. 556 (hereinafter referred to as the “Implementing Regulation”) regulate attachment of a trademark. Pursuant to these articles, a registered trademark can be attached independently of an enterprise.

The procedure with respect to the attachment and sale of a trademark is not regulated in the Decree-Law No. 556 and the Implementing Regulation, and therefore, the relevant articles of Execution and Bankruptcy Law No. 2004 (hereinafter referred to as the “EBL”) are applicable. Accordingly, the attachment process commences with a request to issue an execution in compliance with article 58 of the EBL. A payment order is sent to the debtor. The creditor can request the attachment of a trademark owned by the debtor upon expiration of the time limit designated in the payment order or upon withdrawal of the objections of the debtor. The execution office, which gives the attachment decision, notifies the Turkish Patent Institute (hereinafter referred to as the “TPI”) of this decision. The TPI records the attachment in the trademark register and publishes the recorded attachment. The execution office obtains a valuation report from an expert, following the creditor’s request for sale of the attached trademark. The sale of the trademark must be in compliance with the provisions with respect to the sale of movables.

Pursuant to article 21 of the Implementing Regulation, attachment of a trademark does not prevent termination of the trademark right because of non-payment of a renewal fee or other fees. In addition, pursuant to the same article, attachment of a trademark does not prevent transfer of the trademark, either. The 11th Chamber of the Supreme Court stated in its decision dated 09.03.2000 with the principle number of 1999/8623 and decision number of 2000/2232 that article 86/1 of the EBL, which requires permission of the creditor and the execution officer to dispose of the attached movables, does not apply in attachment of trademarks. It is also stated in this decision that the aim of the restriction imposed on the disposal of movables is to prevent creditors from suffering damages due to changes of possessor. However, it is stressed that it is not required to

* *Article of August 2010*

impose restrictions with respect to trademark rights which are recorded in the register and which can only be transferred over register. This is because the transferee takes over the trademark as attached, and the attachment will have a binding effect on the transferee. The attachment process will also be continued in this case.

Pursuant to article 22 of the Decree-Law No. 556 and article 23 of the Implementing Regulation, the attachment procedure may also apply to trademark registration applications. The attachment procedure is also to be published in the Bulletin if the application has been published. The attachment of a trademark registration application does not prevent cancellation of the application based on not submitting the necessary documents in a timely fashion.

In addition to the attachment of a trademark, credits arising from the transfer of a trademark or the granting of licenses or undertaking of granting licenses can also be subject to an attachment. In these cases, the attachment procedure will be executed by sending a notification of attachment to the debtor of the proprietor of the trademark.

Regulation on Intellectual Property Rights Common Database*

It is stipulated under additional article 9 of the Law of Intellectual Property Rights numbered 5846 (hereinafter referred to as the “Law”) that a common database will be formed in order to follow-up and protect intellectual property rights to be used in investigations and prosecutions and that the details of this database will be determined in a regulation to be issued.

The “Regulation of Intellectual Property Rights Common Database” (hereinafter referred to as the “Regulation”) prepared by the Ministry of Culture and Tourism pursuant to Law entered into force by being published in the official gazette numbered 27751 on 06.11.2010. The Regulation determines the principles and procedures regarding the formation of a common database, as well as the concept, security and access, sharing and usage of the database.

The information mentioned below will be included in the common database pursuant to article 5 of the Regulation.a) Information with regard to transactions of registration-record, certificate, banderole and producer’s document;

- a) Information with regard to the documents on intellectual property rights prepared by the Ministry;
- b) Information with regard to notifications made in conformity with this section by the employee associations, radio-television institutions, employee associations representing public places and the institutions who copy and record artistic works;
- c) Information with regard to notifications made in conformity with this section by the employee associations, radio-television institutions, employee associations representing public places and the institutions who copy and record artistic works;
- ç) Other information to be determined by the Copyright and Cinema General Directorate (hereinafter referred to as the “General Directorate”) and which is required by the legislation.

* *Article of November 2010*

The information stated in article 5/a and 5/b will be transmitted to the common database by the General Directorate.

Pursuant to article 7 of the Regulation, employee associations must notify the General Directorate about the information on the work, performance, phonogram and production they represent, and their members and ownership of the work, as well as the tariffs and information with regard to common tariffs, within certain periods each year to be transmitted to the common database.

It is stipulated in article 8 of the Regulation that radio and television institutions must notify the General Directorate about the updated information on the work, performance, phonogram and production they use in their broadcast or communication, within certain periods each year to be transmitted to the common database.

Employee associations which are established pursuant to law as public institutions and which represent public places will notify the General Directorate about the updated address and communication info with respect to the places using the work, performance, phonogram and production, within certain periods each year to be transmitted to the common database pursuant to article 9 of the Regulation. The amendments with regard to the determined address and communication info will be notified within one month following the date of the amendment to the General Directorate.

Pursuant to article 10 of the Regulation, recording facilities will notify the General Directorate monthly about the banderole information, the detailed reports indicating which of the works bear affixed banderoles, the introductory information of those who demanded recording. Publishing houses must notify the General Directorate monthly with information on the work that has been copied, the number of issues and the introductory information of those who demanded copying, and this is to be transmitted to the common date base.

The information with regard to transactions of registration-record, certificate, banderole and producer's document which are performed by the Ministry on intellectual property rights must be transmitted to the common database during transactions. The updated information that have been notified pursuant to articles 7, 8, 9 and 10 must be transmitted to the common database in the frame of the procedures to be determined by the General Directorate.

It is essential to keep the commercial life confidential while accessing the common database and using such information.

The institutions and organizations given access authorization by the Ministry may use the common database.

The General Directorate must take the necessary precautions in order to control the users of the common database and control access only to the limited authorized information. All the legal, criminal, administrative and financial liabilities created by using the information will be borne by the party who used such information.

PROCEDURAL LAW

Partial Cases*

In the law of civil procedure, a partial case is suing for a part of a claim and for some reason reserving the other part of the claim for a later date in order to amend the reserved rights without filing a new suit. In this respect, the claimant may demand its reserved rights in the partial case by amendment of its claim in the same case without filing a new lawsuit.

The reason for a partial case is minimizing the expenses of litigation. Perhaps a claimant does not want to undertake the expenses of the whole case in the beginning. By filing the partial case, the claimant can see the progress of the case without initially undertaking a large fee and may form its final claim according to this progress. In this way, the claimant avoid paying high amount of fees and can decide to pay them after being sure about the outcome of the case. In practice, generally, claimants act according to the facts in their partial cases (e.g., according to the conclusion of an expert report) and prefer to amend the claim amount after the expert report.

The right to bring a partial case was authorized by a Constitutional Court Decision on July 20, 1999, with the number of 1999/1 E. and 1999/3 K. and published in the Official Gazette dated 04.11.2000 by annulment of the last sentence of Article 87 of the Code of Civil Procedure which stated “claimant can not increase the statement of a claim by amendment”.

Before this decision, claimants had to, first, file a suit for a part of the claim and then later file a new suit for the other part of their claims and they had to demand the consolidation of the cases. The Constitutional Court, annulled the relevant article in Code of Civil Procedure on the grounds that the fact that the article does not give the right to increase the claim by an amendment, that it force the claimant to file a second lawsuit and it restricted basic human rights and it was against procedural economy, the rule of law, and the freedom to seek a remedy.

* *Article of May 2010*

By the legal arrangement in Article 87, the claimant gained the right to file a partial case and had the chance to increase a claim by amendment.

In partial cases, the competent court is determined according to the value of the claim of the whole case and not to the value of claim in the partial case pursuant to Article 4 of the Code of Civil Procedure. Thus, changing the competent court by dividing the case is prevented. Also, the existence of the right to file an appeal is determined according to the value of the claim of the whole case.

The amendment petition, which is filed by the claimant in a partial case, triggers a new phase in the case, which is provided for by Article 195 et seq. The claim stated in the amendment petition should be considered a new case, and a new defense is to be filed against the amendment petition.

It is not always possible to file a partial case. For example, the Court of Appeal does not permit filing of a partial case in lawsuits concerning moral compensation. It is pointed that the moral compensation shall not be divided since the discretion of judge may not be divided. In another decision, the Court of Appeal stated that it is not possible to file a partial case for default interest. It is also impossible to bring partial cases in adaptation cases concerning changes in conditions and unanticipated situations because, "It is not possible to reserve rights concerning an amount that the judge can determine by intervening in an agreement of the parties."

According to court decisions and doctrine, partial claims do not suspend the limitation period for the remaining part which is not filed with the partial case. The limitation period is only suspended for the claim which is filed in the partial case.

Another advantage of filing a partial case is apparent at the end of the case if the claim is dismissed. The claimant in the partial case will pay the attorneys' fees and court costs, which are calculated according to the value of the partial claim if the case is completely or partially dismissed. Thus, it would not undertake the attorneys' fees and court costs which will be calculated according to the value of whole case.

Proportional Decree and Writ Fee*

General

Fees are the amounts being paid by real-legal persons for their utilization of public services for the sake of their private benefits. Therefore, fees are financial liabilities imposed on persons benefiting from public services. Due to its nature as a financial liability, it may only be imposed in accordance with Article 73/3 of our Constitution. Therefore, Law of Fees No.492 was enacted on July 2nd, 1964. With all its subsequent supplements and amendments, it still remains the general law of fees.

In fact, the services being rendered by the State are free of charge due to their nature as public services. However, by such reasons as rendering public services to the citizens more effectively, preventing unnecessary applications, etc., a number of financial liabilities have been imposed on those benefiting from some of these services. Likewise, persons claiming their rights before courts have also been subjected to a similar financial liability. In other words, those persons are to pay a certain amount of money to the state in the form of fee. This is the so-called Court Fee. However, this does not fully correspond to the state's services in this field. If so, it would lead to the limitation of people's freedom to claim their rights. Besides, it is impossible for the citizens to meet such a financial burden. While Article 1 of the Law of Fees specifies the kinds of the fees, legal fees are specified under Article 1.1. Legal fees are also regulated in detail under the first part of the first section of the Law. In accordance with Article 2 of the Law, "Among the legal proceedings, those listed under tariff no.(1) are subjected to legal fees."

The first clause of this article includes the legal proceedings listed under tariff no.(1) within the scope of legal fees. Therefore, it is impossible to receive any legal fee from a legal proceeding that is not described and identified under tariff no.(1). In accordance with Article 73/3 of our Constitution mentioned above, it may also be out of the question to generate a new fee by analogy.

So as to become effective from the beginning of each calendar year, applicable fixed fees (limits specifying the minimum and maximum amounts of the fixed and proportional fees included) of the previous

* *Article of March 2010*

year are increased by the revaluation rates specified and declared for the respective year.

In consideration of tariff no.(1), numerous party and judge proceedings are also listed. There are fees of various rates and amounts payable for each of the proceedings. What we can conclude from this is that the intention is not to receive a single fee from one lawsuit, but to receive fees of different rates and amounts from different proceedings.

Scope of the review

It is not intended herein to review all the fees applicable under Tariff No.1 of the Law of Fees, but to examine the Constitutional Court Decree No.2009/27 E., 2010/9 K., dated January 14th, 2010 (published in the Official Gazette No.27524, dated March 17th, 2010), taken with regard to the cancellation of the second sentence of Article 28.1(a) of the Law of Fees No.492, dated July 2nd, 1964, saying “Unless the decree and writ fee is paid, the addressee is not served with the respective writ”, due to its contradiction with Articles 2 and 36 of the Constitution.

The rule cancelled by the Constitutional Court

Article 28 of the Law of Fees No.492, which includes the cancelled sentence, is as follows:

“**Article 28** – The proportional fees written under tariff no.(1) are paid at the following times:

a) Decree and Writ Fee,

Decree and Writ fees are payable one-quarter in advance and the remainder within two months as from the date of the respective decree. ***Unless the decree and writ fee is paid, the respective writ is not notified to the addressee.***

b) Execution Collection Fee,

In cases of execution proceedings, the Collection Fee is payable at the time of payment of the respective receivable, and, in cases of non-payment, it is paid no later than 15 days as from the date of the arising of the fee.

The fee arises upon the fulfillment of the respective execution.

The provisions of this clause are also applicable with regard to the Bankruptcy Fees receivable over the value of the case.

c) Fees with regard to down payments, bookkeeping, and inheritance affairs,

Fees with regard to down payments, bookkeeping, and inheritance affairs, written under section (D) of tariff no.(1) are payable no later than 15 days as from the date of completion of the respective proceeding.

Rationale of the applications before the Constitutional Court

In the applications to the Constitutional Court from various first degree courts, it has been set forth that, even though the claimant party wins the respective lawsuit, its receipt of the respective writ and the commencement of execution proceedings are contingent upon the fulfillment of a duty by the counterparty charged via writ. Since the rule in question stipulates that unless the decree and writ fee is paid to the addressee, the writ is not to be delivered the non-delivery of the writ to the prevailing party hinders the claimant party's freedom to claim its right of access to the court. It is therefore claimed that the objected rule contradicts Articles 2, 5, 10, 35, 36, and 90 of the Constitution.

Review by the Constitutional Court

As put forth above, the objected rule is included under Article 28 of the Law of Fees No.492, titled "Time of Payment of Proportional Fees". In the first sentence of Article 28.1(a), it is specified that one-quarter of the decree and writ fees is payable in advance and the remainder is payable no later than two months from the date of the respective decree, and the second sentence states that unless the decree and writ fee is paid, the respective writ is not notified to the addressee.

In Article 37 of the Law, the collection of the fees specified under the Law which are not timely paid, is also stipulated. In accordance with this rule, the decree and writ fees unpaid by their payees within their due term of payment are to be collected in accordance with the respective provisions of the Law on Collection Procedures of Public Receivables No.6183 by the local tax department.

A fee is a monetary amount being received from those utilizing administrative services for those services and is, therefore, a special and

distinct type of tax. Therefore, similar to the other fees, the rule in legal fees is that they are to be paid by the claimant party of a lawsuit, or by the person requesting the fulfillment of the execution subject to the respective fee. However, while resorting to a legal proceeding results in a fee liability forit's the respective applicant, if the applicant prevails, the same liability is charged to the non-prevailing party.

Therefore, in lawsuits subject to proportional fees, in addition to the fees payable at the end of the legal proceedings, the real liability for the respective fees is also ascertained by means of the court decrees.

Assessment of the claims of contradiction with the Constitution

Under Article 2 of the Constitution, a state obedient to the rule of law, mentioned as one of the characteristics of the Republic, is a state that respects human rights; preserves and consolidates such rights and freedoms; acts and proceeds in line with its current law; establishes, maintains, and develops a just order of law; takes the criteria of justice and equity into consideration in its enacted rules; facilitates the attainment of rights; and eliminates any obstacle in the freedom to claim ones' rights.

Under Article 36.1 of the Constitution, "each and every person has the right to claim, and defend his/her rights, and be tried fairly before judicial authorities under the title of either claimant, or defendant, by way of benefiting from respective legitimate means and methods".

While freedom to claim ones' rights is among the guarantees properly benefiting from and preserving the other basic rights and freedoms, it is also the means for strengthening social peace and a way for individuals to seek justice, to acquire their rightful shares, and to avoid inequity.

Freedom to claim ones' rights and the right to be tried fairly, mentioned under Article 36 of the Constitution, not only comprise the right to claim and defend one's rights before the judicial authorities as either claimants or defendants, but also one's right to acquire a rightful share. While paying the respective fee in cash at the time of bringing a lawsuit to a court in the lawsuits subjected to proportional fees, the claimant's non-liability as to the payment of the fee balance, the payment of which is delayed until the finalization of the respective lawsuit due to its nature, is ascertained by means of a court decree. While the delivery of the writ of the respective lawsuit to the claimant is subject to the collection of a fee, the payer of

which is not the claimant, such a circumstance hinders the rights of the individuals to claim their rights.

Thus, the Constitutional Court concluded in deciding to cancel the rule for its contradiction of Articles 2 and 36 of the Constitution.

Conclusion

Upon its respective review, by virtue of its Constitutional Court Decree No.2009/27 E., 2010/9 K., dated January 14th, 2010 (published in the Official Gazette Issue No.27524, dated March 17th, 2010), the Constitutional Court has decided on the deletion of the second sentence of Article 28.1(a) of the Law of Fees No.492, dated July 2nd, 1964, due to its contradiction of Articles 2 and 36 of the Constitution saying, “Unless the decree and writ fee is paid, the addressee is not served with the respective writ.”, In accordance with this decision, claimants will be able to receive writs for the lawsuits they win in order to promptly commence their execution proceedings by sending the writs to the bailiffs’ offices and acquiring their receivables without any need to pay the respective balance proportional decree and writ fees and without waiting for the collection of the fees from the defendant in accordance with the Rules of the Law No.6183.

Judicial Break*

The judicial break, which means “collective use of annual vacations”, corresponds to the period between 1 August and 5 September during which the members of the judiciary suspend working according to article 175 of the Civil Procedure Code (CPC).

The original reason for having a judicial break when it was instituted in the first years of the Republic was to accommodate the need for the harvesting season in what was basically an agrarian society. However, the judicial break is currently being criticized since the circumstances of the society have changed. It is argued that the break also suspends “justice and law.” Furthermore, it is claimed that the overload of work in the courts is related to the judicial break. Accordingly, the break, which used to last for 45 days between 20 July and 5 September, was shortened by 10 days to the period between 1 August and 5 September by the Act numbered 5219 and dated 2005.

However, opposing opinions arguing against this amendment state that the judicial break is not the reason for the overload of work; that it is mandatory for the judges to have a long break considering the nature of the work they perform; and that collective use of vacation is a requirement of the principle of natural justice. As a matter of fact, the previously determined breaks do not have the same effect as a sudden, unexpected break because people will be aware of it and the same judge will be able to review the file upon his or her return. Thus, the principle of natural justice will not be prejudiced.

The judicial break applies to all courts. However, the other procedural codes, and not the CPC, apply to courts other than the civil courts. Criminal Procedure Code Article 423 applies to the judicial break in criminal courts; Council of State Code Article 86-87 applies to the judicial break in the Council of State; Administrative Procedure Code Article 61-62 applies to the judicial break in the administrative courts; High Military Administrative Courts Code Article 85-86 applies to the judicial break in the High Military Administrative Court; Military Court of Appeal Code Article 25 applies to the judicial break in the Military Court of Appeal; Court of Auditors Code Article 101 applies to the judicial break in the

* *Article of June 2010 – Prof. Dr. H. Ercüment Erdem*

Court of Auditors; Conflict Courts Code Article 5/3 applies to the judicial break in the Conflicts Court; and the provisions added to CPC Article 176 by Article 12 of the Code numbered 5236 apply to the judicial break in the courts of appeal.

Leaving aside the discussions on the judicial break, the importance of the judicial break is its effect on lawsuits and time periods. In principle, cases and work are suspended during the judicial break (CPC Art. 81). However, there are exceptions to this rule in Article 176 of the CPC: The following shall be performed and not suspended during the judicial break: Precautionary measures, precautionary attachment and determination of evidence; taking of maritime reports and requirements for an adjudicator and decisions on any objections against these; the discoveries decided to be performed during the judicial break; any type of maintenance cases; guardianship and custody cases; birth record cases; cases arising out of labor contracts; annulment cases arising out of the loss of negotiable instruments; the disputes and cases on which the courts have jurisdiction according to the provisions concerning arbitration; bankruptcy and composition cases; the cases on which the peace courts have jurisdiction; other cases which shall be seen urgently or that can be seen during the judicial break according to the laws; cases to be seen by expedited proceedings; and cases that are deemed to deserve expedited treatment upon the request of one of the parties by the court. However, according to Article 176/2 of the CPC, upon agreement of the parties or upon the request of the present party in case of proceedings conducted in the absence of the other party, the above mentioned cases may be examined after the judicial break.

Cases other than those mentioned above may not be examined during the judicial break. Then, the following question should be answered: Does the ending of periods concerning cases that cannot be examined during the judicial break infringe any rights? Article 177 of the CPC gives the answer to this question. According to this article, if a period ends during the judicial break, this period is to be extended for seven more days following the last date of the judicial break.

TAX LAW

Application for Scrutiny in Relation to Taxes Based on Declaration and the Relevant Lawsuit*

Pursuant to Article 378/2 of the Procedural Tax Law (hereinafter referred to as the “Law”), taxpayers are not entitled to initiate a lawsuit against the declared tax base and the accrued tax over this base. However, the same article further stipulates that the provisions of the Law as to tax mistakes are reserved.

1. SCRUTINY REQUEST

The taxpayers may demand the scrutiny of the mistakes in tax procedures by submitting a written application to the tax office pursuant to the scrutiny request prescribed under Articles 119/5 and 122. If the tax office finds the scrutiny request justified, then they may correct the mistake. If the tax office does not find the request justified, it would notify the situation to the tax payer in written form.

If the tax payer applies for scrutiny after the expiration of the prescription time for initiating a law suit and if their application in this regard is rejected, then the relevant payer would be able to apply to the Ministry of Finance by way of complaint pursuant to Article 124 of the Law.

2. INITIATION OF THE LAW SUIT

- **Directly Initiating a Law Suit**

Pursuant to Article 377/1 of the Law, the taxpayers may initiate a law suit against the taxes accrued in their name. Article 7 of the Administrative Procedural Law states that the prescription time for initiating a law suit before tax offices is 30 days from the date of the notification or the transactions replacing the notification. Thus, the taxpayers have a right to directly initiate

* *Article of November 2010*

a lawsuit before tax courts rather than making a request of scrutiny before the tax offices pursuant to Article 122.

Application for scrutiny of tax mistakes and initiation of lawsuit are rights, which can be used separately.

- **Initiating a Law Suit in case of Rejection of the Scrutiny Request**

First of all, we must state that the application for scrutiny is made before the expiration of the prescription time for initiation a lawsuit, this would suspend the prescription time. Thus, if the application is rejected, then a law suit may be initiated within the residual prescription time period.

On the other hand, as explained above, the tax payers who applied for scrutiny after the expiration of the prescription time, may only make a complaint to the Ministry of Finance pursuant to Article 124 of the Law, if their application for scrutiny is rejected. In such a case, if the Ministry of Finance rejects the above mentioned complaint, the tax payer may initiate a law suit against the rejection decisions of both the tax office and the Ministry of Finance before the Tax Courts within 30 days from the notification of the Ministry of Finance's rejection to himself.

CONCLUSION

In relation to taxes based on declaration, the application rights of the taxpayers pursuant to Article 119/5 and the right of initiating a law suit pursuant to Article 377 must be used in compliance with the above mentioned prescription time limits, in order to avoid any forfeiture of rights.

Suspension of Execution in Tax Procedure Law*

The administration takes actions by using prerogatives conferred to it by law. Thus, there may be unlawful actions of the administration. Consequently, administration's operations related to taxation are subject to review and in the wake of conflicts, it will be question of tax jurisdiction.

Differently from administrative procedure law, in tax procedure law, actions brought because of tax conflicts suspend the execution of the collection of the disputed part of the imposed taxes, fees, duties and other similar financial obligations or increases and penalties concerning these obligations without the need of the tax-payers' request.

Suspension of execution has the character of temporary expedient, so it is only valid in the courts of first instance. If a decision against the tax payer is given, the operation of collection will not be suspended in case of objection before the administrative court. In order for the decision to be suspended, the existence of specific conditions, the request and decision of the claimant shall exist.

The reason of the impossibility of the suspension of the execution just after the bringing of the action before administrative courts is due to the fact that the administration's operations have public interest purpose; and if the operations could be subject to a suspension of execution upon bringing of an action, this would cause interruption of the attainment of the public interest purpose. Suspension of execution in administrative courts, differently from tax courts, will be possible in the case of existence of specific conditions and upon request.

Request of a set of conditions for suspension of execution in tax courts.

The first condition is, naturally, to have brought a tax action. It is impossible to ask for suspension of execution before having brought a tax action.

Excluding the bringing of an action, the most important condition is the possibility of "occurrence of damages which are difficult or impossible to remedy and the express contradiction of the administrative act to the law".

* *Article of January 2010*

In fact, the damage stated here does not correspond to concrete damage; it corresponds to the fact that the claimant suffered damage from an administrative act and that it will be impossible or difficult to indemnify that damage. Nevertheless, in order for a suspension of execution order to be given, this possibility is not enough. As a matter of fact, the administrative act shall also be expressly contrary to law. The situation of contradiction to law shall not be strictly interpreted. Indeed, not only the legislation, but also the equality, justice and equity rules shall be taken into account in their integrity. Courts interpret whether or not there is a possibility of contradiction to law upon a simple analysis of the initial petitions they receive without examining the merits of the case.

Another condition is that, in order for a suspension of execution order to be given, a “ground” shall be given as per Article 27 of the Code of Administrative Procedure (hereinafter referred to as the “CAP”) and Paragraph 5 of Article 125 of the Constitution. The condition of existence or not of the occurrence of damages which are difficult or impossible to remedy and the express contradiction to law of the administrative act shall be established with a valid ground. Decisions without a ground are invalid.

Paragraph 5 of Article 27 of the CAP provides that suspension of execution orders will be given against financial guaranty. The purpose of the financial guarantee is to cover the administration’s damages caused due to a suspension of execution and the non-annulment of the administrative act at the end of the lawsuit. As financial guaranty, money, letters of guarantee issued by banks, treasury bonds and debentures, national stocks and bonds to be determined by the government and moveable and immoveable property provided by the persons concerned or which have been provided by third parties in favor of the persons concerned and which have been seized pursuant to an attachment order by the creditor public administration set forth in the Code of Civil Procedure and in the Law on the Procedure for the Collection of Public Receivables are accepted. Financial guarantee is not requested from the administration or a person who benefits from public legal aid.

Finally, a “situation in which suspension of execution cannot be requested” shall not exist. As examples to these situations, pursuant to Article 125/6 of the Constitution, acts not submitted to judicial review and to which suspension of execution orders may not be given – for instance, the acts of President of the Republic in his own competence, and the decisions of the Supreme Military Council, Decisions of the Council of

States, disciplinary decisions, operations realized by the governor of the state of emergency while using his prerogatives within the scope of the Statutory Decree Numbered 285.

There are exceptions to suspension of execution upon bringing of an action before the tax courts.

As stated in Paragraph 3 of Article 26 of the CAP, in case that the notification cannot be made to the claimant in the address shown by him, the action shall automatically be suspended along with the suspension of execution order, if there is any, until the new address is appraised. If a request to renew the action, with a new address, is not made within a year, the action shall be deemed not to be brought. In the renewed action, the execution is not automatically suspended and collection operations continue. In order for the execution to be suspended, this shall be requested and the Court shall decide in line with the request.

Another exception is the situation of bringing an action against taxes to be levied on the declaration submitted with a reservation. Tax payers may foresee the possibility to recourse to Courts for conflicts by indicating a reservation in their declaration. Nevertheless, in that situation, tax payers may bring an action against their declaration. In case the tax payer brings an action against the levying operation on the basis of the declaration he has submitted with a reservation, the execution will not be automatically suspended. In order for the levying and operations realized on this to be suspended, the existence of the conditions for suspension of execution, the request of the claimant and a Court decision in line with that request are required.

In lawsuits brought by reason of the application of the Law on the Procedure for the Collection of Public Receivables Numbered 6183, the bringing of an action does not automatically suspend the execution. Lawsuits brought against orders of payment, provisional attachment, precautionary accrual and attachment proceedings may be given as examples. In order to suspend the action, the existence of the conditions for suspension of execution, the request of the claimant and a Court decision in line with that request are required.

The fourth exception corresponds to actions arising out of Article 198 of the Customs Law. As per this Article, in case missing and not levied

taxes are determined, notification is made to the tax payer. The tax payer is obliged to pay the tax within 10 days. If the tax payer has an objection, he must first make an objection to the administration. He will bring an action in case his objection is rejected. In that case, neither to object nor to bring an action will suspend the concerned tax execution.

The final exception corresponds to actions brought against imputed value determined by the valuation commission upon the request of the tax payer in accordance with Article 267 of the Tax Procedure Law. The bringing of an action against the imputed value determined by the valuation commission upon the request of the tax payer does not suspend the collection of the tax calculated as per the determined imputed value.

Objection against suspension of execution is possible.

Within 7 days following the notification of the decision related to the suspension of execution, the objection shall be made by one of the parties. The authority to whom the objection is made shall give a decision within 7 days as of the receiving of the objection and this decision is definitive, new objection cannot be made and the decision cannot be subject to judicial review. Authorities to whom objection may be made are stated in Paragraph 6 of Article 27 of the CAP. However, there is neither legal nor constitutional restraint to re-request the suspension of execution or the annulment of the existing one. The Constitutional Court is also in this opinion.

Suspension of execution regime has different functions in appeals and objection phases.

In tax procedure law, by the bringing of an action, the suspension of execution regime is possible upon request in appeals and objection phases and upon decision of the appeal or objection authority.

Furthermore, objection against decision related to the suspension of execution is not possible. Conditions requested for suspension of execution are also valid here.

As also explained before, suspension of execution order is a decision suspending the administrative act until the decision on the merits is given and losing its effects upon the decision on the merits. In other words, the decision on the merits, whether parallel with the suspension of execution order or contrary to it, terminates the suspension of execution order.

Rescission of Time Limitation in Investment Allowance by the Constitutional Court*

Investment allowance is enacted as an incentive of abatement of the 40% income tax which is earned by the depreciable economic funds which are bought or manufactured to be used in operations by tax payers whose agricultural or commercial earnings are detected on balance sheet basis. But this tax rebate was repealed, beginning from 01 January 2006 by the Law No.5479.

It qualified for the investment allowance for income generated in 2006, 2007 and 2008 under Temporary Article No.69 which was added to the Revenue Code for tax payers who made invested but could not benefit from the tax rebate because of the abrogation, as of 01.01.2006, of provisions in Revenue Code concerning tax rebate.

The limitation on the investment allowance to three years meant revoking the anticipated rights of the tax payers, who were making financial feasibilities of their investments relying on the investment allowance because of the late return on their large scale investments and the fact that they did not earn any profit even until 2008.

This situation was against the “Rule of Law” and also “Certainty and Predictability of the Law”, “Respect for the Acquired Rights” with the “Non-retroactivity of the Law”. The new legal arrangement was also contrary to “Equality before the Law” and “Tax Justice”.

The abovementioned provision, which provides for a transition period because of abrogation of investment allowance, was subject to a constitutional objection as consequence of its character revoking the anticipated rights of tax payers and cancellation of Art. 3 of Law no. 5479 and the phrase “only for years 2006, 2007, 2008...” added to Art. 69 of Revenue Code no. 193 was requested. The Constitutional Court, decided to revoke the clause on October 15, 2009 with case no.2006/95 and to entry into force of decision through its publication on the Official Gazette. Consequently, the time limitation for investment allowance is no longer in force.

Even though the decision of cancellation referred to the earlier situation, new difficulties about tax calculations arose with the decision.

* *Mart 2010 tarihli Makale*

In accordance with Article 153/5 of the Constitution, the Constitutional Court's decisions are non-retroactive. But it might be possible that the strict implementation of this rule would cause some contrarities to justice and reason. Because of this fact, an opinion in doctrine and in some of the Supreme Court decisions defend that some of the court decisions may have retroactive effect.

For example, in the cases which have not been the subjects of constitutional challenges, there is no consensus about the enforcement of the Constitutional Court's decision about cancellation. According to the general opinion, the Constitutional Court's decision about cancellation should be enforced and must be retroactive for the pending cases.

The Council of State is also of this opinion according to their settled decisions. For instance, a decision of the Court states that; "If the Constitutional Court's decision about cancellation of a part or total of law or executive order is known, it is contrary to the "Supremacy of the Constitution Rule" and "Rule of Law" to bring the cancelled or unconstitutional law into the action."

Consequently, in case the tax payers who could not benefit from the investment allowance because of the law amendment file a suit (or be able to file a suit) in Tax Court or with the Council of State, with the reserve that the Constitutional Court's decision must be taken into consideration, the tax payers should be able to sue for reimbursement of the over-paid tax payments.

It could also be argued that the retroactivity of the Constitutional Court's decision about cancellation could be a punishment or result in an inequality for the tax payers who did not sue for reimbursement of their over-paid tax payments because they did not want to start a lawsuit against the Government.

If the Council of State's settled opinion in this respect is considered, the tax payers who did not file a lawsuit cannot recover their excess tax payments because of not benefiting from the investment allowance. In this respect, the best resolution that could be offered to those tax payers is using the set off or tax refund proceedings.

HEALTH LAW

The Regulation on Legal Warnings Regarding the Use and Sale of Tobacco Products Was Published*

The Regulation on Legal Warnings with regard to the Use and Sale of Tobacco Products (hereinafter referred to as the “Regulation”) prepared by the Tobacco and Alcohol Market Regulatory Authority, was published in the Official Gazette dated 17 April 2010 and numbered 27555 and entered into force.

The aim of the regulation is to determine the procedures and principles with regard to legal warning signs used to provide for the breathing of clean air, protecting people from the hazards associated with tobacco products, and explaining the risks of such products.

The regulation’s scope is to determine the form and contents of legal warning signs to be displayed at places where the use and sale of tobacco products is prohibited or where they are sold and the health warning signs to be displayed at places where the use of tobacco products is allowed.

The Regulation is based on Article 4/5 of the Code relating to the Protection and Control of Tobacco Products’ Hazards dated 7 November 1996 and numbered 4207 (hereinafter referred to as the “Code dated 4207”).

The form and content of the legal warning signs to be displayed at places where the use and sale of tobacco products is prohibited or where they are sold; and health warning signs to be displayed at places where the use of tobacco products is allowed, are determined by the regulation. The warning signs which are not in compliance with the form and content stipulated in the regulation or which include additional expressions will not be deemed as valid.

Those who do not fulfill the obligation to display legal warning signs and those who do not display the legal warning signs in compliance with

* *Article of April 2010*

the form and content that are determined in the regulation will be punished with a 1.000 TL administrative fine according to Article 5/11 of the Code dated 4207.

The regulation entered into force on 17.04.2010 and will be enforced by the President of Tobacco and Alcohol Market Regulatory Authority.

The Council of State Ruled that the Smoking Ban in Coffee Houses is Unconstitutional and Applied to the Constitutional Court for Annulment of the Legal Provisions Introducing the Interdiction*

The Izmir Chamber of Coffee House Owners' lawsuit for the annulment and stay of execution of the 1st article of the Prime Ministry Circular concerning the application of the provisions of the Prevention and Control of the Consumption of Tobacco Products Law no. 4207, was discussed in the Plenary Session of the Chambers for Administrative Cases and the issue was resolved by the 13th Chamber.

The Chamber of Coffee House Owners had argued that the interdictions in the Act no 4207 violate the freedom of private enterprises and the property right guaranteed by the Constitution, and constitute a violation of the principles of equality, proportionality, and necessity.

The 10th Chamber stated in its judgment numbered 2009/13450 "Taking into consideration the fact that the consumption of tobacco products is a widespread habit and a serious problem for public health, that it also affects the passive smokers, that the children and the youth being together with smoker adults and taking them as models put the next generations in danger; in brief, due to big problems concerning the public health caused by smoking and the environmental effects of tobacco product consumption, taking legal measures for protection against the damages caused by tobacco and tobacco products is an obligation resulting from article 56 of the Constitution and the World Health Organization Framework Convention on Tobacco Control."

Additionally, in the following part of the judgment, the court also states that, "in this context, to protect the public health and to form a healthy environment, in the other business enterprises and also in coffee houses, there is no hesitation that some prohibitions and limitations can be introduced by the legislature against tobacco product consumption. However, it is necessary that the imposed limitations and prohibitions do not obstruct disproportionately the survival of these enterprises and do not subject their liberty of work to some severe requirements. As a matter

* *Article of June 2010*

of fact, the freedom to work and operate a business in security is also guaranteed by the Constitution.”

After stating in this judgment, “As expressed in article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law without infringing upon their essence by respecting the principle of proportionality. Being a requirement of the principle of proportionality, the instrument for the limitation must be convenient for realizing the aim of limitation, and the aim and the instrument shall not be in an unmeasured proportion. With the principle of proportionality, the fundamental rights and freedoms are guaranteed; it aims to ensure a balance between the limited rights and freedoms and to cause the minimum infringement to the rights and freedoms. In other words, the measure must be convenient and necessary and proportional to realize the aim..,” the Court mentioned that article 3/1-d of Act no. 5727 interdicts completely the consumption of tobacco products in coffee houses and that this prohibition restricts the survival of the enterprises (economic freedom) contrary to the principle of proportionality.

In the same judgment, as the consumption of tobacco products is not completely banned, it is emphasized that consumption also concerns personal freedom and while preparing legal regulations to reduce the consumption of tobacco products and the struggle against addiction to protect the public health, it is necessary not to restrict disproportionately personal freedom.

The 10th Chamber stated in its judgment that, “It is necessary to determine the restrictions and the prohibitions on the consumption of tobacco products to protect the public health, respecting the principal of proportionality and considering both the freedom to work of the owners of coffee houses and the personal freedoms of the consumers of tobacco products. As the state is tasked with taking measures to secure the operation of the businesses of enterprises in security and stability according to article 48 of the Constitution,, it is possible to introduce some restrictions, while respecting the principle of proportionality and without infringing the freedom to work and personal freedom, by separating sections of coffee houses into smoking/non smoking areas or by applying the prohibition according to the size of the coffee house or introducing other restrictions. As a result, the phrase ‘coffee house’ found in article 3/1-d of Law no. 5727, ‘In the undertakings which provide the entertainment service as the

restaurants, coffee houses, cafeterias and the beer houses owned by private law persons' which impose an absolute prohibition is found contrary to articles 13, 17 and 18 of the Constitution.” and applied to the Constitutional Court for annulment of the relevant article of Law no. 4207.

The Council of State applied to the Constitutional Court only for the phrase “coffee house” of article 3/1-d of Act no 5727 because the competence of the court for the contention of unconstitutionality is limited by the interest of the complainant. However, as the annulment grounds are also valid for the “*undertakings which provide the entertainment service as the restaurants, cafeterias and the beer houses*”, it will be possible to apply to the Constitutional Court for annulment of article 3/1-d of Act no. 5727 for actions of nullity brought by the owners of these undertakings or relevant associations.

The Regulation on Assisted Reproductive Treatment Applications and Assisted Reproductive Treatment Centers has Entered into Force*

The Regulation on Assisted Reproductive Treatment Applications and Assisted Reproductive Treatment Centers (hereinafter referred to as the “Regulation”) which was drafted by the Ministry of Health was published in the Official Gazette numbered 27513 and put into force on 06.03.2010.

This regulation stipulates the principles of the procedures in order for married couples who have reproductive problems and who are deemed appropriate medically to have a child through the assisted reproductive treatment (hereinafter referred to as the “ART”) and stipulates the procedures and aspects regarding the opening, operation, and auditing of the centers which will provide this treatment.

As this Regulation has been put into force, the regulation on Assisted Reproductive Treatment Applications dated 21.08.1987 has been abrogated.

Remarkable regulations that have been newly put into force are as follows:

Science Commission Shall Be Formed

A science commission will be formed of 20 members headed by the relevant deputy undersecretary of the Ministry.

This commission will render an opinion on the assessment of the yearly working inputs of the ART centers, assessment of the pregnancies and babies resulting from the ART methods in the frame of the health conditions of the mother and the baby, and on other issues that may be raised during the application of the regulation and the standards of the ART methods.

The Centers Which Apply the ART Methods Cannot Be Established Privately

Pursuant to the new Regulation, the centers which apply the ART methods can only be established as units within hospitals which have departments of obstetrics and gynecology, and newborn and adult intensive care units.

* *Article of March 2010*

This unit cannot be established outside the building complex of the hospital. Furthermore, only one center may be established within the hospital. In this manner, applications filed after the enforcement date of the regulation in order to establish centers to be operated privately will not be accepted. Applications which had been filed with district authorities in order to establish private centers as of the enforcement date of the Regulation in accordance with the abrogated Regulation on Assisted Reproductive Treatment Applications dated 21/08/1987, will be evaluated by the Ministry.

The centers which had been licensed or given permission to operate in hospitals and medical centers for the purpose of operating within the scope of the abrogated Regulation and the centers licensed privately operating outside of the hospital and medical centers must comply with the new Regulation.

The Officer of the ART Unit and the ART Laboratory Will Be Employed Full Time/In-House

Pursuant to the Regulation, the managing director, ART Unit officer, ART laboratory officer, urologist, anesthetist, reanimation specialist, nurse, biologist, and other personnel with the qualifications specified in the Regulation will be employed in the centers.

The managing director of the hospital will also be the managing director of the center. The officer of the ART Unit and the ART Laboratory will be employed full time/in house in accordance with the relevant legislation. The urologist, anesthetist, and reanimation specialist can be employed full time or part time in accordance with the relevant legislation.

Recording System Will Be Formed In the Centers for Safekeeping the Data of the Patients

Pursuant to the Regulation, applicants who apply for ART must be married and must proceed by filling out the Informed Consent Form. The application of the patient filed with the center, all the concluded proceedings, samples to be stored, and information with regard to completed procedures will be recorded. In case of the use of electronic recording systems, sufficient and safe back up must be used.

The Relevant Persons Will Be Reported To the Public Prosecutor In Cases Of Violations of the Regulation

Pursuant to the Regulation, it is prohibited to keep, use, transfer, or sell for whatever purpose, the sperm and ova received from the couples participating in ART and the developed embryos other than in accordance with this Regulation. In case of prohibited activity, the activities of these centers and the facilities outside the centers will be suspended by the governor immediately.

Only germ cells belonging to the couples will be used by the couples who are participating in ART.

Pursuant to the Regulation, the donation, the donation for development of an embryo, the implementation of the ovum and sperm received from the applicants and the developed embryos to anyone other than the applicants is prohibited. The implementation of anything received from non-applicants for the applicants is also prohibited.

If a pregnancy should at any time occur as a result of a violation of these prohibitions, the center will be indefinitely closed, the certificates of the relevant persons will be cancelled, and the employment of personnel involved in the violation at ART centers will be prohibited indefinitely.

The governor will suspend the activities of the centers for three months for the first violation and indefinitely in the case of any repetition if it is determined that the centers or their personnel send, direct, or encourage patients or their intermediaries to go to ART centers at home or abroad for medical procedures that violate the Regulation.

The Ministry will cancel the certificates, if any, of persons who are not employed as personnel by the centers and determined to act as intermediaries in this respect.

If it is determined that actions in violation of the regulations have occurred, those who are involved in these activities, including the pregnant woman and the donor will be notified to the public prosecutor.

The Prevention of Multiple Pregnancies is Essential

Pursuant to the new Regulation, the prevention of undesirable multiple pregnancies and multiple pregnancies which create a risk for the health of

the mother and the baby is essential. Therefore, the transfer of embryos will be limited.

Therefore, it will be essential not to implement more than one embryo during the application of ART in the centers. However, only one embryo will be used for patients under 35 years old for the first and second application; two embryos will be implemented for the third and following applications; and a maximum of two embryos will be used for patients over 35 years old.

The applications to these centers will be suspended if it is determined that violations of the regulation have taken place. The first violation will result in a suspension of three months; a suspension of six months will be imposed for the second occurrence.

If there are ongoing violations, the license of the center and the certificate of the ART unit officer will be cancelled.

Centers Will Be Held Responsible For The Patient Follow-Up Until The Time Of The Birth

Pursuant to the Regulation, the centers will be held responsible for following up with patients who become pregnant as a result of the ART application until the time of the birth. In this regards:

a) Centers will ensure that the specialist doctor follows up with the pregnant woman in the hospital, the pregnant woman gives birth and that the centers will provide care unit service to the adult and the newborn.

b) If the woman is domiciled outside of the province of the center, the center will see to it that a specialist doctor follows up with the pregnant woman in the hospital where the woman is domiciled and the pregnant woman gives birth and ensure that the centers provide care unit service to the adult and the newborn.

c) The center will notify the directorate if the patient becomes unrecorded at any stage.

In order to follow up the applications, the centers will send the standard forms determined by the Ministry to the Directorate of Maternal and Child Health and Birth Control every year in January containing the previous year's working input and information with regard to pregnancies.

Furthermore, inputs will be recorded regularly if the Ministry establishes an electronic recording system.

The centers will store the forms and documents that the Regulation deems necessary for at least 30 years, and they will be submitted at the request of the science commission or the Ministry. In addition, the centers will send all kinds of information and documents with regard to the center as requested in electronic form by the Ministry within the stipulated period.

MONTHLY LEGAL DEVELOPMENTS

Important International Agreements

- The Resolution of the Council of Ministers dated 04.12.2009 on the ratification of the “Additional Protocol of the Agreement signed on the Date of 01.04.1986 between the Ministry of Labor and Social Security on behalf of the Republic of Turkey and the Ministry of Labor and Social Security on behalf of the State of Qatar on Organizing of Employment of Workforce” signed on 17.08.2009 in Istanbul was published in the Official Gazette dated 04.12.2009 and numbered 27481.
- The Resolution of the Council of Ministers dated 25.12.2009 on the Ratification of the “Agreement Pertaining to the Preservation, Acquisition and Return of Cultural, Archeological, Artistic and Historical Works which are Illegally Traded, Exported or Exchanged” that is Signed between the Republic of Turkey and the Republic of Peru signed on 06.02.2003 in Vienna was published in the Official Gazette dated 02.02.2010 and numbered 27481.
- The Resolution of the Council of Ministers dated 04.12.2009 on the Ratification of Number TUR-40 “Sale of Logistic Support for Stinger Weapon System Agreement” between the Ministry of National Defense of the Republic of Turkey and NATO Maintenance and Logistics Agency was published in the Official Gazette dated 02.02.2010 and numbered 27481.
- The Resolution of the Council of Ministers dated 05.02.2010 on the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Lebanon on Mutual Lifting of Visa Requirements signed on 11.01.2010 in Ankara was published in the Official Gazette dated 10.02.2010 and numbered 27489.
- The Resolution of the Council of Ministers dated 21.01.2010 on the Approval of the Ratification of the Agreement between the Republic of Turkey and Georgia on the Prevention of Double

Taxation Pertaining to the Taxes Levied on Income and of Tax Evasion, and of the Protocol Attached Thereto signed in Tbilisi on 21.11.2007 was published in the Official Gazette dated 10.02.2010 and numbered 27489.

- The Resolution of the Council of Ministers dated 04.01.2010 on the Ratification of the “Cooperation Agreement in the Field of Health” between the Government of the Republic of Turkey and the Government of the Kuwait State signed in Kuwait on 12.02.2008 was published in the Official Gazette dated 10.02.2010 and numbered 27489.
- The Resolution of the Council of Ministers dated 21.01.2010 on the Ratification of the “Economic Cooperation Agreement” that was signed between the Government of the Republic of Turkey and the Government of the Republic of Serbia on 26.10.2009 in Belgrade was published in the Official Gazette dated 13.02.2010 and numbered 27492.
- The Resolution of the Council of Ministers dated 01.01.2010 on the Ratification of the “Agreement on Reciprocal Promotion and Protection of Investments signed between the Government of Turkey and the Government of Singapore” signed on 19.02.2008 in Singapore was published in the Official Gazette dated 19.02.2010 and numbered 27498.
- The Resolution of the Council of Ministers dated 21.01.2010 on the Ratification of the Agreement on the Share of Third Parties’ Costs signed between the Government of Turkey (the Donor) and the United Nations Development Program (UNDP)” signed on 16.07.2009 was published in the Official Gazette dated 24.02.2010 and numbered 27503.
- The Resolution of the Council of Ministers dated 21.01.2010 on the Ratification of the “Memorandum of Understanding on Mutual Lifting of Visa Requirements between the Government of the Republic of Turkey and the Great Socialist People’s Libyan Arab Jamahiriya” signed on 25.11.2009 in Tripoli was published in the Official Gazette dated 24.02.2010 and numbered 27503.
- The Resolution of the Council of Ministers dated 01.03.2010 on the Ratification of the “Memorandum of Understanding on Cooperation

and Help in the Field of Transportation between the Ministry of Transportation of the Republic of Turkey and the Ministry of Public Works and Transportation of the Turkish Republic of Northern Cyprus” signed on 23.10.2009 in Nicosia was published in the Official Gazette dated 11.03.2010 and numbered 27518.

- The Resolution of the Council of Ministers dated 01.03.2010 on the Ratification of the “Economic Cooperation Agreement between the Government of the Republic of Turkey and the Government of Montenegro” signed on 11.12.2009, in Podgorica was published in the Official Gazette dated 13.03.2010 and numbered 27520.
- The Resolution of the Council of Ministers dated 01.03.2010 on the Ratification of the “Agreement between the Republic of Turkey and Republic of Yemen on the Prevention of Double Taxation Pertaining to the Taxes Levied on Income” signed on 26.10.2005, in Sana was published in the Official Gazette dated 13.03.2010 and numbered 27520.
- The Resolution of the Council of Ministers dated 01.03.2010 on the Ratification of the “Agreement on Mutual Lifting of Visa Requirements between the Government of the Turkish Republic and the Government of the Hashemite Kingdom of Jordan” signed on 01.12.2009, in Amman was published in the Official Gazette dated 13.03.2010 and numbered 27520.
- It has been resolved by the Council of Ministers to ratify the “Agreement between the Government of the Republic of Turkey and the Government of the Sultanate of Oman on the Prevention of Double Taxation Pertaining to the Taxes Levied on Income and of Tax Evasion” and the “Protocol” signed on 31.05. 2006, in Ankara. The Resolution of the Council of Ministers was published in the Official Gazette dated 13.03.2010 and numbered 275120.
- It has been resolved by the Council of Ministers to adhere to the “Protocol Amending the International Convention dated 1976 on Limitation of Liability for Marine Claims” with reservations on 05.02.2010. The Resolution of the Council of Ministers was published in the Official Gazette dated 13.03. 2010 and numbered 27520.

- The Resolution of the Council of Ministers dated 11.03.2010 on the participation in the “United Nations Convention on Contracts for the International Sale of Goods” on 11.03.2010. The resolution of the Council of Ministers was published in the Official Gazette dated 07.04.2010 and numbered 27545.
- The Resolution of the Council of Ministers dated 24.02.2010 on the Ratification of the “Agreement on Labor Force Exchange between the Republic of Turkey and the Government of Kuwait” signed in Ankara on 30.03.2008. The resolution of the Council of Ministers was published in the Official Gazette dated 08.04.2010 and numbered 27545.
- The Resolution of the Council of Ministers dated 22.03.2010 on the Ratification of the “Memorandum of Understanding Related to the Cooperation Agreement in the Field of Health Between the Ministry of Health of the Republic of Turkey and the Ministry of Health of the Sultanate of Oman” signed in the Sultanate of Oman on 24.12.2005 was published in the Official Gazette dated 10.04.2010 and numbered 27548.
- The Resolution of the Council of Ministers dated 22.03.2010 on the Ratification of the “Culture Agreement Application Program for the Years 2010-2011-2012 Between the Government of the Turkish Republic and the Syrian Arab Republic” signed in Damascus on 23.12.2009, was published in the Official Gazette dated 24.04.2010 and numbered 27561.
- It was resolved by the Council of Ministers on 29.03.2010 to enter into force the Agreement Related to the Credit in the Amount of USD 500.000.000 signed between the Republic of Turkey and the Turkish Republic of Northern Cyprus. The Agreement was published in the Official Gazette dated 30.04.2010 and numbered 27567.
- The Resolution of the Council of Ministers dated 18.04.2010 on the Ratification of the “Scientific and Technological Cooperation Agreement that was signed between the Government of the Republic of Turkey and the Government of the Arab Republic of Syria” in Damascus on 23.12.2009 was published in the Official Gazette dated 02.05.2010 and numbered 27569.

- The Resolution of the Council of Ministers dated 29.03.2010 on the ratification of the “Protocol on Training, Supervision, Coast Guard Command would Provide to the Units of the Coast Guard Command of the Turkish Republic of Northern Cyprus as well as on Cooperation in the Fields of Operation and Intelligence” signed in the Turkish Republic of Northern Cyprus on 11.01.2010 was published in the Official Gazette dated 02.05.2010 and numbered 27569.
- The Resolution of the Council of Ministers dated 16.04.2010 on the Ratification of the “Protocol between the Ministry of Justice of the Republic of Turkey and the Ministry of Justice of the Republic of Bulgaria on Cooperation” signed in Ankara on 24.05.2006 was published in the Official Gazette dated 06.05.2010 and numbered 27573.
- The Resolution of the Council of Ministers dated 30.04.2010 on the Ratification of the “Legal Assistance Agreement between the Government of the Republic of Turkey and the Government of the Sultanate of Oman on Legal, Commercial and Penal Subjects” signed in Ankara on 06.06.2008 was published in the Official Gazette dated 22.05.2010 and numbered 27588.
- The Resolution of the Council of Ministers dated 15.04.2010 on the Approval of the Ratification of the Agreement between the Republic of Austria, the Republic of Bulgaria, the Republic of Hungary, Rumania and the Republic of Turkey on the Nabucco Project *via* the Law dated 04.03.2010 and numbered 5956 was published in the Official Gazette dated 04.06.2010 and numbered 27601.
- The Resolution of the Council of Ministers dated 07.05.2010 for the Ratification of the “Agreement on the Mutual Lifting of Visa Requirements for the Holders of Service and Private Passports” that was Signed Between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania signed in Ankara on 18.02.2010 was published in the Official Gazette dated 02.07.2010 and numbered 27629.
- The Resolution of the Council of Ministers dated 01.06.2010 on the Ratification of the “Cooperation Agreement of Law Enforcement Units Between the Government of the Republic of Turkey and the

Council of Ministers of Ukraine” signed in Kiev on 04.12.2009 was published in the Official Gazette dated 03.07.2010 and numbered 27630.

- The Resolution of the Council of Ministers dated 01.06.2010 on the Ratification by Law dated 16.03.2010 and numbered 5968 of the “Protocol on Cooperation Between the Ministry of Justice of the Republic of Turkey and the Ministry of Justice of the Kingdom of Morocco” signed in Rabat on 23.01.2006 was published in the Official Gazette dated 03.07.2010 and numbered 27630.
- The Resolution of the Council of Ministers dated 13.05.2010 on the Ratification by Law dated 16.03.2010 and numbered 5967 of the “Agreement on Mutual Promotion and Protection of Investments Between the Republic of Turkey and the Kingdom of Thailand” signed on 24.06.2010 in Ankara was published in the Official Gazette dated 03.07.2010 and numbered 27630.
- The Resolution of the Council of Ministers dated 07.05.2010 on the Ratification of the “Free Trade Agreement” that was Signed between the Republic of Turkey and the Republic of Serbia signed in Istanbul on 01.06.2009 was published in the Official Gazette dated 03.07.2010 and numbered 27630.
- The Resolution of the Council of Ministers dated 07.05.2010 on the Ratification by Law dated 16.03.2010 and numbered 5874 of the “Framework Contract related to the Establishment of a Free Commerce Zone between the Republic of Turkey and MERCOSUR” signed on 30.06.2008 in San Miguel was published in the Official Gazette dated 03.07.2010 and numbered 27630.
- The Resolution of the Council of Ministers dated 07.05.2010 on the Ratification of the Agreement Pertaining to the Joint Efforts for Optimal Power Production in Turkey to Meet the Maximum Demand for Energy, which was Made by Exchanging Notes between the Republic of the Government of Turkey and the Government of Japan was published in the Official Gazette dated 04.07.2010 and numbered 27631.
- The Resolution of the Council of Ministers dated 21.06.2010 on the Ratification by law dated 16.03.2010 and numbered 5970 of the “Agreement between the Government of the Republic of Turkey

and the Government of the Arab Republic of Syria on Scientific and Technical Cooperation in the Field of Forestry and Forestry Research” that was signed in Ankara on 04.12.2008 was published in the Official Gazette dated 03.08.2010 and numbered 27661.

- The Resolution of the Council of Ministers dated 21.06.2010 on the Ratification by law dated 16.03.2010 and numbered 5965 of the “International Highway Transportation Agreement between the Government of the Republic of Turkey and the Government of the Kingdom of Bahrain” that was signed in Ankara on 02.05.2006 was published in the Official Gazette dated 03.08.2010 and numbered 27661.
- The Resolution of the Council of Ministers dated 19.07.2010 on the Ratification of Turkey’s “Accession to the International Immigration Organization” was published in the Official Gazette dated 10.08.2010 and numbered 27668.
- The Resolution of the Council of Ministers dated 12.07.2010 on the “Approval of the Ratification of the Agreement between the Republic of Turkey and Ireland on the Prevention of Double Taxation Pertaining to the Taxes Levied on Income and of Tax Evasion, and of the Protocol Attached Thereto” that was signed in Dublin on 24.10.2008 was published in the Official Gazette dated 10.08.2010 and numbered 27668.
- The Resolution of the Council of Ministers dated 12.07.2010 on the Ratification of the “Cultural Cooperation Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal” that was signed in Ankara on 19.02.2008 was published in the Official Gazette dated 10.08.2010 and numbered 27668.
- The Resolution of the Council of Ministers dated 19.07.2010 on the Ratification of the “Culture Agreement between the Government of the Republic of Turkey and the Government of Kyrgyz Republic” that was signed in Ankara on 11.08.2008 was published in the Official Gazette dated 15.08.2010 and numbered 27673.
- The Resolution of the Council of Ministers dated 27.07.2010 on the Ratification by law dated 09.06.2010 and numbered 5991 of the “Protocol Amending the Free Trade Agreement Between Bosnia

Herzegovina and the Republic of Turkey” was published in the Official Gazette dated 24.08.2010 and numbered 27682

- The Resolution of the Council of Ministers dated 19.07.2010 on the Ratification of the “Agreement between the Ministry of Health of the Government of the Republic of Turkey and the Ankara Embassy of the Macedonian Republic Pertaining to Making Contributions in the Field of Health” signed in Ankara on 26.05.2010 was published in the Official Gazette dated 01.09.2010 and numbered 27689.
- The Resolution of the Council of Ministers dated 27.07.2010 on the Ratification of the “Agreement between the Ministry of Health of the Government of the Republic of Turkey and the Ankara Embassy of Ukraine Pertaining to Making Contributions in the Field of Health” signed in Ankara on 13.05.2010 was published in the Official Gazette dated 02.09.2010 and numbered 27690.
- The Resolution of the Council of Ministers dated 04.08.2010 on the Ratification of the “Agreement of Cooperation in the Field of Health between the Ministry of Health of the Government of the Republic of Turkey and the Ministry of Health of the Government of the United States of Mexico” signed in Geneva on 18.05.2010 was published in the Official Gazette dated 04.09.2010 and numbered 27692.
- The Resolution of the Council of Ministers dated 13.09.2010 on the Ratification by law dated 14.07.2010 and numbered 6006 of the “Documents Pertaining to the Amendment of the Main Agreement of International Monetary Fund” was published in the Official Gazette dated 01.10.2010 and numbered 27716.
- The Resolution of the Council of Ministers dated 13.09.2010 on the Ratification by law dated 02.04.2009 and numbered 5866 of the “Unification of Certain Rules Related to International Carriage by Air” that was signed in Montreal on 28.05.1999 was published in the Official Gazette dated 01.10.2010 and numbered 27716.
- The Resolution of the Council of Ministers dated 27.08.2010 on the Ratification by law dated 15.07.2010 and numbered 6007 of the “Agreement on Cooperation for Building and Operation of a Nuclear Power Plant on the Akkuyu Site between the Government of the Republic of Turkey and the Government of the Russian

Federation” signed in Ankara on 12.05.2010 was published in the Official Gazette dated 06.10.2010 and numbered 27721.

- The Resolution of the Council of Ministers dated 13.09.2010 on the Ratification of the “Memorandum of Understanding Pertaining to the Sale and Shipping of Natural Gas between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Industry and Energy of the Republic of Azerbaijan” signed in Istanbul on 07.06.2010 was published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The Resolution of the Council of Ministers dated 18.08.2010 on the Ratification by law dated 08.06.2010 and numbered 5988 of the “Amendment of the Main Statute of the International Building and Development Bank” was published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The Law on the Approval of the Ratification of the “Technical and Economic Cooperation Agreement between the Government of the Republic of Turkey and the Government of the Arab Republic of Syria”, that was signed on 15.05.2009 in Damascus, was published in the Official Gazette dated 11.11.2010 and numbered 27756.
- The Law on the Approval of the Ratification of the “Legal Cooperation Agreement between the Republic of Turkey and the Arab Republic of Syria, in Legal and Commercial Matters”, that was signed on 09.04.2009 in Damascus was published in the Official Gazette dated 11.11.2010 and numbered 27756.
- The Resolution of the Council of Ministers dated 14.11.2010 pertaining to the putting into force of the Loan Agreement Regarding “South East European Energy Community Program” and the Annexed Letter that was made with the International Bank for Reconstruction and Development was published in the Official Gazette dated 14.11.2010 and numbered 27759.
- The Resolution of the Council of Ministers dated 06.12.2010 on the Ratification by Law dated 20.10.2010 and numbered 6019 of the annexed “Agreement between the United Nations Population Fund and the Government of the Republic of Turkey, Pertaining to the Setting-Up of a United Nations Population Fund Regional Office for Eastern Europe and Central Asia in Turkey” that was signed

in New York on 01.07.2010 was published in the Official Gazette dated 10.12.2010 and numbered 27781.

- The Resolution of the Council of Ministers dated 10.12.2010 on the Ratification of the annexed “Memorandum of Understanding Between the Republic of Turkey Represented by the Ministry of National Defence (TUR MOD) and the NATO Consultation, Command, and Control Organisation (NC3O) Represented by the NATO Consultation, Command, and Control Agency (NC3A) for the Continuation of a National Expert Office at NC3A” that was signed on 25.06.2010 was published in the Official Gazette dated 12.12.2010 and numbered 27783.

Important Council of Ministers Resolutions

- The Resolution of the Council of Ministers dated 04.01.2010 on the entering into force of the Regulation on the Amendment of the Regulation Pertaining to the Investigations of Money Laundering Crimes entered into force by being published in the Official Gazette dated 05.02.2010 and numbered 27484.
- It was resolved by the Council of Ministers on 01.03.2010 to put into force the Decision related to the extension of six months of the short period of employment within the scope of the principles stated in the provisional Article 8 of the Unemployment Insurance Law numbered 4447. The Resolution of the Council of Ministers was published in the Official Gazette dated 11.03.2010 and numbered 27518.
- The Council of Ministers resolved on the “Amendment of the Resolution on the Procedures and Principles Pertaining to Support which the Treasury would Provide to the Credit Guarantee Institutions” on 10.05.2010. The Resolution of the Council of Ministers was published in the Official Gazette dated 13.05.2010 and numbered 27580.
- The “Resolution of the Council of Ministers Pertaining to Importation Quotas and Tariff Allotment Administration” dated 14.04.2010 was published in the Official Gazette dated 02.06.2010 and numbered 27599.
- The Resolution of the Council of Ministers Pertaining to Resetting of the Lump-Sum Charges that are Mentioned in Annex Tariff 6 of Law 492 on Charges, which is Titled “I. Passport Charges” dated 07.06.2010 was published in the Official Gazette dated 20.06.2010 and numbered 27617.
- The Council of Ministers approved the entry into force of “the Regulation on the Amendment of the Stock Exchange Markets Foundation and Operating Procedures” *via* its resolution dated 08.07.2010. This resolution entered into force on the publication date.
- The Council of Ministers approved on 07.07.2010 the entry into force of the “Decision on the Amendment of the Resolution

Pertaining to the Application of Some Articles of the Customs Law 4458”. The decision of the Council of Ministers was published in the Official Gazette dated 13.07.2010 and numbered 27640.

- The Council of Ministers approved on 07.06.2010 the entry into force of the “Decision on the Private Consumption Tax applied to the Goods set forth in Scale (B) of the List Numbered (I) attached to the Private Consumption Tax Law Numbered 4760”. The decision of the Council of Ministers was published in the Official Gazette dated 25.07.2010 and numbered 27652.
- The Council of Ministers resolution of 19.07.2010 on the “Amendment of the Resolution Pertaining to Clean Export Credits and to Tax Due and Charge Exemption Certificates” entered into force by being published in the Official Gazette dated 05.08.2010 and numbered 27663.
- The Resolution of Council of Ministers dated 27.07.2010 on the Importation Regime Annex to Decree dated 20.12.1995 and numbered 95/7606 was published in the Official Gazette dated 15.08.2010 and numbered 27673. The dates for entry into force are determined differently for the different articles.
- The Council of Ministers approved on 27.08.2010 the entry into force of the “Supplementary Resolution on Importation Regime” and the resolution entered into force by being published in the Official Gazette dated 19.09.2010 and numbered 27704.
- The Council of Ministers approved on 18.08.2010 the entry into force of the “Supplementary Resolution on Importation Regime” and the resolution entered into force by being published in the Official Gazette dated 30.09.2010 and numbered 27715.
- The Council of Ministers approved on 13.09.2010 the entry into force of the “Principles on the Amendment of the Principles Pertaining to the Tenders that would be Called by the Ministry of Internal Affairs under Subparagraph “b” of the 3rd Article of the Public Tenders Law 4737” and the resolution was published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The Council of Ministers approved on 27.08.2010 the entry into force of the “Implementation of Tariffs Quota for the Importation

of Some Agricultural Products” and the resolution was published in the Official Gazette dated 06.10.2010 and numbered 27721.

- The Council of Ministers approved on 08.10.2010 the entry into force of the “Approval of the Medium Term Program (2011-2013) prepared by the Undersecretariat of State Planning Organization” and the resolution was published in the Official Gazette dated 10.10.2010 and numbered 27725.
- The Council of Ministers approved on 12.10.2010 the entry into force of the “Year 2011 Program” and the “Implementation, Coordination, and Monitoring of the 2011 Program” submitted by the report dated 11.10.2010 and numbered 2010/29 of the State Planning Organization, and the resolution was published in the Official Gazette dated 17.10.2010 and numbered 27732.
- The Council of Ministers approved on 12.10.2010 the entry into force of the “Resetting of the Rates that Apply to Late Payment of Public Debts”, and the resolution was published in the Official Gazette dated 19.10.2010 and numbered 27734.
- The Council of Ministers approved the entry into force of the “Year 2011 General Investment and Financing Program of the Public Enterprises and their Associated Companies”, and the resolution was published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The Council of Ministers approved the entry into force of the “Resolution on the Deduction of Resource Usage Support Fund”, and the resolution entered into force by being published in the Official Gazette dated 28.10.2010 and numbered 27743.
- The Council of Ministers approved the entry into force of the “Resolution on the re-designation of the Tax Rates concerning the (A) Scale of the List No. (III) annexed to the Private Consumption Tax Law and of the Minimum Fixed Tax Rates”, and the resolution entered into force by being published in the Official Gazette dated 28.10.2010 and numbered 27743.
- The Council of Ministers approved the entry into force of the “Annex Resolution to the Resolution on the Importation Regime”,

and the resolution entered into force by being published the Official Gazette dated 28.10.2010 and numbered 27743.

- The Council of Ministers approved on 25.10.2010 the entry into force of the “Amendment of the Export Regime Resolution”, and the resolution was published in the Official Gazette dated 02.11.2010 and numbered 27747.
- The Council of Ministers approved on 27.09.2010 the entry into force of the “Resolution On Permitting the Transfer of the Immovable Properties on which the Private Üsküdar American High School, Private Izmir American High School and Private Tarsus American High School, which had been Founded By American Board Committee, Education and Health Foundation” and the resolution was published in the Official Gazette dated 02.11.2010 and numbered 27747.
- The Council of Ministers approved on 12.10.2010 the entry into force of the “Resolution Pertaining to the Extension of the Deadline for Restructuring of the Public Banks and for the Selling of Shares”, and the resolution was published in the Official Gazette dated 06.11.2010 and numbered 27751.
- The Council of Ministers approved on 27.09.2010 the entry into force of the “Principles Pertaining to the Tenders that would be Called by the General Directorate of Social Assistance and Solidarity under Subparagraph “f” of the 3rd Article of the Public Tenders Law 4734”, and the resolution was published in the Official Gazette dated 07.11.2010 and numbered 27752.
- The Council of Ministers approved on 25.10.2010 the entry into force of the “Amendment of the Domestic Processing Regime”, and the resolution was published in the Official Gazette dated 13.11.2010 and numbered 27758.
- The Council of Ministers approved on 06.12.2010 the entry into force of the “Resolution on the Amendment of the Resolution Pertaining to State Aid in Investments”, and the resolution was published in the Official Gazette dated 29.12.2010 and numbered 27800.

Important Changes and Developments in Laws

- The Law Amending the Free Zones Law was published in the Official Gazette dated 22.01.2010 and numbered 27470. This Law has amended the Amended Article 7 of the Free Zones Law dated 06.06.1985 and numbered 3218 relating to Free Zone revenues and expenditures. The Law will enter into force three months after its date of publication.
- The Law approving the Technical, Scientific, and Economic Cooperation Agreement in the Cultivated Area between the Government of the Turkish Republic and the Government of Kuwait entered into force by being published in the Official Gazette dated 29.01.2010 and numbered 27477.
- Some amendments have been made to the Procedure Law on Collection of Public Claims dated 21.07.1943 and numbered 6183 *via* the Law Amending the Procedure Law on Collection of Public Claims and Some Other Laws published in the Official Gazette dated 05.02.2010 and numbered 27484. Article 2 of this Law entered into force on 21.12.2009, while Articles 7, 10 and 11 entered into force on 01.01.2010 and other provisions entered into force on the publication date.
- The Law numbered 5952 on the Organization and Duties of the Undersecretariat of Public Order and Security which aims to develop politics and strategies related to the prevention of terrorism entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Law numbered 5955 on the Amendment of the Law Pertaining to Referendum on Legislation Amending Constitution amending the expression “as of the 120th day” stated in Article 2 of the Law on the Law Pertaining to the Referendum on Legislation Amending the Constitution as “as of the 60th day” and the expression “as per article 94 of the Law, 40 days in the Referendum for citizens who are abroad” stated in the second sentence of the first paragraph of article 6 of the same Law as “as per the Law, 20 days as of the Referendum for citizens who are abroad” entered into force by being published in the Official Gazette dated 09.03.2010 and numbered 27516.

- The Law numbered 5954 on the Approval of the Ratification of the Free Trade Agreement between the Republic of Turkey and the Republic of Serbia entered into force by being published in the Official Gazette dated 09.03.2010 and numbered 27516.
- The Law numbered 5953 on the Amendment of the Law Pertaining to the Creation and Utilization of Lots and of Some Law entered into force by being published in the Official Gazette dated 09.03.2010 and numbered 27516.
- The Law on the Ratification of the Agreement related to the Nabucco Project between the Republic of Austria, the Republic of Bulgaria, the Republic of Hungary, Romania and the Republic of Turkey entered into force by being published in the Official Gazette dated 11.03.2010 and numbered 27518.
- The Biosafety Law which provides for the supervision procedures and principles as well as the establishment and application of the biosafety system entered into force by being published in the Official Gazette dated 26.03.2010 and numbered 27533.
- The Law Amending both the Law on the Basic Provisions of Election and the Electoral Register and the Law on the Election of Deputies entered into force by being published in the Official Gazette dated 10.04.2010 and numbered 27548.
- The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey entered into force by being published in the Official Gazette dated 13.05.2010 and numbered 27580. This law will be approved in case it will be submitted to referendum.
- The Law on Veterinary Services, Plant Health, Food and Animal Feed was published in the Official Gazette dated 13.06.2010 and numbered 27610. Article 46 of this Law entered into force on 01.04.2010. As for the first Paragraph of Article 31, Article 33, the 2nd and 3rd Paragraphs of Article 46 and the 4th Paragraph of the 1st Provisional Article of this Law, they entered into force on the publication date. All other Articles will enter into force six months after the publication date.
- The Law on the Amendment of the Cooperatives Law and Some Laws and Legislative Decrees was published in the Official Gazette

dated 13.06.2010 and numbered 27610. The first three articles of the said Law entered into force on the publication date. As for the other articles, they will enter into force six months after the publication date.

- The “Law on the Approval of the Ratification of the Amendment of the Free Trade Agreement between the Republic of Turkey and the Republic of Bosnia Herzegovina” signed in Sarajevo on 14.05.2009 entered into force by being published in the Official Gazette dated 13.06.2010 and numbered 27610.
- The “Law on the Approval of the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Korea Pertaining to Economic Development Cooperation Fund Credits” signed in Ankara on 10.04.2003 entered into force by being published in the Official Gazette dated 13.06.2010 and numbered 27619.
- The “Law on the Approval of the Ratification of the Nakhjevan Agreement Pertaining to the Foundation of a Cooperation Council of Turkish Speaking Countries” signed on 03.10.2009 entered into force by being published in the Official Gazette dated 13.06.2010 and numbered 27610.
- The Law on the Approval of the Ratification of Asia Pacific Space Cooperation Organization (APSCO) Convention signed on 01.06.2006 on behalf of the Republic of Turkey entered into force by being published in the Official Gazette dated 13.06.2010 and numbered 27610.
- The “Law on the Approval of the Ratification of the Agreement between the Republic of Turkey and Ireland on the Prevention of Double Taxation Pertaining to the Taxes Levied on Income and Capital Gains, and of Tax Evasion as well as of the Protocol Attached” signed in Dublin on 24.10.2008 entered into force by being published in the Official Gazette dated 13.06.2010 and numbered 27610.
- The Law on the Amendment of the Municipal Law entered into force by being published in the Official Gazette dated 24.06.2010 and numbered 27621.

- The Law on the Amendment of the Mining Law and Some Laws entered into force by being published in the Official Gazette dated 24.06.2010 and numbered 27621.
- The Law on the Amendment of the Expropriation Law entered into force by being published in the Official Gazette dated 30.06.2010 and numbered 27627.
- The Law on the Approval of the Ratification of the Strategic Partnership Agreement between the Republic of Turkey and the Republic of Kazakhstan was published in the Official Gazette dated 04.07.2010 and numbered 27631.
- The Law on the Foundation and Duties of the Ministry of Foreign Affairs which regulates the principles related to the foundation, duties, and powers of the Ministry of Foreign Affairs entered into force by being published in the Official Gazette dated 13.07.2010 and numbered 27640.
- The Law on the Amendment of the Law on Fighting Terror and some Laws entered into force by being published in the Official Gazette dated 25.07.2010 and numbered 27652.
- The Law Amending the Highway Traffic Law dated 13.10.1983 and numbered 2918 entered into force by being published in the Official Gazette dated 31.07.2010 and numbered 27658.
- “The Law 6009 dated 23.07.2010 on the Amendment of the Income Tax Law and on Some Laws and Legislative Decrees” was published in the Official Gazette dated 01.08.2010 and numbered 27659. The dates for entry into force are determined differently for the different articles.
- “Law 6015 Pertaining to the Following up and Auditing of State Supports” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Law on the Supreme Council of Judges and Public Prosecutors” entered into force by being published in the Official Gazette dated 18.12.2010 and numbered 27789.
- The “Law on the Amendment of the Turkish Penal Code” entered

into force by being published in the Official Gazette dated 19.12.2010 and numbered 27790.

- The “Law on the Court of Accounts” entered into force by being published in the Official Gazette dated 19.12.2010 and numbered 27790.

Important Changes and Developments in Regulations

- The Regulation on the Amendment of the Regulation Pertaining to the Appropriation of Publicly Owned Immovable Property for Tourism Investments entered into force by being published in the Official Gazette dated 07.01.2010 and numbered 27455.
- The Regulation on the Auditing of Bank Information Systems and Banking Processes by Independent Auditing Establishments stating the procedures and principles for the auditing of bank information systems and banking processes by independent auditing establishments entered into force by being published in the Official Gazette dated 13.01.2010 and numbered 27461. Nevertheless, this Regulation will be effective as of 01.01.2011.
- The Regulation on the Amendment of the Regulation on the Implementation of the Law Pertaining to the Work Permits of Foreigners entered into force by being published in the Official Gazette dated 21.01.2010 and numbered 27469. This Regulation clarifies subjects such as professional competence and application procedures (documents to be used, application period, etc.).
- The Regulation on General Directorate of Security's Personnel to be Temporarily Assigned for the Protection of Foreign Representatives which states the procedure and principles governing the selection, education, assignment, function, prerogatives, responsibilities, discipline, and record operations of the General Directorate of Security's personnel to be temporarily assigned to the staff of the Ministry of Foreign Affairs as protection officers for foreign representatives entered into force by being published in the Official Gazette dated 27.01.2010 and numbered 27475.
- The Regulation Pertaining to the Transition Regarding the Performance of Electronic Communication Services regulating the principles and procedures related to the necessary transitions in order to permit the operators to establish and use all kinds of electronic communication networks, infrastructure, or support equipment needed for the service in the performance of electronic communication services entered into force by being published in the Official Gazette dated 03.02.2010 and numbered 27482.

- The Resolution of the Council of Ministers dated 04.01.2010 on the entering into force of the Amendment of the Regulation Pertaining to Declaration of Property entered into force by being published in the Official Gazette dated 05.02.2010 and numbered 27484.
- The Regulation on the Amendment of the Regulation on Radio and Television High Council Cable Broadcast Licenses and Permits entered into force by being published in the Official Gazette dated 24.02.2010 and numbered 27503.
- The Regulation on the Amendment of the Regulation on Permits and Licenses to be Obtained pursuant to the Law on Environment entered into force by being published in the Official Gazette dated 24.02.2010 and numbered 27503.
- The Regulation on the Amendment of the Implementation Regulation of the Purchase of Consultancy Services Tenders entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Regulation on the Amendment of the Implementation Regulation of the Purchase of Service Tenders entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Regulation on the Amendment of the Implementation Regulation of Construction Works Tenders entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Regulation on the Amendment of the Regulation on the Foundation and the Duties of the Assembly of Exporters of Turkey as well as the Union of Exporters published in the Official Gazette dated 03.09.2009 and numbered 27338 entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Regulation on the Amendment of the Press and Announcements Agency Regulation published in the Official Gazette dated 12.12.1997 and numbered 23198 entered into force by being published in the Official Gazette dated 05.03.2010 and numbered 27512.

- The Regulation on the Amendment of the Regulation Pertaining to the Definition of Services of the Turkish Radio-Television Corporation and on the personnel that would be assigned to such Services published in the Official Gazette dated 24.09.2008 and numbered 27007 entered into force by being published in the Official Gazette dated 05.03.2010 and numbered 27512.
- An additional Article has been added to the Organ and Tissue Transplantation Services Regulation published in the Official Gazette dated 01.06.2000 and nubmered 24066 (“Organ and Tissue Regulation”) *via* the the Regulation on the Amendment of the Organ and Tissue Transplantation Services Regulation (“Regulation”). This Regulation entered into force by being published in the Official Gazette dated 05.03.2010 and numbered 27512.
- Controllers Regulation of the General Directorate of Protection of Consumers and Competition of the Ministry of Industry and Commerce which provides for the recruitment, the competences, functions, powers and responsibilities and the working procedures and principles of controllers who work in the General Directorate of the Protection of Consumers and Competition of the Ministry of Industry and Commerce entered into force by being published in the Official Gazette dated 06.03.2010 and numbered 27513.
- The Regulation Pertaining to Fertility Treatment Applications and Fertility Treatment Centers (“Regulation”) entered into force by being published in the Official Gazette dated 06.03.2010 and numbered 27513. This Regulation abrogated the Regulation Pertaining to Fertility Treatment Centers published in the Official Gazette dated 21.08.1987 and numbered 19551.
- The Revenue Auditors Regulation of the Presidency of the Revenue Administration which provides for the recruitment, placement to the function of associates of revenue auditors, proficiency exams, and the procedure and principle for being assigned to the function of associate of revenue auditors entered into force by being published in the Official Gazette dated 07.03.2010 and numbered 27514.
- The Regulation on the Amendment of the Heavy and Dangerous Jobs Regulation published in the Official Gazette dated 16.06.2004

and numbered 25494 entered into force by being published in the Official Gazette dated 07.03.2010 and numbered 27514.

- The Nursery Regulation which provides the powers and responsibilities of nurses who work in institutions or organizations offering health services in accordance with their working areas, positions, and education situations entered into force by being published in the Official Gazette dated 08.03.2010 and numbered 27515.
- The Regulation on the Amendment of the Regulation Pertaining to the Risk Transaction of the Customers of the Banks and the Other Financial Establishments published in the Official Gazette dated 20.09.2007 and numbered 26649 entered into force by being published in the Official Gazette dated 11.03.2010 and numbered 27518.
- The Regulation on the Amendment of the Telegraph Services Regulation published in the Official Gazette dated 30.07.2009 and numbered 27304 entered into force by being published in the Official Gazette dated 12.03.2010 and numbered 27519.
- The Regulation on the Amendment of the Customs Regulation entered into force by being published in the Official Gazette dated 31.03.2010 and numbered 27537.
- The Regulation on the Amendment of Postal Stamp Vendors Regulation entered into force by being published in the Official Gazette dated 02.04.2010 and numbered 27540.
- The Regulation on the Amendment of the Implementation Regulation of Construction Works Tenders entered into force by being published in the Official Gazette dated 02.04.2010 and numbered 27540.
- The Regulation Pertaining to the Implementation of the Turkish Citizenship Law entered into force by being published in the Official Gazette dated 06.04.2010 and numbered 27544.
- The Regulation Amending the Regulation on the Procedures and Principles of Production Method, Tag-Out, and Control of Tobacco Products for Protection against Damage by Tobacco Products

entered into force by being published in the Official Gazette dated 08.04.2010 and numbered 27546.

- The Regulation on the Amendment of the Regulation on Work Placement Services within Turkey entered into force by being published in the Official Gazette dated 10.04.2010 and numbered 27548.
- The Regulation on Legal Warnings Concerning the Consumption and Sale of Tobacco Products entered into force by being published in the Official Gazette dated 17.04.2010 and numbered 27555.
- The Regulation Amending the Application Regulation on Free Zones entered into force by being published in the Official Gazette dated 22.04.2010 and numbered 27560.
- The Regulation Amending the Regulation on Permissions and Licenses that have to be obtained as per the Environment Law entered into force by being published in the Official Gazette dated 25.04.2010 and numbered 27562.
- The Regulation on the Amendment of the Highways Traffic Regulation entered into force by being published in the Official Gazette dated 01.05.2010 and numbered 27568.
- The Regulation on the Amendment of the National Education Council Regulation which amends the 2nd point of Subparagraph (c) of the 1st Paragraph of Article 7 and repeals the point 10 of the Subparagraph (b) of the same article of the National Education Council Regulation published in the Official Gazette dated 08.09.1995 and numbered 22398 entered into force by being published in the Official Gazette dated 04.05.2010 and numbered 27571.
- An addition was made to the Subparagraph (b) of the 1st Paragraph of Article 7 of the Turkish Food Pharmacopoeia Regulation published in the Repeated Official Gazette dated 16.11.1997 and numbered 23172 by the Regulation on the Amendment of Turkish Food Pharmacopoeia Regulation which was published in the Official Gazetted dated 05.05.2010 and numbered 27572. This Regulation entered into force at the publication date.

- The Subparagraph (c) of the first Paragraph of Article 30 of the Highways Traffic Regulation published in the Repeated Official Gazette dated 18.07.1997 and numbered 23053 was amended by the Regulation on the Amendment of the Highways Traffic Regulation which was published in the Official Gazette dated 07.05.2010 and numbered 27574. This Regulation entered into force as of 01.05.2010.
- The Regulation on the Amendment of the Insurance Experts Regulation entered into force by being published in the Official Gazette dated 08.05.2010 and numbered 27575.
- The Regulation on the Amendment of the Application Regulation of Settlement Law was published in the Official Gazette dated 08.05.2010 and numbered 27575. This Regulation entered into force as of 02.12.2007.
- The Social Security Procedures Regulation which aims to regulate the principles and procedures related to both rights and obligations and social security procedures brought by the Social Security and General Health Insurance Law dated 31.05.2006 and numbered 5510 entered into force by being published in the Official Gazette dated 12.05.2010 and numbered 27579.
- The Regulation on the Amendment of the Organ and Tissue Transplantation Services Regulation amends Article 16 of the Organ and Tissue Transplantation Services Regulation published in the Official Gazette dated 01.06.2000 and numbered 24066. This Regulation entered into force by being published in the Official Gazette dated 12.05.2010 and numbered 27579.
- The Regulation on the Repeal of the Regulation Pertaining to Achieve Services of the Ministry of Finance entered into force by being published in the Official Gazette dated 14.05.2010 and numbered 27581.
- The Regulation Pertaining to Making the Safety Assessment National and Foreign Air Vessels (SHY – SAFA) which aims to determine the procedures and principles related to ramp controls of national and foreign vessels in order to permit a flight secure standard in a high level in the Turkish air space entered into force

by being published in the Official Gazette dated 14.05.2010 and numbered 27581.

- The Regulation on the Exchange of Real Estates in Archaeological Sites with Real Estates Belonging to the Treasury repealing the Regulation on the Exchange of Real Estates Situated in Archaeological Sites Where There Are Cultural and Natural Properties to Which a Definitive Prohibition of Construction Was Brought Because they Need to be Protected with Real Estates Belonging to the Treasury published in the Official Gazette dated 08.02.1990 and numbered 20427 entered into force by being published in the Official Gazette dated 22.05.2010 and numbered 27588.
- The Regulation on the Amendment of Private Hospitals Regulation entered into force by being published in the Official Gazette dated 24.05.2010 and numbered 27590.
- The Family Practice Application Regulation which repeals the Family Practice Pilot Scheme Application Regulation published in the Official Gazette dated 06.07.2005 and numbered 25867 and which aims the increase of the quality of health entered into force by being published in the Official Gazette dated 25.05.2010 and numbered 27591.
- The Regulation on the Amendment of Seamen Regulation entered into force by being published in the Official Gazette dated 28.05.2010 and numbered 27594.
- The Regulation on the Amendment of the Regulation on the Internal Systems of Banks was published in the Official Gazette dated 01.06.2010 and numbered 27598. The 3rd Article of this Regulation will enter into force on 01.05.2010. As for the other Articles, they entered into force on the publication date.
- The Regulation on the Amendment of the Regulation on Private Retirement Homes and the Old Aged Person Care Centers entered into force by being published into force on 02.06.2010 and numbered 27599.
- The Defense Industry Safety Regulation entered into force by being published in the Official Gazette dated 04.06.2010 and numbered 27601.

- The Regulation on the Assessment and Management of Environmental Noise entered into force by being published in the Official Gazette dated 04.06.2010 and numbered 27601.
- The Type Approval Regulation Pertaining to the Reusability, Recyclability and Recoverability of Motor Vehicles (2005/64/AT) entered into force by being published in the Official Gazette dated 04.06.2010 and numbered 27601.
- The Regulation on the Amendment of the Regulation Pertaining to the Principles on the Establishment and Operation of Stock Markets that are Organized outside Exchange Markets entered into force by being published in the Official Gazette dated 05.06.2010 and numbered 27602.
- The Shipbuilding Regulation entered into force by being published in the Official Gazette dated 05.06.2010 and numbered 27602.
- The Regulation on the Amendment of the Regulation on the Submission of Documents to be Taken as Basis in the Exportation of Dual-Use Nuclear Goods entered into force by being published in the Official Gazette dated 08.06.2010 and numbered 27605.
- The Regulation on the Amendment of the Packaging and Labeling of Medicinal Products for Human Use was published in the Official Gazette dated 10.06.2010 and numbered 27607. This Regulation entered into force on 01.06.2010.
- The Regulation on the Amendment of the Regulation Pertaining to the Principles of Establishment and Operation of Futures and Options Markets entered into force by being published in the Official Gazette dated 15.06.2010 and numbered 27612.
- The Regulation on the Amendment of the General Regulation on the Foundation and the Operating Principles of the Precious Minerals Exchange Market entered into force by being published in the Official Gazette dated 15.06.2010 and numbered 27612.
- The Regulation on the Amendment of the Istanbul Gold Exchange Regulation entered into force by being published in the Official Gazette dated 17.06.2010 and numbered 27614.
- The Regulation on the Amendment of the Advertisement Regulation of the Turkish Radio-Television Corporation entered into force

by being published in the Official Gazette dated 18.06.2010 and numbered 27615.

- The Regulation on Dialysis Centers entered into force by being published in the Official Gazette dated 18.06.2010 and numbered 27615.
- The Regulation on the Amendment of Movable Properties Regulation entered into force by being published in the Official Gazette dated 19.06.2010 and numbered 27616.
- The Regulation on the Amendment of Private Education Services Regulation entered into force by being published in the Official Gazette dated 22.06.2010 and numbered 27619.
- The Regulation on the Amendment of the Regulation on the Determination of the Athletes to be Prepared for the Olympic Games 2010, Determination of Allowance and Provision of Food, Quarters, and Travel Expenses entered into force by being published in the Official Gazette dated 23.06.2010 and numbered 27620.
- The Regulation on the Amendment of the Regulation on Pharmacy and Pharmaceutical Services entered into force by being published in the Official Gazette dated 23.06.2010 and numbered 27620.
- The Regulation on the Amendment of the Practice Regulation of Construction Project Bids entered into force by being published in the Official Gazette dated 26.06.2010 and numbered 27623.
- The Regulation on the Amendment of the Regulation on Energy Performance in Buildings entered into force by being published in the Official Gazette dated 30.06.2010 and numbered 27627.
- The Regulation on the Amendment of the Regulation on the Implementation and Principles of the Law Pertaining to the Prevention of Violations of Possession of Immovable Properties which was published in the Official Gazette dated 31.07.1985 and numbered 18828 entered into force by being published in the Official Gazette dated 02.07.2010 and numbered 27629.
- The Regulation on the Amendment of the Customs Regulation which was published in the repeated Official Gazette dated 07.10.2009 and numbered 27369 entered into force by being published in the Official Gazette dated 02.07.2010 and numbered 27629.

- The Regulation on the Amendment of the Regulation Pertaining to the Centers that Manufacture and/or Implement Custom Made Ortho-Denture and that Sell and Implement Hearing Aids which was published in the Official Gazette dated 03.12.2008 and numbered 27073 entered into force by being published in the Official Gazette dated 10.07.2010 and numbered 27637.
- The Regulation on the Amendment of the Regulation Pertaining to the Procedures and Principles on the Mode of Production, Labeling and Supervision of Tobacco Products for Protection Against Their Hazards which was published in the Official Gazette dated 06.01.2005 and numbered 25692 entered into force by being published in the Official Gazette dated 10.07.2010 and numbered 27637.
- The Regulation Pertaining to the Procedures and Principles on the Production, Processing, and Domestic and Foreign Trade of Tobacco entered into force by being published in the Official Gazette dated 10.07.2010 and numbered 27637.
- The Regulation on the Amendment of the General Regulation on the Foundation and the Operation Principles of the Precious Minerals Exchange Market which was published in the Official Gazette dated 03.04.1993 and numbered 21541 entered into force by being published in the Official Gazette dated 10.07.2010 and numbered 27637.
- The Regulation Pertaining to Providing Loans to Small Industrial Zones entered into force by being published in the Official Gazette dated 14.07.2010 and numbered 27641.
- The Regulation on the Establishment and Operation Procedures and Principles of the National Red Meat Council entered into force by being published in the Official Gazette dated 15.07.2010 and numbered 27642.
- The Regulation on the Amendment of the Regulation on Measuring and Assessment of Liquidity Adequacy of the Banks which was published in the Official Gazette dated 01.11.2006 and numbered 26333 entered into force by being published in the Official Gazette dated 16.07.2010 and numbered 27643.

- The Regulation on the Amendment of the Regulation Pertaining to the Applications that would be Made with Regard to Tenders which was published in the Official Gazette dated 03.01.2009 and numbered 27099 entered into force by being published in the Official Gazette dated 17.07.2010 and numbered 27644.
- The Regulation Pertaining to the Measures that Need to be Taken for the Protection of the Environment and Public Health against the Negative Effects of Non-ionizing Radiation entered into force by being published in the Official Gazette dated 24.07.2010 and numbered 27651.
- The Regulation on Consumer Rights in the Electronic Communications Sector was published in the Official Gazette dated 28.07.2010 and numbered 27655. This Regulation, with the exception of certain articles, entered into force on its publication date. As for the excluded articles, they will enter into force three months after the publication date.
- The Regulation on Radiation Safety Controls and Sanctions entered into force by being published in the Official Gazette dated 31.07.2010 and numbered 27658.
- “The Regulation Pertaining to Setting the Rules Regarding the Nominal Filling Quantity Prepackaged Products (2007/45/AT)” was published in the Official Gazette dated 03.08.2010 and numbered 27662. The dates for entry into force are determined differently for the different products in scope of the regulation.
- “The Regulation on the Amendment of the Regulation Pertaining to the Private Health Establishments that Diagnose and Treat Outpatients” entered into force by being published in the Official Gazette dated 03.08.2010 and numbered 27661.
- “The Regulation on the Amendment of the Identification Sharing System Regulation” entered into force by being published in the Official Gazette dated 05.08.2010 and numbered 27663.
- “The Regulation on the Amendment of the Building Inspection Practices Regulation” entered into force by being published in the Official Gazette dated 07.08.2010 and numbered 27665.

- “The Regulation on the Amendment of the Istanbul Stock Exchange Developing Enterprises Market Regulation”, “The Regulation on the Amendment of the Istanbul Stock Exchange Stock Market Regulation”, “The Regulation on the Amendment of the Istanbul Stock Exchange Quotation Regulation” and “The Regulation on the Amendment of the Istanbul Stock Exchange Regulation Debentures and Bonds Market Regulation” entered into force by being published in the Official Gazette dated 12.08.2010 and numbered 27670.
- “The Regulation on the Amendment of the Implementation Regulation of Free Zones” entered into force by being published in the Official Gazette dated 12.08.2010 and numbered 27670.
- “The Regulation Pertaining to Genetically Modified Organisms and Products” was published in the Official Gazette dated 13.08.2010 and numbered 27671. The aim of the regulation is to regulate and take under control the production and consumption of GMO products. The date of entry into force of the regulation is 26.09.2010. An annulment action has been filed with the Council of State concerning the Regulation.
- “The Regulation on the Amendment of the Foundations Regulation” entered into force by being published in the Official Gazette dated 14.08.2010 and numbered 27672.
- “The Regulation Pertaining to the Control of Big Industrial Accidents” was published in the Official Gazette dated 18.08.2010 and numbered 27676. Different dates of entry into force are determined for different articles of the Regulation.
- “The Regulation Pertaining to the Principles and Application of Organic Agriculture” was published in the Official Gazette dated 18.08.2010 and numbered 27676. Different dates of entry into force are determined for different articles of the Regulation.
- “The Purchasing and Tenders Regulation of the General Directorate of Mechanical and Chemical Industry Cooperation” entered into force by being published in the Official Gazette dated 19.08.2010 and numbered 27677.

- “The Regulation on the Amendment of the Regulation Pertaining to the Restrictions Regarding the Production, Marketing, and Use of Some Hazardous Substances, Preparations, and Goods” was published in the Official Gazette dated 29.08.2010 and numbered 27687. The date of entry into force of Regulation is 31.12.2010.
- “The Regulation on the Amendment of the Prohibition of Advertisement Regulation of the Turkish Bar Association” entered into force by being published in the Official Gazette dated 07.09.2010 and numbered 27695.
- “The Regulation on the Amendment of the Advocates’ Law Regulation of the Union of Turkish Bar Associations” entered into force by being published in the Official Gazette dated 07.09.2010 and numbered 27695. With this Regulation, subparagraph (h) of paragraph 3 of article 73/A is abrogated.
- “The Regulation on Service Quality in the Electronic Communications Sector” was published in the Official Gazette dated 12.09.2010 and numbered 27697. The Regulation will enter into force six months after its publication.
- “The Regulation on the Amendment of Private Hospitals’ Regulation” entered into force by being published in the Official Gazette dated 22.09.2010 and numbered 27707.
- “The Regulation on the Amendment of the Regulation Pertaining to the Private Health Establishments that Diagnose and Treat Outpatients” entered into force by being published in the Official Gazette dated 25.09.2010 and numbered 27710.
- “The Regulation on the Amendment of Airport Ground Services Handling Regulation” entered into force by being published in the Official Gazette dated 28.09.2010 and numbered 27713.
- The “Regulation on the Amendment of the Istanbul Stock Exchange Quotation Regulation” entered into force by being published in the Official Gazette dated 01.10.2010 and numbered 27716.
- The “Regulation on the Amendment of the Istanbul Stock Exchange Developing Enterprises Market Regulation” entered into force by being published in the Official Gazette dated 01.10.2010 and numbered 27716.

- The “Regulation Pertaining to the Acquisition of Immovable Properties and of Limited Real Rights by Foreign Capital Companies” entered into force by being published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The “Regulation Pertaining to the Environmentally Conscious Designing of Energy Products” entered into force by being published in the Official Gazette dated 07.10.2010 and numbered 27722.
- The “Regulation on the Amendment of the Regulation on the Bank Transactions that are Subject to Permission and on Indirect Share Participation by the Banks” entered into force by being published in the Official Gazette 08.10.2010 and numbered 27723.
- The “Regulation on the Amendment of the Satellite Broadcasting License and Permission Regulation of Turkish Radio-Television Supreme Council” entered into force by being published in the Official Gazette dated 16.10.2010 and numbered 27731.
- The “Regulation on the Amendment of the Regulation on the Procedures and Principles Regarding the Domestic and Foreign Trade of Alcohol and Alcoholic Beverages” entered into force by being published in the Official Gazette dated 21.10.2010 and numbered 27736.
- The “Regulation on the Amendment of the Ship Building Regulation” entered into force by being published in the Official Gazette dated 21.10.2010 and numbered 27736.
- The “Regulation on the Amendment of the Regulation Pertaining to the Investigation of Maritime Accidents” entered into force by being published in the Official Gazette dated 21.10.2010 and numbered 27736.
- The “Regulation on the Amendment of the Regulation Pertaining to the Procedures and Principles Pertaining to the Stamp Tax” entered into force by being published in the Official Gazette dated 01.11.2010 and numbered 27746.
- The “Regulation on the Amendment of the Regulation Pertaining to the Principles on the Foundation, Activities, Operations and

Auditing of the Central Registration Establishment” entered into force by being published in the Official Gazette dated 02.11.2010 and numbered 27747.

- The “Regulation on the Amendment of the Regulation Pertaining to the Foundation and Duties of the Turkish Radio-Television Corporation”, entered into force by being published in the Official Gazette dated 03.11.2010 and numbered 27748.
- The “Regulation on the Procedures and Principles Pertaining to the Production and Trade of Tobacco Products” entered into force by being published in the Official Gazette dated 04.11.2010 and numbered 27749.
- The “Regulation on the Joint Database for Intellectual Property Rights” entered into force by being published in the Official Gazette dated 06.11.2010 and numbered 27751.
- The “Implementation Regulation for Mining Activities” entered into force by being published in the Official Gazette dated 06.11.2010 and numbered 27751.
- The “Internet Domain Names Regulation” was published in the Official Gazette dated 07.11.2010 and numbered 27752. The dates for entry into force are determined differently for the articles.
- The “Regulation Pertaining to Insuring and Auditing of the Ships that are Associated with Marine Claims” was published in the Official Gazette dated 14.11.2010 and numbered 27759. This Regulation will enter into force on 01.07.2011.
- The “Regulation on the Amendment of the Customs Regulation” entered into force by being published in the Official Gazette dated 02.12.2010 and numbered 27773.
- The “Regulation on the Amendment of the Regulation Pertaining to the Use of the Domestic Trading Services Development Share” was published in the Official Gazette dated 10.12.2010 and numbered 27781. This Regulation will enter into force on 01.01.2011.
- The “Regulation on the Amendment of the Exchange Markets Procedures Regulation” entered into force by being published in the Official Gazette dated 11.12.2010 and numbered 27782.

- The “Regulation on the Amendment of the Natural Gas Market Tariffs Regulation” entered into force by being published in the Official Gazette dated 16.12.2010 and numbered 27787.
- The “Regulation on the Amendment of the Tender Application Regulation” entered into force by being published in the Official Gazette dated 16.12.2010 and numbered 27787, and entered into force by being published.
- The “Regulation on the Amendment of the Tender Service Procurement Implementation Regulation” was published in the Official Gazette dated 16.12.2010 and numbered 27787. The dates for entry into force are determined differently for the different articles.
- The “Regulation on the Amendment of the National Market Implementation on Oil Market Regulation” entered into force by being published in the Official Gazette dated 17.12.2010 and numbered 27788, and entered into force by being published.
- The “Regulation on the Amendment of the Regulation Pertaining to the Petroleum Market Information System” entered into force by being published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “Regulation on the Amendment of the Electricity Market Customer Services Regulation” entered into force published in the Official Gazette dated 29.12.2010 and numbered 27800, and entered into force by being published.
- The “Regulation Pertaining to the Procedures and Principles to be Followed for Tax Examinations” was published in the Official Gazette dated 31.12.2010 and numbered 27802. This Communiqué will enter into force on 01.01.2011.
- The “Regulation on the Amendment Customs Regulation” entered into force by being published in the Official Gazette dated 31.12.2010 and numbered 27802.

Important Changes and Developments in Communiqués

- As per the Central Bank of the Turkish Republic's Communiqué on International Bank Account Numbers published in the Official Gazette dated 10.10.2008 and numbered 27020, the use of the IBAN by both the consigner and the receiver has been made obligatory.
- The Communiqué on the Amendment of the Communiqué Pertaining to Supporting the Producers that Give up Tobacco Production and Raise Alternative Products (N. 2010/3) entered into force by being published in the Official Gazette dated 17.02.2010 and numbered 27496.
- The Communiqué on the Amendment of the General Communiqué of Customs (Generalised System of Preferences) (Series No. 4) was published in the Official Gazette dated 26.02.2010 and numbered 27505.
- The Communiqué Amending the Communiqué on the Procedures and Principles Regarding the Reserves that would be Set Aside by the Leasing, Factoring, and Finance Companies for the Amounts Due to Them was published in the Official Gazette dated 09.04.2010 and numbered 27547. This Communiqué entered into force as being valid as of 01.03.2010.
- The Communiqué on the Principles Pertaining to the Recording and Sale of Shares by the Board (Series: I, N.:40) entered into force by being published in the Official Gazette dated 03.04.2010 and numbered 27541.
- The Communiqué Pertaining to Updating the Monetary Limits for Purchases of Goods and Services for Building Survey, Restoration, Restitution Projects, Street Improvement, and Environmental Arrangement Projects as well as for the Implementation, Assessment, Preservation, Transportation, and Excavation Works of Those Projects (Communiqué No. 2010/1) was published in the Official Gazette dated 03.04.2010 and numbered 27541. This Communiqué entered into force as being valid as of 01.02.2010.
- The Communiqué Amending the Communiqué on the Principles on the Rating Activities in the Capital Market and the Rating

Associations (Series: VIII, N.: 68) entered into force by being published in the Official Gazette dated 15.04.2010 and numbered 27553.

- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No. 2010/11) entered into force by being published in the Official Gazette dated 02.05.2010 and numbered 27569.
- The Communiqué Pertaining to Organization and Assessment of Fairs at Abroad (Communiqué No. 2010/5) entered into force by being published in the Official Gazette dated 07.05.2010 and numbered 27574.
- The Communiqué on the Amendment of the Communiqué Pertaining to the Principles Regarding Merger Procedures (Series: I, N.: 41) entered into force by being published in the Official Gazette dated 08.05.2010 and numbered 27575.
- The Communiqué on the Procedures and Principles Pertaining to Sending of the Reports about the Absence of the Insured Personnel who were on Sick entered into force by being published in the Official Gazette dated 12.05.2010 and numbered 27579.
- The Communiqué on the Amendment of the Communiqué Pertaining to the Maximum Interest Rates that would Apply to Credit Card Transactions (Number.2010/6) entered into force by being published in the Official Gazette dated 16.06.2010 and numbered 27613.
- The Communiqué Pertaining to Making Payments for Supporting Organic Agriculture (N.2010/24) was published in the Official Gazette dated 20.06.2010 and numbered 27617.
- “The Communiqué on the Prevention of Unfair Competition in Imports (N. 2010/23)” and “The Communiqué on the Prevention of Unfair Competition in Imports (N. 2010/24)” were published in the Official Gazette dated 05.08.2010 and numbered 27663 and “The Communiqué on the Prevention of Unfair Competition in Imports (N. 2010/25)” was published in the Official Gazette dated 15.08.2010 and numbered 27673, and entered into force upon publication.

- “The Communiqué Pertaining to Supporting Overseas Units, Trademarks and Advertisement Activities (N. 2010/6)” entered into force by being published in the Official Gazette dated 18.08.2010 and numbered 27676.
- “The Communiqué Pertaining to the Planning and Implementation Process in Coastal Structures and Facilities” entered into force by being published in the Official Gazette dated 04.09.2010 and numbered 27692.
- “The Communiqué on the Implementation of the Supervision of Imports (N. 2010/7)” and “The Communiqué on the Implementation of the Supervision of Imports (N. 2010/9)” were published in the Official Gazette dated 12.09.2010 and numbered 27697. Communiqué N. 2010/7 will enter into force on the 30th day following its publication and Communiqué N. 2010/9 will enter into force on the 15th day following its publication.
- “The Communiqué on Supporting the Development of International Competitiveness (N. 2010/8)” entered into force by being published in the Official Gazette dated 23.09.2010 and numbered 27708.
- The “Communiqué on the Amendment of the Communiqué 2005/9 Pertaining to the Implementation of the Supervision of Imports” was published in the Official Gazette dated 01.10.2010 and numbered 27716. This Communiqué will enter into force on the 15th day following its publication.
- The “Communiqué Pertaining to the Payment that Joint Stock and Limited Companies will make as per Law 4054 (N.: 2010/5)” was published in the Official Gazette dated 05.10.2010 and numbered 27720.
- The “Communiqué on the Amendment of the Domestic Processing Communiqué 2006/12 (Exports 2010/13)” entered into force by being published in the Official Gazette dated 15.10.2010 and numbered 27730.
- The “Communiqué on the Standardization of Foreign Trade Pertaining to the Foreign Trade Data System (N. 2010/41)” entered into force by being published in the Official Gazette dated 18.10.2010 and numbered 27733.

- The “Communiqué on the Amendment of the Communiqué Pertaining to the Sales Methods in Public Offers of Capital Market Instruments (Series: VIII, N.: 72)” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Principles Pertaining to Public Disclosure of the Special Circumstances of the Companies that Issue Capital Market Instruments which are not Traded on the Stock Exchange (Series: VIII, N.:71)” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Principles Pertaining to Public Disclosure of Special Incidents (Series: VIII, N.:70)” entered into force by being published in the the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Amendment of the Communiqué on the Principles Pertaining to the Recording and Sale of Foreign Capital Market Instruments by the Board (Series: III, N.:44)” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Amendment of the Communiqué on the Principles Pertaining to the Recording and Sale of Borrowing Instruments by the Board (Series: II, N.:26)” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Principles Pertaining to the Recording and Sale of Shares by the Board (Series: I, N.:42)” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué Pertaining to the Assessment of the Applications for Building Inspection Permission Certificates as per Provisional Article 9 of the Building Inspection Practices Regulation” entered into force by being published in the Official Gazette dated 23.10.2010 and numbered 27738.
- The “Communiqué on the Amendment of the General Customs Communiqué (Tariff) (Series: 13)” entered into force by being

published in the Official Gazette dated 27.10.2010 and numbered 27742.

- The “Communiqué on the Amendment of the Social Security Operations Communiqué” entered into force by being published in the Official Gazette dated 28.10.2010 and numbered 27743.
- The “Communiqué on the Amendment of the Communiqué Pertaining to the Suspension of Activity at Workplaces and the Closure of Workplaces” entered into force by being published in the Official Gazette dated 28.10.2010 and numbered 27743.
- The “Communiqué Pertaining to the Prevention of Unfair Competition in Importation (No: 2010/29)” entered into force by being published in the Official Gazette dated 30.10.2010 and numbered 27744.
- The “Communiqué Pertaining to the Prevention of Unfair Competition in Importation (No: 2010/26)” entered into force by being published in the Official Gazette dated 30.10.2010 and numbered 27744.
- The “Communiqué Pertaining to the Prevention of Unfair Competition in Importation (No: 2010/28)” entered into force by being published in the Official Gazette dated 31.10.2010 and numbered 27745.
- The “Communiqué Pertaining to the Prevention of Unfair Competition in Importation (No: 2010/27)” entered into force by being published in the Official Gazette dated 31.10.2010 and numbered 27745.
- The “Communiqué Pertaining to Ship and Inland Vessels Operating on Inland Waters” entered into force by being published in the Official Gazette dated 31.10.2010 and numbered 27745.
- The “Communiqué on the Amendment of the Domestic Processing Communiqué 2006/12 (Exports 2010/15)”, entered into force by being published in the Official Gazette dated 10.11.2010 and numbered 27755.
- The “Communiqué on the Amendment of the Required Reserves

Communiqué (No: 2010/10)” entered into force by being published in the Official Gazette dated 12.11.2010 and numbered 27757.

- The “Communiqué on the Amendment of the Liquidation Communiqué” entered into force by being published in the Official Gazette dated 12.11.2010 and numbered 27757.
- The “Communiqué on the Amendment of the Communiqué on Procedures and Principles of Keeping Records of Dematerialized Capital Market Instruments (Series: IV, No: 49)” entered into force by being published in the Official Gazette dated 13.11.2010 and numbered 27758.
- The “Communiqué on the Standardization of Foreign Trade Pertaining to the Foreign Trade Data System of Importation Audits of Some Agricultural Products (Series No. 2010/42)” was published in the Official Gazette dated 03.12.2010 and numbered 27774. This Communiqué will enter into force on 08.12.2010.
- The “Communiqué on the Standardization of Foreign Trade (Series No.2010/50)” entered into force by being published in the Official Gazette dated 11.12.2010 and numbered 27782, and entered into force by being published.
- The “Communiqué on the Amendment of the Communiqué Pertaining to Principles on Information, Documents and Declarations Signed in an Electronic Environment and to be sent to the Public Disclosure Platform (Series: VIII, No: 73)” entered into force by being published in the Official Gazette dated 17.12.2010 and numbered 27788.
- The “Communiqué on the Amendment of the Communiqué Pertaining to Mandatory Provisions (No: 2010/13)” was published in the Official Gazette dated 17.12.2010. This Communiqué will enter into force on 07.01.2011.
- The “Communiqué on the Amendment of the Communiqué Pertaining to Interest Rates on Deposits and Credit Accounts and Profit and Loss Sharing Rates on Participation Accounts and Other Benefits Provided by Credit Operations except for Interest (No: 2010/12)” entered into force by being published in the Official Gazette dated 17.12.2010 and numbered 27788.

- The “Communiqué on the Amendment of the Communiqué Pertaining to Maximum Interest Rates Applied in Credit Card Operations (No:2010/11)” entered into force by being published in the Official Gazette dated 17.12.2010 and numbered 27788, and entered into force by being published.
- The “Communiqué Pertaining to the International Standardization for Foreign Trade on the Status of Audit Companies (No: 2010/51)” was published in the Official Gazette dated 17.12.2010 and numbered 27788. This Communiqué will enter into force on the 15th day following its publication.
- The “Communiqué Pertaining to Procedures and Principles on Foreign Notification and Rogatory Requests” was published in the Official Gazette dated 17.12.2010 and numbered 27788. This Communiqué will enter into force on 01.01.2011.
- The “Communiqué Regarding Increasing the Lower Limit of Administrative Fines Regulated under the First Paragraph of Article 16 of Act No. 4054 on the Protection of Competition until 31.12.2011 (No: 2011/1)” entered into force by being published in the Official Gazette dated 18.12.2010 and numbered 27789.
- The “Communiqué on the Amendment of the Communiqué Pertaining to Processes and Technical Criteria Related to Electronic Signatures” entered into force by being published in the Official Gazette dated 18.12.2010 and numbered 27789.
- The “Communiqué Pertaining to the Prevention of Unfair Competition in Imports (No: 2010/30)” entered into force by being published in the Official Gazette dated 24.12.2010 and numbered 27795.
- The “Communiqué Regarding Standardization for Foreign Trade on Imports of Products for Which Conformity Assessments are made by the Turkish Standards Institute” was published in the Official Gazette dated 29.12.2010 and numbered 27800. This Communiqué will enter into force on 01.01.2011.
- The “Communiqué on the Amendment of the Public Tender General Communiqué” was published in the Official Gazette dated 29.12.2010 and numbered 27800.

- The “Communiqué Pertaining to the Determination of Interest Rates to be Applied to the Rediscount and Advance Transactions of the Central Bank of the Republic of Turkey” was published in the Official Gazette dated 30.12.2010 and numbered 27801.

Important Changes and Developments in General Communiqués

- The General Communiqué on the Tax Procedure Law (Series N.396) was published in the Official Gazette dated 04.02.2010 and numbered 27483. The principles and procedures set forth in this Communiqué will apply to declarations to be submitted in January 2010 and the following months.
- The General Communiqué of Customs (Explanatory Notes on Customs Tariff Schedule) (Series N. 2) entered into force by being published in the Official Gazette dated 06.02.2010 and numbered 27485.
- The Communiqué on the Amendment of the General Communiqué of Public Tenders published in the Official Gazette dated 22.08.2009 and numbered 27327 entered into force by being published in the Official Gazette dated 04.03.2010 and numbered 27511.
- The Communiqué on the Amendment of the Communiqué on Principles Regarding Real Estate Investment Companies (Serial: VI; No: 27) entered into force by being published in the Official Gazette dated 30.03.2010 and numbered 27537.
- The General Communiqué on Tax Procedure Law (Series N. 397) entered into force by being published in the Official Gazette dated 05.03.2010 and numbered 27512.
- The General Communiqué on Private Consumption Tax (Series N. 18) entered into force by being published in the Official Gazette dated 06.03.2010 and numbered 27513.
- The General Communiqué of Valuable Papers Law (Number.2010/1) was published in the Official Gazette dated 20.06.2010 and numbered 27617.
- The General Communiqué on Law on Charges (Series N.62) was published in the Official Gazette dated 20.06.2010 and numbered 27617.
- The General Communiqué on Tobacco Products and on Control Principles of the Banderol on Alcoholic Beverages (Series No. 2) was published in the Official Gazette dated 25.06.2010 and numbered 27622.

- “The General Communiqué on Income Taxes (Series N.274)” entered into force by being published in the Official Gazette dated 04.08.2010 and numbered 27662.
- “The General Communiqué of Customs (Customs Transactions) (Series N. 77) entered into force by being published in the Official Gazette dated 04.09.2010 and numbered 27692.
- “The General Communiqué on the Motor Vehicles Tax (Series N.36)” was published in the Official Gazette dated 07.09.2010 and numbered 27695.
- “The General Communiqué on National Estate (Series N.328)” was published in the Official Gazette dated 12.09.2010 and numbered 27697.
- “The General Communiqué on National Estate (Series N.328)” was published in the Official Gazette dated 12.09.2010 and numbered 27697.
- The “General Communiqué on Tax Procedure Law (Series N.400)” was published in the Official Gazette dated 01.10.2010 and numbered 27716. The General Communiqué on Tax Procedure Law (Series N.395) is abrogated by this Communiqué.
- The “General Communiqué on Income Taxes (Series N.276)” was published in the Official Gazette dated 01.10. 2010 and numbered 27716.
- The “General Communiqué on National Estate (Series N.329)”, was published in the Official Gazette dated 09.10.2010 and numbered 27724.
- The “General Communiqué on Turkey-EU Pre-Accession Assistance (IPA) Framework Agreement (Sequence N.1)” entered into force by being published in the Official Gazette dated 15.10.2010 and numbered 27730.
- The “General Communiqué of Collections, Series: c, Sequence N. 2” was published in the Official Gazette dated 21.10.2010 and numbered 27736.

- The “General Communiqué on Income Taxes (Series N.87)” was published in the Official Gazette dated 22.10.2010 and numbered 27737.
- The “General Communiqué on Tax Procedure Law (Series No: 401)” was published in the Official Gazette dated 12.11.2010 and numbered 27757.
- The “General Communiqué on the Movable Property Regulation (No: 3)” entered into force by being published in the Official Gazette dated 19.12.2010 and numbered 27790.
- The “General Communiqué on National Estate (Series No: 331)” was published in the Official Gazette dated 23.12.2010 and numbered 27794. General Communiqué on National Estate (Series No.325) is abrogated by this Communiqué.
- The “General Communiqué on Income Taxes” entered into force by being published in the Official Gazette dated 25.12.2010 and numbered 27796.
- The “General Communiqué on National Estate (Series No: 332)” was published in the Official Gazette dated 28.12.2010 and numbered 27799. This Communiqué will enter into force on 01.01.2011.
- The General Communiqué Pertaining to the Implementation of Supervision on Importation (No: 2010/10)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on the Real Estate Tax Law (Series No: 56)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on Tax Procedure Law (Series No: 402)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on Income Tax (Series No: 278)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on the Value Added Tax (Series No: 114)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.

- The “General Communiqué on the Act of Fees (Series No: 63 and 64)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on the Stamp Duty Law (Series No: 54)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on Inheritance and the Succession Tax Law (Series No: 42)” was published in the Official Gazette dated 29.12.2010 and numbered 27800.
- The “General Communiqué on Customs (Customs Operations) (Series No: 77)” was published in the Official Gazette dated 31.12.2010 and numbered 27802. This Communiqué will enter into force on 01.01.2011.
- The “General Communiqué on the Valuable Paper Law (Series: 2010/2)” was published in the Official Gazette dated 31.12.2010 and numbered 27802.

Important Changes and Developments in Other Legislation

- Visa Exemptions for the Citizens of the Kingdom of Saudi Arabia for their Touristic Trips to our Country for a Total Staying Time which Does not Exceed 90 Days within [any] 180-Day [Period] was granted by the Council of Ministers on 17.12.2009 pursuant to Article 10 of the Passport Law numbered 5682. (OG, 09.01.2010; 27457)
- Tariff and Instructions Pertaining to the Liability Insurances that would be Made for Hazardous Materials were published in the Official Gazette dated 09.03.2010 and numbered 27576. The Tariff entered into force as of 11.05.2010.
- The Notice Amending the Notice Numbered 2008-32/34 of the Prime Ministry Treasury by the 32th Decision on the Protection of the Value of Turkish Currency (Number: 2010/4) entered into force by being published in the Official Gazette dated 09.04.2010 and numbered 27547.
- The Notice on the Application of the Registered Offices' Legal Personality Information System within the Trade Register Offices (Internal Commerce 2010/1) entered into force by being published in the Official Gazette dated 16.04.2010 and numbered 27554.
- The Tariff on the Amendment of the Minimum Fee Tariff for Attorneys-at-Law entered into force by being published in the Official Gazette dated 04.06.2010 and numbered 27601.
- The Procedures and Principles on the Amendment of the Procedures and Principles Related to the Allocation of Public Real Estate to Investments entered into force by being published in the Official Gazette dated 29.07.2010 and numbered 27656.
- “The Tariff on the Amendment of the Minimum Fee Tariff for Attorneys-at-Law” entered into force by being published in the Official Gazette dated 02.09.2010 and numbered 27690. By this Tariff, paragraph 6 of article 11 of the Minimum Fee Tariff for Attorneys-at-Law is abrogated.
- “The List of Investment Certificates that are Given for the Investments of Foreign Capital Companies for the Month of

September 2010” was published in the Official Gazette dated 22.10.2010 and numbered 27737.

- “The List of Incentive Certificates for the Month of September of the Year 2010” was published in the Official Gazette dated 22.10.2010 and numbered 27737.
- The “Minimum Fee Tariff for Attorneys-at-Law” entered into force by being published in the Official Gazette dated 03.12.2010 and numbered 27774.
- “The List of Incentive Certificates for the Month of October of the Year 2010” of the Prime Ministry Undersecretariat of the Treasury was published in the Official Gazette dated 05.12.2010 and numbered 27776.
- “The List of Investment Certificates Given for the Investments of Foreign Capital Companies for the Month of October of the Year 2010” of the Prime Ministry Undersecretariat of the Treasury was published in the Official Gazette dated 05.12.2010 and numbered 27776.
- “The List of Incentive Certificates for the Month of November of the Year 2010” of The Prime Ministry Undersecretariat of the Treasury was published in the Official Gazette dated 26.12.2010 and numbered 27797.
- “The List of Investment Certificates Given for Investments by Foreign Capital Companies for the Month of November of the Year 2010” of The Prime Ministry Undersecretariat of the Treasury was published in the Official Gazette dated 26.12.2010 and numbered 27797.

Important Legislation and Decisions in Competition

- The Competition Board, as a result of the examination made upon a request for a negative clearance document / exemption within the scope of Articles 8 and 5 of the Act No. 4054 to the “Agreements New Holland and Case” concluded between CNH International SA and Türk Traktör ve Ziraat Makineleri Tic. A.Ş. and to the “Harman Agreement” concluded between CNH International SA and Harman Traktör ve Biçerdöver San. ve Tic. A.Ş., the market share threshold of 40% being exceeded in the relevant market, decided that the Agreements could not benefit from the block exemption set forth in the Block Exemption Communiqué on Vertical Agreements, Amended by the Competition Board Communiqué No. 2003/3 Communiqué No: 2002/2 and to grant an individual exemption within the scope of Article 5 of the Act No. 4054. (06.01.2010; 10-01/ 9-7)
- The Competition Board, as a result of the examination made upon the allegation charging abuse of a dominant position because although certain HP-branded printers could not be repaired anywhere else, the price offered for the repairs by HP’s Technical Service was even higher than the price of printers equivalent to the products requiring repair, decided that it was not necessary to open an investigation in accordance with Article 41 of the Act No. 4054, and the complaint was rejected. (12.01.2010; 10-04/38-18)
- The Competition Board, as a result of the examination made upon the allegations regarding the distortion of competition because retail prices were lower than wholesale tariff prices in the leased line prices offered by Türk Telekomünikasyon A.Ş., decided that it was not necessary to open an investigation in accordance with Article 41 of the Act No. 4054, and the complaint was rejected. (12.01.2010; 10-04/36-16)
- The Competition Board, as a result of the examination made upon the allegation of the abuse of a dominant position realized *via* the campaign “250 airtime minutes with 2 covers” and the campaign “100 Airtime Minutes for Each Cover” conducted by Turkcell İletişim Hizm. A.Ş. and Coca-cola Satış Dağıtım A.Ş., decided that it was not necessary to open an investigation in accordance with

Article 41 of the Act No. 4054 and to the refusal of the complaint and the temporary expedient. (21.01.2010; 10-08/69-33)

- The Competition Board, during its meeting dated 28.01.2010 by reason of its provisions that may restrict competition, granted a three-year exemption in lieu of granting timeless exemption to the “ATM Bank Card Sharing Platform Protocol” signed among 26 banks to allow customers to withdraw money, check balance with the bank card they own on another bank’s ATM.
- The 2nd edition of the Competition Journal was published on the official website of the Competition Authority on 03.02.2010.
- The Competition Board, as a result of the examination conducted based on the claim that the agreement between Türkiye İş Bankası A.Ş. and Kocaeli University regarding the payment of the expenses incurred by the staff and students inside the university *via* their identification cards out of their accounts at Türkiye İş Bankası A.Ş. is capable of limiting competition, decided that there is no need for an investigation to be opened under Article 41. Thus, the request was dismissed. (04.02.2010; 10-13/155-65)
- The Competition Board, as a result of the examination conducted based on the claim that the lease contract (“Contract”) concluded between Sulas Petrol Tic. Ltd. Şti. and Shell&Turcas Petrol A.Ş. annotated on the title deed infringes Act No. 4054 and Communiqué No. 2002/2, decided in accordance with the relevant report and in view of the scope of the case in question that the Contract can benefit from a block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements until 18.09.2010. The parties will be informed that proceedings will be taken under Article 4 of the Act No. 4054 in the event that attempts are made to extend the vertical agreement by force, either *de jure* or *de facto*, beyond 18.09.2010 without the express consent of both of the parties. (04.02.2010; 10-13/132-52)
- An examination was conducted because of a claim by a complainant who based the claim on the Competition Board Decision dated 04.12.2008 and numbered 08-69/1122-438. The complainant applied to Doğan Dağıtım Satış Pazarlama ve Matbaacılık A.Ş. to become its ancillary dealer, but did not receive any response.

The complainant alleged that Doğan Dağıtım Satış Pazarlama ve Matbaacılık A.Ş. exerted pressure on its main dealers regarding the sale of non-media products. It was decided that there is no need for an investigation to be opened under Article 41 of the Act No. 4054. Thus, the complaint was dismissed. (04.02.2010; 10-13/140-60)

- The Competition Board, as a result of the examination conducted based on the claim that Lider Gıda Sanayi A.Ş. applies predatory pricing, decided that there is no need for an investigation to be opened under Article 41 of the Act No. 4054. (04.02.2010; 146-62)
- The Competition Board, as a result of the examination conducted based on the request that a negative clearance document be given or an exemption be granted to the “Waste Oil Management Protocol” (“Protocol”) signed between Petrol Sanayi Derneği İktisadi İşletmesi and those undertakings that produce their own lube oil, market it with their own brand, and import it or that are liable to collect and dispose of the lube oil contained in their vehicles imported from abroad, decided that a negative clearance document may not be given since the Protocol falls under Article 4 of the Act No. 4054. However, the Protocol contained in the application will be given an individual exemption since it has become clear that in anticipation of the amendment to be made in 2010 the Protocol fulfils the exemption conditions under Article 5 of the Act No. 4054. (04.02.2010; 10-13; 130-50)
- The Competition Board, as a result of the examination conducted based on the request that a negative clearance document be given or an exemption be granted to the “Sales Contract” (“Contract”) concluded between Arçelik A.Ş. and Sony Eurasia Pazarlama A.Ş., decided that the Contract may not be given a negative clearance document since it falls under Article 4 of the Act No. 4054 as regards the markets for LCD TV and laptop computers. However, the contract affected by the notification will be granted an individual exemption for the duration of the contract since all of the conditions under Article 5 of the Act No. 4054 are present. (04.02.2010; 10-13/145-61)
- The investigation initiated by the Competition Board on 23.10.2008 against İzocam Ticaret ve Sanayi A.Ş. (“İzocam”) has been finalized

and the final decision numbered 175-66 was taken during the Competition Board meeting dated 08.02.2010 and numbered 10-14. In this decision, it has been unanimously decided that İzocam was within the scope of Article 4 of the Act and that it did not benefit from block exemption. Furthermore, it has been decided by a majority of votes that İzocam did not fulfill the conditions of individual exemption, that it must abstain from practices constituting infringement of competition, and that it must pay an administrative fine by five thousandth of its gross revenue accumulated by the end of the fiscal year 2008 which amounts to TRY 1,317,714.37.

- The Competition Board, as a result of the examination conducted based on the claim that BOTAŞ Boru Hatları ile Petrol Taşıma A.Ş. infringed Article 6 of the Act No. 4054, decided that there is no need to open an investigation under Article 41 of the Act No. 4054 at this stage, and the complaint is thus dismissed. (11.02.2010; 10-16/189-73)
- The Competition Board, as a result of the examination conducted based on the claim that ERA Reklam Hizmetleri Tekstil Mobilya ve Gıda San. Tic. A.Ş.-Wall Şehir Dizaynı ve Ticaret Ltd. Şti. exerted pressure on the municipalities in the district of Bodrum in an effort to prevent undertakings other than themselves from operating in open air advertising, decided that there is no need to open an investigation under Article 41 of the Act No. 4054 and the complaint is thus dismissed because the subject of the dispute needs to be resolved under the rules of private law. (11.02.2010; 10-16/180-68)
- In order to effectively control the operations of concentration and to establish judicial certainty as to the parties' operations, and in consideration of the essential principles of transparency, the Draft prepared in order to replace Communiqué No. 1997/1 has been submitted for public comment until 05.03.2010 by being published on the official website of the Competition Authority on 15.02.2010.
- Because the Council of State repealed the Competition Board decision taken on 13.07.2006 concerning the investigation conducted by the Board on grounds that Roche Müstahzarları San. Tic. A.Ş., Eczacıbaşı İlaç Pazarlama A.Ş. and Beşer Ecz Deposu Tic. ve San.

Ltd. Şti. infringed Act No. 4054 in the granisetron tenders opened by SSK (Social Security Institution), state and university hospitals in 2003, the case has been reevaluated. As a result of the reevaluation made from the perspective of Roche Müstahzarları San. Tic. A.Ş. and Beşer Ecza Deposu Tic. ve San. Ltd. Şti., it has been decided that the above-mentioned behaviour resulted in the prevention of competition and falls under Article 4 of the Act No. 4054; that Roche Müstahzarları San. Tic. A.Ş. and Beşer Ecza Deposu Tic. ve San. Ltd. Şti. will be penalized in accordance with Article 16; and that the aforementioned undertakings will be given administrative fines at discretion of 1% of their net sales generated in 2002, which amounts to 3,505,784.18 TL for Roche Müstahzarları San. Tic. A.Ş. and 404,768.67 TL for Beşer Ecza Deposu Tic. ve San. Ltd. Şti. (18.02.2010; 10-18; 207-78)

- The Competition Board, as a result of the examination conducted based on the claim that British American Tobacco Türkiye A.Ş. infringed competition by not providing Kent- and Polo-branded products to an undertaking that did not accept to use its promotion shelf, decided that there is no need to open an investigation under Article 41 of the Act No. 4054, and the complaint is thus dismissed. (18.02.2010; 10-18/199-75)
- It has been decided that the “Investment Support Agreement” to be signed between Mey İçki Sanayi ve Ticaret A.Ş. and the final points of sale will be given a negative clearance document since the Agreement does not include any provision limiting competition under Articles 4, 6, and 7 of the Act No.4054. (25.02.2010; 239-93)
- The Competition Board decided [with regard to] the transaction of acquisition by Alstom Power ve Ulaşım A.Ş. of Alstom Power Proje A.Ş. with all of its assets and liabilities which were in the same economic entity that the transaction did not fall under article 7 of the Act No. 4054 and the Communiqué No. 1997/1 due to the fact that the parties were within the same economic entity and that a negative clearance certificate be provided to the transaction under article 8 of the Act No. 4054. (04.03.2010; 10-21/264-97)
- The Competition Board, as a result of the examination made upon the claim that in those stores belonging to Desa Deri San. ve Tic.

A.Ş. and Boyner Büyük Mağazacılık A.Ş., Samsonite branded products were sold for the same price and the prices in question were quite high as compared with the same products' prices abroad, decided that opening an investigation in accordance with article 41 of the Act No. 4054 was not relevant and that the complaint be rejected. (04.03.2010; 10-21/273-101)

- The Competition Board, as a result of the examination made upon the claim that Turkcell İletişim Hizmetleri A.Ş. set certain intra-network tariffs below the fee of interconnection it provided to the other GSM operators as an input and in this context abused its dominant position *via* price squeeze, decided that opening an investigation against Turkcell İletişim Hizmetleri A.Ş. in accordance with article 41 of the Act No. 4054 was not required and that the complaint be rejected. (04.03.2010; 10-21/271-100)
- The message of the Competition Authority President Prof. Dr. Nurettin KALDIRIMCI for the 13th anniversary of the foundation of the Competition Authority was published on the official website of the Competition Authority on 05.03.2010.
- The 41st issue of the Competition Journal was published on the official website of the Competition Board on 08.03.2010.
- The Competition Board, as a result of the examination made for purposes of detecting whether the existing structures and activities of formations that made measurement as to advertisement conduits other than TİAK infringed the Act No. 4054, decided that an investigation against the Radio Monitorization Research Board and Interactive Advertising Bureau Turkey Interactive Advertisement Platform was not required in accordance with article 41 of the Act No. 4054. (11.03.2010; 10-22/303-111)
- The 11th Research Bulletin Issue (June 2009) was published on the official website of the Competition Authority on 12.03.2010.
- The Competition Board, as a result of the examination performed upon the request to allow Bimpaş Bira ve Meşrubat Pazarlama A.Ş. and its dealers and distributors to benefit from the exemption granted within the scope of the Block Exemption Communiqué on Vertical Agreements No. 2002/2, decided to grant an individual exemption, under article 5 of the Act No. 4054, to single brand

limitations that did not exceed 5 years in the type contracts Bimpaş Bira ve Meşrubat Pazarlama A.Ş. and its dealers and distributors would conclude with the final points of sale. (18.03.2010; 10-24/331-119)

- The Competition Board, as a result of the examination made upon the request to terminate the lease contract set out in the title deed which was arranged between BP Petrolleri A.Ş. and Kadıköy Cihaz Oto Tic. A.Ş.'s partner Rafet DİKİCİ, decided that the vertical relation which consisted of the dealership and lease contracts made as to the liquid fuel station that was the subject of the application and which contained a prohibition on competition benefited from a block exemption until 18.09.2010 within the scope of the Communiqué No. 2002/2. (24.03.2010; 10-26/359-130)
- The Competition Board, as a result of the examination made upon the request that an exemption be given to the vertical relationship between Petrol Ofisi Inc. and Petrol -Tur Petrol ve Turizm Tic. ve San. Ltd. Şti. (the "Companies"), decided that the wills of the parties were renewed with the dealership agreement dated 01.05.2008, the protocol dated 30.05.2008, and the grant of the usufruct dated 20.08.2008 and that the vertical relationship benefits from a block exemption for five years as of the date of the dealership agreement within the scope of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements and that the agreement cannot be granted an individual exemption under Article 5 of Act No. 4054. (08.04.2010; 10-29/436-162)
- The Competition Board, as a result of the examination made upon the claim that (1) FIAT branded cars are given a guarantee for 3 years or up to 150.000 km, (2) the sales agreement states that the guarantee will be invalid if oil is not bought from OPET ten times successively, and (3) the same practice is applied to Ford branded cars that belong to the same group decided that the claims against the "Oil Guarantee System" of OPET Petrolcülük A.Ş. stating that FIAT branded cars would be out of guarantee if oil is not bought from OPET ten times successively were evaluated. The Board decided on 24.07.2008 that it was not necessary to carry out a preliminary inquiry or investigation within the framework of Act No. 4054, and the complaint was rejected. (08.04.2010; 10-29/442-170)

- The Competition Board, as a result of the examination made upon the claim that Form Group refuses to supply spare parts, response devices, and certain software to a firm that provides technical service for devices whose distribution in Turkey it handles thus violating Act No. 4054, decided that it was not necessary to open an investigation according to Act No. 4054 and the complaint was rejected. (08.04.2010; 10-29/446-169)
- The Competition Board, as a result of the examination made upon the request that the franchise agreement signed between Marks&Spencer plc. and Marka Mağazacılık A.Ş. on 08.01.2010 be found as under the scope of a block exemption, or, failing that, be given another exemption, decided that the franchise agreement benefits from a block exemption under the scope of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements. (15.04.2010; 10-31/485-181)
- The Competition Board, as a result of the examination made upon the claim that the usufruct agreement between Akpet Akaryakıt Dağıtım ve Pazarlama A.Ş. and Halis Koca Petrol İşletmeciliği is contrary to Act No. 4054 and Communiqué No. 2002/2, decided that the vertical relationship consisted of the dealership agreement about the oil station and the agreement granting usufruct, which includes a non-compete obligation, will benefit from block exemption until 18.09.2010 under the scope of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements. (15.04.2010; 10-31/474-177)
- The Competition Board, as a result of the examination made upon the claim that Turkish Airlines operating on the Turkey – Saudi Arabia route applies excessive prices, decided that it is not necessary to open an investigation according to Article 41 of the Act No. 4054. (15.04.2010; 10-31/466-172)
- The Communiqué on the Rules for Access to Files and the Protection of Trade Secrets numbered 2010/3 entered into force by being published in the Official Gazette dated 18.04.2010 and numbered 27556 and only concerns investigations to be opened after that date.
- The Communiqué No.2010/2 on Hearings to be Held before the Competition Authority entered into force by being published in the Official Gazette dated 24.04.2010 and numbered 27561.

- The Competition Board, as a result of the examination conducted based on the claim that turnip juice producing firms collusively set the prices of turnip juice excessively above cost and this situation was disadvantageous for the consumer, decided that no investigation was necessary under Article 41 of the Act No. 4054 and that the complaint should be rejected. (06.05.2010; 10-34/547-195)
- The Competition Board, as a result of the examination conducted based on the claims that Nuh Çimento Sanayi A.Ş. violated Article 6 of the Act No. 4054 by refusing to supply cement to Detaş Beton Sanayi A.Ş., decided that no investigation was necessary under Article 41 of the Act No. 4054. (06.05.2010; 10-34/541-193)
- The Competition Board, as a result of the examination conducted based on the claims that, concerning those subscribers who cancelled their subscription with TTNNet A.Ş. and wished to get service from another internet service provider, the ports were not released for four to five days after the cancellation of their internet connection by TTNNet, thereby complicating their cancellation of the subscription and getting service from another internet service provider, decided that no investigation was necessary under Article 41 of the Act No. 4054. (06.05.2010; 10-34/540-192)
- The Competition Board, as a result of the examination conducted based on the claims that, owing to the password implementations adopted in Vestel Angel security systems, monitoring services could only be provided from MGİ Elektronik Cihazlar ve Kimyevi Ürünler San. Tic. A.Ş., decided that no investigation was necessary under Article 41 of the Act No. 4054. (06.05.2010; 10-34/539-191)
- The Competition Board, as a result of the examination conducted on the claims that Kanuf İnşaat ve Yapı Elemanları San. ve Tic. A.Ş. and Dalsan Alçı San. ve Tic. A.Ş., in order to prevent the sales of plasterboard at reasonable prices, gave notices to Oskay Yapı Malzemeleri İnş. San. Paz. Tic. Ltd. Şti. not to use their brands and logos, decided that no investigation was necessary under Article 41 of the Act No. 4054 and that the complaint should be rejected. (06.05.2010; 10-34/538-190)
- The Competition Board, as a result of the examination conducted based on the claims that, *via* its coordinator in Vienna, Pegasus

Hava Yolları made “confidential seat sales agreements” with Akın, Side and Yılmaz Traval Agencies based in that city concerning its Vienna-Istanbul Flights for the June-September period of each year since 2004, that in this way approximately 17% of seasons tickets were given to the aforementioned agencies without any notice beforehand, that this practice harmed the other agencies and led to unfair competition, that no investigation was necessary under Article 41 of the Act No. 4054. (12.05.2010; 10-36/578-208)

- The Competition Board re-evaluated the file following the decision of the 13th Chamber of the Council of State of the Board decision dated 04.10.2007 and numbered 07-77/950-M concerning the claim that Mediamarkt Media-Saturn Yönetim Hizmetleri Ltd. Şti, established on 25.09.2007, implemented low prices. The Competition Board, as a result of the re-evaluation, decided that no investigation was necessary under Article 41 of the Act No. 4054 and that the complaint should be rejected. (12.05.2010; 10-36/575-205)
- The Competition Board, as a result of the examination conducted based on the request for the authorization for the joint venture established by S&B Endüstriyel Mineraller A.Ş., Pabalk Maden San. ve Tic. A.Ş. and real persons Orca Kırker and Bülent İper to operate within the perlite market, decided that the joint venture established through the Shareholders Agreement dated 14.01.2010 by Pabalk Maden San. ve Tic. A.Ş. and real persons Orca Kırker and Bülent İper to operate within the perlite market did not fall under Article 7 of the Act No. 4054 and Article 2 of the Communiqué No. 1997/1 that was issued based on the aforementioned Communiqué and that it was not possible to grant negative clearance certificate under Article 8 of the Act No. 4054 to the relevant transaction since the aforementioned joint venture agreement had goals or effects limiting the competition between the parties. However, the Competition Board decided that individual exemption should be granted to the aforementioned transaction since it fulfilled all conditions set out in Article 5 of the Act. (27.05.2010; 10-38/657-224)
- The Competition Board, as a result of the examination conducted based on the claim that Turkcell İletişim Hizmetleri A.Ş. abused its dominant position in the market for the retail and wholesale markets

for SIM card, prepaid card, digital airtime minutes, activation and other subscriber services through *de facto* exclusive practices and complicated the operations of Vodafone Telekomünikasyon A.Ş., and on the request for interim measures, decided that the aforementioned claims should be assessed under the ongoing investigation initiated with the Competition Board decision dated 11.11.2009 and numbered 09-54/1289-M and that the request of the aforementioned undertaking for interim measures should be rejected at this stage. (27.05.2010; 10-38/659-226)

- The Competition Board, as a result of the examination made upon the request for the issuance of a negative clearance certificate to the “Waste Motor Oil Delivery and Refinement and Regeneration Contract” concluded between the Petroleum Industrial Association Economic Enterprise and Refinement & Regeneration facilities, decided to give a negative clearance certificate to the contract cited in accordance with article 8 of the Act No. 4054. (10.06.2010; 10-42; 730-237)
- The Competition Board, as a result of the examination made upon the claim that Milangaz LPG itself made sales at low prices under the name of its dealer and main dealer in Kırıkkale, decided that it was not necessary to open an investigation in accordance with article 41 of the Act No. 4054 and rejected the complaint. (10.06.2010; 10-42/732-239)
- The Competition Board, as a result of the reassessment made due to the overruling by the Council of State of the Board decision taken on 15.11.2007 with regard to the claim that Ankara Halk Ekmek ve Un Fabrikası A.Ş. controlled by the Ankara Metropolitan Municipality committed competition-distorting activities in the bread production market through bread-selling kiosks to which it had given the right to operate, decided that it was not necessary to open an investigation in accordance with article 41 of the Act No. 4054 and rejected the complaint. (10.06.2010; 10-42/717-230)
- The Competition Board, as a result of the examination performed upon the claim that Net Ankara Telekomünikasyon Elektronik ve Bilgisayar Teknolojileri A.Ş. could not receive call termination service from Turkcell İletişim Hizmetleri A.Ş. and Vodafone

Telekomünikasyon A.Ş. and for this reason competition was restricted in the sector for electronic communications, decided that it was not necessary to open an investigation in accordance with article 41 of the Act No. 4054, and rejected the complaint. (17.06.2010; 10-44/768-251)

- The Competition Board, as a result of the examination performed upon the claim the United International Pictures Filmcilik ve Tic. Ltd. Şti. did not provide movies demanded by Mersin Pocket Theatre, decided that it was not necessary to open in accordance with article 41 of the Act No. 4054. (17.06.2010; 10-44/765-248)
- The Competition Board, as a result of the examination performed upon the claim that the economic entity made up of Türk Telekomünikasyon A.Ş. and TTNNet A.Ş. abused its dominant position in the sector by creating a price squeeze through pricing and ancillary practices related to the metro ethernet internet service offered to end users resulting in a distortion of competition, decided that it was not necessary to open an investigation in accordance with article 41 of the Act No. 4054. (17.06.2010; 10-44/761-245)
- The Competition Board, in its meeting on 01.07.2010, decided that an investigation be opened about Efes Pazarlama ve Dağıtım Tic. A.Ş. The purpose of the initiation of an investigation was to determine whether Act No. 4054 on the Protection of Competition was infringed by Efes Pazarlama ve Dağıtım Tic. A.Ş. and its distributors by demanding the sale of only Efes-branded beer at points of sale, to supply these points with goods, and/or complicating the activities of those that sell rival products through various practices and whether the decision of the Competition Board dated 22.04.2005 has been complied with.
- The Competition Board decided during its meeting on 01.07.2010 that an investigation is opened about Türk Hava Yolları A.O. The investigation has been initiated to determine whether Türk Hava Yolları A.O. engaged in exclusionary conducts in domestic and international passenger transportation routes from İstanbul against its competing firm.
- The Competition Board decided during its meeting on 02.07.2010 that an investigation is opened about Güneş Ekspres Havacılık A.Ş.

and Condor Flugdienst GmbH. The investigation has been initiated to determine whether Güneş Ekspres Havacılık A.Ş. and Condor Flugdienst GmbH. infringed Act No. 4054 on the Protection of Competition by engaging in anticompetitive behavior for flights between Germany and Turkey through agreements between themselves.

- The Competition Board, as a result of the examination conducted upon the request that a negative clearance document be given or an exemption be granted to the Distributorship Contract (the Contract) signed on 13.07.2009 between Roche Müstahzarları San. A.Ş. and Drogan İlaçları San. ve Tic. A.Ş. in relation to the drugs branded as Roaccutane, decided that it is not possible to give a negative clearance document to the Contract under Article 4 of Act No. 4054 and that the Contract benefits from a block exemption under Communiqué No. 2002/2. (08.07.2010; 10-49/908-317)
- The Competition Board, as a result of the reevaluation made upon the overruling by the Council of State on 16.02.2010 of the Competition Board Decision taken 01.02.2007 regarding the acquisition of the shares of Inco Limited by CVRK Canada Inc. through a stock market purchase without an agreement, decided that because the transaction with which the Board decision is concerned was entered into without the authorization of the Competition Board, CVRD Canada Inc., must pay administrative fines of TRY 1,592 in accordance with Act No. 4054. (08.07.2010; 10-49/949-332)
- The Competition Board, as a result of the examination conducted into the claim that Siemens Healthcare Diagnostik Tic. Ltd. Şti. abuses its dominant position through certain exclusionary practices, decided that no investigation need be opened under Act No. 4054 and dismissed the complaint. (08.07.2010; 10-49/896-310)
- In accordance with the Competition Board decision dated 07.07.2010 and numbered 10-49/951-M within the scope of the investigation to determine whether Aras Kargo, Yurtiçi Yurtdışı Taşımacılık A.Ş., Filo Kargo A.Ş., MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. and Yurtiçi Kargo Servisi A.Ş. violated Act No. 4054, a hearing will be held on Wednesday 01.09.2010 at 10:00 as per the “Communiqué

on the Hearings Held by Competition Board”. This was published on the official website of the Competition Board on 13.07.2010.

- The Competition Board, as a result of the examination made upon the claim that the tickets of matches under the body of the Turkish Football Federation are sold only on the website of Biletix Bilet Dağıtım Basım ve Ticaret A.Ş., that the service costs of the services are high, and that the problems related to the provision of the services cause harm to consumers, decided that the provisions granting exclusivity for more than one year to Biletix Bilet Dağıtım Basım ve Ticaret A.Ş. in the agreements concluded between football clubs and Biletix Bilet Dağıtım Basım ve Ticaret A.Ş. regulating the purchase of agency services for the sale of tickets are contrary to Article 4 of the Act No. 4054. (05.08.2010; 10-52/1056-390)
- The Competition Board has conducted an investigation under Article 41 of the Act No. 4054 in order to determine whether 56 Peugeot dealers, which are members of the Peugeot Turkey Dealers’ Council, violated Act No. 4054. As a result of the investigation, a final decision numbered 1057-391 was taken in the Competition Board meeting numbered 10-53 on 06.08.2010, and it has been decided unanimously that the listed undertakings have violated article 4 of Act No. 4054.
- The Competition Board, as a result of the examination made upon the request for negative clearance/individual exemption for “Peugeot Web Store” service that will be provided by Peugeot Otomotiv Pazarlama A.Ş., decided that a negative clearance document cannot be given pursuant to Act no. 4054. However, it has been decided to entitle individual exemption as the planned service provides all the conditions required in Article 5 of the Act, but this exemption is limited to 3 years because of the risk of causing coordination in the relevant market. (26.08.2010; 10-56/1064-396)
- The Competition Board, as a result of the re-examination made following the annulment by the 13th Chamber of the Council of State on 16.06.2010 of the Board decision on 18.09.2000 regarding the claim that the Turkish Pharmacists Association’s decisions concerning the acquisitions of pharmacies, surcharges, and related practices are contrary to Law no. 4054, levied an administrative

fine of 2.433,60 TL on the Turkish Pharmacists Association. (26.08.2010; 10-56/1078-407)

- The Competition Board, as a result of an investigation concluded upon the request to apply sanctions for infringement of Law 4054 and Communiqué no. 2002/2 by Total Oil Türkiye A.Ş., decided that it is not necessary to open an investigation according to Article 41 of the Act No. 4054. (26.08.2010;10-56/1080-409)
- The Competition Board, as a result of the examination made upon the claim that the usufruct contract between Petrol Ofisi A.Ş and the filling station in question is contrary to Law no. 4054 and it has to be annulled and that Petrol Ofisi A.Ş abused its dominant position on the basis of this contract, decided that it is not necessary to open an investigation according to Article 41 of the Act No. 4054. (26.08.2010; 10-56/1081-410)
- The Competition Board, as a result of the re-examination conducted upon the partial annulment by the Council of State of the Competition Board decision taken on 01.12.2005 concerning the investigation conducted based on the claim that Karbogaz Karbondioksit and Kurubuz San. A.Ş. signed agreements with provisions infringing Act no 4054 and engaged in practices aimed at eliminating competition within the relevant market, decided to impose an administrative fine of TRY 5,800 on Karbogaz Karbondioksit ve Kurubuz San. A.Ş. (New Title: Linde Gaz A.Ş.) on the grounds that agreements signed by the aforementioned undertaking with its dealers included provisions that were in violation of Article 4 of Act no 4054. (02.09.2010, 10-57/1152-437)
- The Competition Board decided, as a result of the re-examination conducted upon the annulment by the Council of State of the Competition Board decision taken on 25.07.2006 concerning the investigation of the imported coal market, that Glencore İstanbul Madencilik Ticaret A.Ş. and Minerkom Mineral ve Katı Yakıtlar Tic. A.Ş. were engaged in anti-competitive cooperation with Krutrade AG within the imported lump coal market and that the companies which were a part of an economic union with Minerkom Mineral ve Katı Yakıtlar Tic. A.Ş. should pay an administrative fine of TRY 34,020.57 and Glencore İstanbul

Madencilik Ticaret A.Ş. should pay an administrative fine of TRY 20,369.24. (02.09.2010, 10-57/1141-430)

- The Competition Board concluded on 03.09.2010 the investigation initiated on 13.04.2009 concerning Aras Kargo, Yurtiçi Yurtdışı Taşımacılık A.Ş. - Fillo Ürün Odaklı Taşımacılık A.Ş., MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. and Yurtiçi Kargo Servisi A.Ş. and announced the decision on 07.09.2010. As a result of the investigation, the Board decided unanimously that the aforementioned companies had violated Article 4 of Act no 4054 on the Protection of Competition between 2006 and 2008 by making agreements with anti-competitive goals and effects; that an individual exemption may not be granted to the aforementioned agreement since it did not fulfill the conditions listed in Article 5 of Act no 4054; and decided by a majority on administrative fines of TRY 6,530,799.79 for Aras Kargo Yurtiçi Yurtdışı Taşımacılık A.Ş. - Fillo Ürün Odaklı Taşımacılık A.Ş. Economic entity, TRY 2,999,930.70 for MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. and TRY 7,031,630.38 for Yurtiçi Kargo Servisi A.Ş. (03.09.2010, 10-58/1193-449)
- The Competition Board concluded the investigation initiated on 25.02.2009 concerning some dealers of Citroen (Baylas Otomotiv) on 23.09.2010. Within the framework of the investigation, it was established that some Citroen dealers collusively set and implemented prices for new vehicles, including accessories, during 2007 and 2008. As well, it was determined that the same dealers had price fixing agreements concerning spare parts, maintenance, and repair services. Within the framework of the Competition Board decision, a total of TRY 1,688,572 in administrative fines was imposed on the 13 dealers.
- The Competition Board decided, in its meeting of 26.09.2010 to initiate an investigation concerning the Central Association of Agricultural Milk Producers. The investigation was initiated based on the claim that the Central Association of Agricultural Milk Producers “took a decision stating that all milk producers’ associations should use a previously designated computer program”.

- The Competition Board authorized the acquisition of 100% of the shares of Fortis Emeklilik ve Hayat A.Ş. (Fortis Retirement and Life Inc.) by BNP Paribas since it would not result in creating a dominant position or strengthening an existing dominant position and hence not in reducing competition significantly of a nature mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1 (30.09.2010, 10-62/1279-483).
- The Competition Board, as a result of an examination made upon the request for the granting of a negative clearance/exemption to the Insurance Information Center in order to deliver the platform Motaport, secondhand vehicle buying, and selling agency service, decided to give a Negative Clearance Certificate under article 8 of the Act on the Protection of Competition No. 4054 to the internet site named www.motaport.com set up by the Insurance Information Center and to the service offered at this internet site. This service is used to investigate the damage and loss of value histories of passenger vehicles by those buying and selling these vehicles. Although the database used in offering this service is not sold or made available to competing undertakings or to undertakings offering services of a similar nature, an exemption was granted for three years within the scope of article 5 of the Act on the Protection of Competition No. 4054 on the ground that they were deemed unlikely to infringe articles 4, 6 and 7 of the same Act. (30.09.2010, 10-62/1277-481)
- The Competition Board decided unanimously that an investigation was not required to be opened in accordance with article 41 of Act No. 4054 with regard to the claims that TTNNet A.Ş. (TTNet Inc.) tied the internet service provision service with the Web TV service named Tivibu thus abusing its dominant position and that the service cost included in Tivibu advertisements did not reflect reality. Therefore, it rejected the complaint (30.09.2010, 10-62/1287-488)
- The Competition Board, as a result of the examination made upon the claim that Nuh Cement, by exercising its power deriving from its dominant position in İstanbul Anatolian bank (including İzmit), conducted a price squeeze in the ready concrete market, infringing Act No. 4054, decided that opening an investigation was not required in accordance with Act No. 4054. (07.10.2010; 10-63/1317-494)

- Upon the overruling by the Council of State on 07.05.2010, as to Medistar Biomedikal Mühendislik A.Ş. (Medistar Biomedical Engineering Inc.) and Nemed Tıbbi Ürünler Sanayi ve Dış Ticaret Ltd. Şti. (Nemed Medical Products Industry and Foreign Trade Co. Ltd.), of the Decision taken by the Competition Board on 16.03.2007 as a result of an investigation conducted with a view to identifying whether undertakings operating in the market for medical expenditure materials infringed article 4 of Act No. 4054 by means of making an agreement among themselves, the file was reassessed. As a result of a re-assessment by the Competition Board, it has been decided to impose an administrative fine of TRY 235.50 (two hundred and thirty-five TRY fifty Kr) on Medistar Biomedikal Mühendislik A.Ş. (Medistar Biomedical Engineering Inc.), discretionally being 5% (five percent) of its gross revenue for the year 2009, to impose an administrative fine of TRY 246,781.14 (two hundred and forty-six thousand seven hundred and eighty-one TL fourteen Kr) on Nemed Tıbbi Ürünler Sanayi ve Dış Ticaret Ltd. Şti. (Nemed Medical Products Industry and Foreign Trade Co. Ltd.), discretionally being 4% (four percent) of its gross revenue for the year 2009. (07.10.2010; 10-63/1325-497)
- The Competition Board, as a result of the examination made upon a request for the acceptance that the vertical agreement between the parties coming from the past experienced an interruption due to the fact that usufruct and lease contracts arranged between Shell&Turcas Petrol A.Ş. (Shell&Turcas Petroleum Inc.) (Shell&Turcas) and its 38 dealers were renewed on the same or very close dates in order to determine a 5-year block exemption period, decided that, among the vertical agreements made by Shell&Turcas Petrol A.Ş. (Shell&Turcas Petroleum Inc.) and dealers as to a total of 38 separate stations; 16 of dealership contracts and usufruct/lease contracts renewed on the same date benefitted for 5 years from the exemption granted by the Communiqué No. 2002/2 from this date, so did 13 agreements, where dealership contracts were renewed short before usufruct/lease contracts, from the date of dealership contracts, and so did 9 agreements, where usufruct/dealership contracts were renewed short before dealership contracts, from the date of signing usufruct/lease contracts. (07.10.2010; 10-63/1313-491)

- The Competition Board, as a result of the examination made upon the claim that BOTAŞ Boru Hatları ile Petrol Taşıma A.Ş. abused its dominant position by means of complicating the activities of the undertaking and causing discrimination by unfairly ceasing to provide natural gas to BİS Enerji Elektrik Üretim A.Ş. needed for generation, which operated in the area of electricity generation and sales, decided that an investigation was not required to be opened in accordance with Act No. 4054. (14.10.2010; 10-65/ 1372-510)
- The Competition Board, as a result of the examination made upon the claim that *de facto* exclusivity was caused in the market for carbonated beverage through practices like quota commitment, no-cost product, and payment of a particular amount included in contracts Coca Cola Satış ve Dağıtım A.Ş. (Coca Cola Sales and Distribution Inc.) and/or its dealers concluded with the final points of sale, decided that an investigation was not required to be opened in accordance with Act No. 4054. (14.10.2010; 10-65/ 1363-505)
- The Competition Board, as a result of the examination made upon the claim that the vertical relation between Azgınoğlu Petrol Ürünleri Nakliyat İnş. Zir. San. ve Tic. Ltd. Şti. and OPET Petrolcülük A.Ş. was contrary to Act No. 4054 and Communiqué No. 2002/2, decided that an investigation was not required to be opened in accordance with article 41 of Act No. 4054. (14.10.2010; 10-65/ 1373-511)
- The Competition Board, as a result of the examination made upon the claim that TNT International Express Taşımacılık Ticaret Ltd. Şti., DHL Worldwide Express Taşımacılık Ticaret A.Ş., and United Parcel Service Ünspet Paket Servisi ve Ticaret A.Ş. signed agreements with provisions infringing Act no 4054 and engaged in practices aimed at eliminating competition within the cargo transportation market, decided that an investigation was not required to be opened in accordance with Act No. 4054. (21.10.2010; 10-66/1405-526)
- The Competition Board, as a result of the examination made upon the claim that Kayserigaz Kayseri Doğalgaz Dağıtım Paz. ve Tic. A.Ş. abused its dominant position by means of effectuating calculations

that infringe EPDK Communiqués on subscriber connection fees, decided that an investigation was not required to be opened in accordance with Act No. 4054. (21.10.2010; 10-66/1401-522)

- The Competition Board, as a result of the examination made upon the claim that the usufruct and dealership contracts signed by Pet-Or Salıpzarı Petrol Orman Ürünleri Nakliyat İnşaat Tic. Ltd. Şti. and Petrol Ofisi A.Ş. were contrary to Communiqué No. 2002/2, decided that concerning the vertical agreement consisting of the liquid fuel dealership contract, protocol, and the formal deed of usufruct rights, the will of the parties was renewed with the dealership contract dated 01.05.2006, the protocol dated 07.09.2006, and the establishment of usufruct rights on 03.08.2006, and that the vertical agreement was within the scope of the block exemption for 5 years following the dealership contract of 01.05.2006. (27.10.2010; 10-67/1419-536)
- The Competition Board, as a result of the evaluation made upon the request that the price policy which Domino's Pizza Restaurantları A.Ş. (Domino's Pizza Restaurants Inc.) applied within a period of one week be examined within the scope of Act No. 4054 on the Protection of Competition and that due action be taken, decided that no investigation need be opened under Act No. 4054, and the complaint was dismissed. (04.11.2010; 10-69/1458-557)
- The Competition Board, as a result of the examination conducted based on the claims that the prices of plans and text messages have been increased and pricing periods have been extended by GSM operators collusively, decided that no investigation need to be opened under Act No. 4054, and the complaint was dismissed. (04.11.2010; 10-69/1451-551)
- The Competition Board, as a result of the examination conducted based on the request that a negative clearance document be given to the transaction allowing the retail-level internet service provided by TTNNet A.Ş. (TTNet Inc.), an affiliate of Türk Telekomünikasyon A.Ş. (Turk Telecom Inc.), and at the same time be provided by Türk Telekomünikasyon A.Ş., decided that the transaction allowing the retail-level internet access service currently provided by TTNNet A.Ş., an affiliate of Türk Telekomünikasyon A.Ş., and at the same

time be provided by Türk Telekomünikasyon A.Ş., is not within the scope of Act No. 4054. (10.11.2010; 10-71/1479-567)

- The Competition Board, as a result of the examination conducted based on the claim that the “sales contract” signed by CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. (CarrefourSA Carrefour Sabancı Trade Center Inc.) (CarrefourSA) with its product supplier Baytekler Gıda San. ve Tic. Ltd. Şti. (Baytekler Food Industry and Trade Co. Ltd.) includes extraordinary provisions in favor of CarrefourSA, that CarrefourSA gained great advantages in the market with the help of such practices and that it is attempting to exclude the local chains from the market, decided that no investigation need be opened under Act No. 4054, and the complaint was dismissed. (10.11.2010; 10-71/1487-570)
- As a result of the examination conducted based on the claim that Havaalanları Yer Hizmetleri A.Ş. was in a monopoly position and abused its dominant position in the passenger transportation market between Gaziantep airport and Gaziantep city center, the Board decided that no investigation need be opened under Act No. 4054, and the complaint was dismissed. (25.11.2010; 10-73/1517-579)
- The Competition Board, as a result of the examination conducted based on the claim that the Mersin Uluslararası Liman İşletmeciliği A.Ş. applied excessive prices concerning the tariffs of services provided in Mersin Port, decided that no investigation need be opened under Act No. 4054, and the complaint was dismissed. (25.11.2010; 10-73/1518-580)
- The Draft Guide on Undertakings, Turnovers and Additional Delimitations concerning Mergers and Acquisitions was submitted for public comment by the Competition Authority, on 26.11.2010. Opinions concerning the Draft Guide can be submitted to the Competition Authority until 14.12.2010.
- As a result of the examination made upon the authorization request for the privatization by the method of “acquisition of the operating right” of TCDD İskenderun Port for 36 years, the Board decided that the transaction of the acquisition of “the operating right” of TCDD İskenderun Port by Limak Yatırım Enerji Üretim İşletme Hizmetleri ve İnşaat A.Ş. or Kumport Liman Hizmetleri ve Lojistik

Sanayi ve Ticaret A.Ş. or YDA İnşaat Sanayi ve Ticaret A.Ş.-Alp Ateş Ltd. Şti.-Butros Deniz ve Nakliyat A.Ş.-Sabay Denizcilik Vapur Acentalığı Nakliye ve Ticaret Ltd. Şti. Ortak Girişim Grubu or Global Liman İşletmeleri A.Ş. or CEY Liman İşletmeleri A.Ş. (Cey Group Joint Venture) is subject to authorization within the scope of Article 7 of Act No. 4054 on the Protection of Competition and Communiqué No.1998/4 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid and that the transaction may be authorized as the possible acquisition to be effectuated by any of the aforesaid bidders would not result in creating a dominant position, or strengthening an existing dominant position and thus in decreasing competition significantly in relevant markets. (02.12.2010; 10-75/1538-592)

- As a result of the examination conducted based on the request that a negative clearance document be given or an exemption be granted to the manufacturing agreement between Arçelik A.Ş. and Sony Europe Limited, the Board decided that because the “Main Purchase Agreement” signed by Arçelik A.Ş. and Sony Europe Limited is within the scope of Article 4 of Act No. 4054, a negative clearance certificate could not be given. However, an individual exemption for 5 years would be granted since it met all the conditions enumerated in article 5 of Act No. 4054. (08.12.2010; 10-76/1572-605)
- As a result of the examination made upon the authorization request for the acquisition of 80% of the shares of Başkent Doğalgaz Dağıtım A.Ş. (Başkent Natural Gas Distribution Inc.) by MMEKA Makine İthalat Pazarlama ve Ticaret A.Ş. (MMEKA Machine Export Marketing and Trade Inc.) within the scope of privatization through a block sale, the Board decided that the acquisition of these shares by MMEKA Makine İthalat Pazarlama ve Ticaret A.Ş. is within the scope of Article 7 of Act No. 4054 and Communiqué No. 1997/1. The shareholders of MMEKA Makine İthalat Pazarlama ve Ticaret A.Ş., Mehmet Kazancı, Esin Kazancı, Begüm Kazancı and Mustafa Kurnaz are within Kazancı Holding Inc. and therefore under the same economic entity as Akxa Elektrik Perakende Satış A.Ş. (Akxa Electricity Retail Sales Inc.), and they are to be

regarded as one undertaking under the scope of Act No. 4054. This transaction would not result in creating a dominant position, or strengthening the existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. Therefore, it was found permissible. (16.12.2010; 10-78/1643- 608)

- As a result of the examination made within the scope of the privatization process of Boğaziçi Elektrik Dağıtım A.Ş. (Boğaziçi Electricity Distribution Inc.), Gediz Elektrik Dağıtım A.Ş. (Gediz Electricity Distribution Inc.), Trakya Elektrik Dağıtım A.Ş. (Trakya Electricity Distribution Inc.) and Dicle Elektrik Dağıtım A.Ş. (Dicle Electricity Distribution Inc.), the Board decided that Mehmet Kazancı, Esin Kazancı, Begüm Kazancı and Mustafa Kurnaz, the shareholders of MMEKA are within Kazancı Holding and therefore under the same economic entity as Aksa Elektrik Perakende Satış A.Ş. (Aksa Electricity Retail Sales Inc.). Moreover, they are to be regarded as one undertaking under Act No. 4054. If İş-Kaya-MMEKA and/or Aksa Elektrik effectuate jointly the acquisition of Boğaziçi, Gediz and Trakya, it would result in creating a dominant position in favor of Kazancı Holding and thus in decreasing competition significantly in relevant markets. However, if the relevant undertakings effectuate the acquisition of two of Boğaziçi, Gediz and Trakya, this acquisition would be permissible according to Act No. 4054. The Board also decided that the acquisition of Dicle by İş-Kaya, MMEKA and Rosse would be authorized under Act No. 4054; that the acquisition of three of Boğaziçi, Gediz, Trakya and Dicle would not result in creating a dominant position and thus in decreasing competition significantly in relevant markets according to Act No. 4054; that the possible acquisitions of Boğaziçi by Park Holding A.Ş, Gediz by Enerjisa Elektrik Dağıtım A.Ş, Trakya by IC İċtař or by KCETAř-AYEN and Dicle by Karavil – Ceylan İnřaat or by alıık Enerji would be authorized. (16.12.2010; 10-78/1643-608)

Important Legislation and Decisions in Mergers and Acquisitions

- The Competition Board authorized the acquisition of the sole control exercised by Tronox Incorporated over certain of its assets and shares by Huntsman Corporation after determining that this operation would not create a dominant position as specified in Article 7 of Act no. 4054 and in Communiqué no. 1997/1, nor would it strengthen the existing dominant position and thus decrease competition significantly in the relevant market. (06.01.2010; 10-01/6-4)
- The Competition Board authorized the acquisition of the control of certain assets and subsidiaries' shares owned by "DyStar Textilfarben GmbH" and "DyStar Textilfarben GmbH & Co Deutschland KG which are Platinum Equity LLC's portfolio companies by Kiri Holding Singapore Private Limited after determining that this operation would not create a dominant position as specified in Article 7 of Act no. 4054 and in Communiqué no. 1997/1, nor would it strengthen the existing dominant position and thus decrease competition significantly in the relevant market. (12.01.2010; 10-04/49-24)
- The Competition Board, by taking into consideration that the parties were not in the same economic integrity, decided that the acquisition of the brand "Köytür Piliç" and other related brands pertaining to Karadeniz İtimat Koll. Şti. by Yemsel Tavukçuluk Hayvancılık Yem. Hay. San. ve Tic. A.Ş. was not within the scope of Article 7 of Act No. 4054 and Communiqué No. 1997/1. (21.01.2010; 10-08/68-32)
- The Competition Board authorized the acquisition of shares representing 50% of the capital of Kayalar Meffert Boya Sanayi ve Ticaret A.Ş. by Kayalar Kimya Sanayi ve Ticaret A.Ş. and Zafer Kayalar after determining that this operation would not create a dominant position as specified in Article 7 of Act no. 4054 and in Communiqué no. 1997/1, nor would it strengthen the existing dominant position and thus decrease competition significantly in the relevant market. (21.01.2010; 10-08/71-35)

- It has been decided that the transfer of the shares that control Anadolu Göcek Marina Turizm Yatırımları A.Ş. representing 100% of the company capital, together with the rights, titles, and benefits vested thereby, to Doğu Turizm Sağlık Yatırımları ve İşletmeciliği San. ve Tic. A.Ş. Doğu Holding A.Ş., Doğu Araştırma Geliştirme ve Müşavirlik Hiz. A.Ş., Doğu Gayrimenkul Yatırım ve İşletme A.Ş., Körfez Havacılık Turizm ve Tic. A.Ş. falls under Article 7 of Act No. 4054 and Communiqué No. 1997/1 but is not subject to authorization since it does not exceed the thresholds provided in the same Communiqué. (04.02.2010; 10-13/152-63)
- The Competition Board authorized the acquisition of MITSU Holdings LLC and MCEPF Metro I Inc. by GS Powers Holdings LLC since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and Communiqué No. 1997/1 and thus in significant lessening of competition. (04.02.2010; 10-13/153-64)
- The Competition Board authorized the acquisition of all of the shares representing the issued and paid up capital of Rieter Perfojet SAS by Andritz AG since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and thus in significant lessening of competition. (11.02.2010; 10-16/184-71)
- The Competition Board authorized the acquisition of all of the shares of 3Com Corporation by Hewlett-Packard Company since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and Communiqué No. 1997/1 and thus in significant lessening of competition. (18.02.2010; 10-18/213-83)
- It has been decided that the acquisition of the full control of the Black and Decker Corporation by the Stanley Works falls under Article 7 of Act No. 4054 and Communiqué No. 1997/1, but it is not subject to authorization since it does not exceed the thresholds provided in the same Communiqué. (25.02.2010; 10-19/231-88).
- The Competition Board, regarding the transaction of acquisition by Deere&Company of BHC Haroshet Matechet Beit Hashita Ltd through its participation in Zvaim Investment Holding Company

Ltd. Was authorized since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly of a nature mentioned in article 7 of the Act No. 4054 and in the Communiqué No. 1997/1. (04.03.2010; 10-21/268-99)

- The Competition Board, with regard to the transaction whereby the share of Multi Veste 186 B.V. in Forum Mersin Gayrimenkul Yatırım A.Ş. of 35% would be purchased by Union Investment Real Estate GmbH and sole control would be established decided that the transaction was subject to authorization within the scope of article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and authorized the transaction since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly of a nature mentioned in the same article of the Act. (11.03.2010; 10-22/305-113)
- The Competition Board, due to the fact that the parties to the transaction of acquisition by ZF Türk Sanayi ve Tic. A.Ş. of ZF Trading Otomotiv Parçaları AŞ. as a whole with all of its assets and liabilities were involved in the same economic entity, decided that the transaction did not fall under article 7 of the Act No. 4054 and the Communiqué No. 1997/1. (24.03.2010; 10-26 352-126)
- The Competition Board authorized the acquisition of the ready-mixed concrete facility belonging to Merve İnşaat Taahhüt Müh. Nak. Ltd. Şti. by Çimbeton Hazırbeton ve Prefabrik Yapı Elemanları San. ve Tic. A.Ş. *via* leasing as the transaction would not result in creating a dominant position or strengthening the existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly (08.04.2010; 10-29/443-167).
- The Competition Board, as a result of the examination made upon the authorization request for the acquisition of 100% of the shares of Uludağ Elektrik Dağıtım A.Ş., within the scope of privatization *via* block sale, by Limak İnşaat Sanayi ve Ticaret A.Ş. or Çalık Enerji ve Sanayi Ticaret A.Ş., decided that the acquisition was subject to authorization under Article 7 of Act No. 4054 and Communiqué No.

1998/4 and authorized the transaction as the possible acquisition by any of these bidders would not result in creating a dominant position or strengthening the existing dominant position as specified in the same Article of the Act and in Communiqué No. 1997/1 and thus in decreasing competition significantly in the relevant market. (08.04.2010; 10-29/438-164)

- The Competition Board, as a result of the examination made upon the authorization request for the acquisition of 100% of the shares of Çamlıbel Elektrik Dağıtım A.Ş., within the scope of privatization *via* block sale, by Kolin İnşaat Turizm Sanayi ve Ticaret A.Ş. (“Kolin İnşaat”) or Anadolu Doğalgaz Dağıtım A.Ş. (“Anadolu Doğalgaz”) or Cengiz Elektrik Toptan Satış A.Ş. (Cengiz Elektrik”) or Çalık Enerji Sanayi ve Ticaret A.Ş. (“Çalık Enerji”), decided that, within the scope of the privatization, the acquisition of these shares by Kolin İnşaat or Anadolu Doğalgaz or Cengiz Elektrik or Çalık Enerji, is subject to authorization under Article 7 of Act No. 4054 and Communiqué No. 1998/4 and authorized the transaction as the possible acquisition by any of these bidders would not result in creating a dominant position or strengthening the existing dominant position as specified in the same Article of the Act and Communiqué No. 1997/1 and thus in decreasing competition significantly in the relevant market. (08.04.2010; 10-29/437-163)
- The Competition Board authorized the acquisition of full control of Siemens Medical Holding GmbH by Drägerwerk AG & Co, KGaA as the transaction would not result in creating a dominant position or strengthening the existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition. (15.04.2010; 10-31/477-178)
- The Competition Board decided that the acquisition by Rheinmetall AG of Man Military Division belonging to Man Nutzfahrzeuge AG is within the scope of Article 7 of Act No. 4054 and Communiqué No. 1997/1; however, total turnovers and the market shares of parties do not exceed the thresholds stated in the same Communiqué; therefore, the transaction is not subject to authorization. (15.04.2010; 10-31/464-171)

- The Competition authorized the acquisition by Mechel Service Global B.V. of the shares of Ramateks Metal San. ve Tic. A.Ş. since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly of a nature mentioned in article 7 of the Act No. 4054 and in the Communiqué No. 1997/1. (10.06.2010; 10-42/729-236)
- The Competition Board authorized the acquisition by Shanghai Geely Zhao Yuan International Investment Co., Ltd. of Volvo Cars of North America LLC and Volvo Car Coporation companies belonging to Ford Motor Company since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly of a nature mentioned in article 7 of the Act No. 4054 and in the Communiqué No. 1997/1. (17.06.2010; 10-44/778-258)
- The Competition Board authorized the acquisition by ASELSAN Elektronik Sanayi ve Ticaret A.Ş. of a portion of 85% of the shares of Mikroelektronik Araştırma Geliştirme Tasarım ve Ticaret Limited Şirketi since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly of a nature mentioned in article 7 of the Act No. 4054 and in the Communiqué No. 1997/1. (17.06.2010; 10-44/767-250)
- The Competition Board authorized the acquisition of a 30% share in Hedef Alliance Holding A.Ş. by Alliance Healthcare Turkey A.Ş. since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and Communiqué No. 1997/1 and thus in significant lessening of competition. (08.07.2010; 10-49/910-319)
- The Competition Board authorized the acquisition of a 70% share of Bölünmez Petrolcülük A.Ş. by Mİlangaz Petrol Ticaret Sanayi A.Ş. since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and Communiqué No. 1997/1 and thus in significant lessening of competition. (08.07.2010; 10-49/932-330)
- The Competition Board authorized the acquisition of the trademark of “Damla Minera” which is registered under the name of The

Coca Cola Company by Coca-Cola İçecek A.Ş. with all of its rights since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and Communiqué No. 1997/1 and thus in significant lessening of competition. (08.07.2010; 10-49/910-319)

- The Competition Board authorized the acquisition of Akmaya Commercial and Economic Entity put up for sale by the Savings Deposit Insurance Fund by Dosu Maya Mayacılık A.Ş. as the transaction would not result in creating a dominant position or strengthening the existing dominant position within the framework of Article 7 of the Act No. 4054 and the Communiqué No. 1998/4 and thus in decreasing competition significantly. (05.08.2010; 10-52/991-355)
- The Competition Board authorized the acquisition of 88.01% of the shares of AFM Uluslararası Film Prodüksiyon Tic. ve San. A.Ş., apart from its public shares, by Esas Holding A.Ş. as the transaction would not result in creating a dominant position or strengthening the existing dominant position as specified in Article 7 of the Act No. 4054 and in the Communiqué No. 1997/1 and thus in decreasing competition significantly. (05.08.2010; 10-52/1004-380)
- The Competition Board, as a result of the examination conducted upon the request that the acquisition of all the shares of İnform Elektronik Sanayi ve Ticaret A.Ş. by Legrand France SA be authorized decided that the notified transaction is subject to authorization under Article 7 of Act No. 4054 and Communiqué No. 1997/1 on “Mergers and Acquisitions that Require the Authorization of the Competition Board” which was issued based on that article and that the transaction be authorized on condition that the second and the third sentences in the second paragraph of the subparagraph 5.1.4 (b) of the Share Purchasing Contract be omitted from the contract text. (08.08.2010; 10-49/898-312)
- The Competition Board, as a result of the examination made upon the authorization request for the acquisition of all movable and immovable goods and all other rights of Mesa Mesken Sanayi A.Ş. Mesa Hospital Branch by Türkiye Odalar ve Borsalar Birliği and TOBB ETÜ Sağlık Hizmetleri A.Ş., stated that the transaction

would not result in creating a dominant position or strengthening the existing dominant position as specified in Article 7 of the Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. However, it has been decided that an administrative fine of TL 294.331,74 will be assessed as the transactions were completed without the permission of the Board. (26.08.2010; 10-56/1088-408)

- The Competition Board decided that the transfer of 80% of the shares of Doğal Elektrik Üretim A.Ş. from Gama Enerji A.Ş. to Hamza DOĞAN fell under the scope of Article 7 of Act no 4054 and Communiqué no 1997/1, but that it was not subject to authorization since the market shares and turnovers of the parties did not exceed the thresholds specified in the same Communiqué. (02.09.2010, 10-57/1138-427)
- The competition Board, as a result of the examinations conducted upon the request for authorization of the acquisition of the assets of Kammgarn Spinnerei Stöhr GmbH and the shares of S.C. Stoehr Rom S.R.L., both of which are affiliates of the Stöhr Group, by the ERWO Group companies Südwolle GmbH & Co. KG and ISBE Holding AG, decided that the notified transaction was not subject to authorization since the market shares and turnovers of the parties did not exceed the thresholds specified in the relevant Communiqué and that the notified transaction should be issued a certificate of negative clearance under Article 8 of Act no 4054. (02.09.2010, 10-57/1148-433)
- The Competition Board, as a result of the examination conducted based on the request for the amendment of some points included in the commitment concerning the conditional acquisition of Burgaz Alkollü İçecekler Ticari ve İktisadi Bütünlüğü (Burgaz Alcoholic beverages Commercial and Economic Entity – Burgaz) by Mey İçki San. ve Tic. A.Ş., which was authorized by the Competition Board decision dated 08.07.2010 and numbered 10-49/900-314, subject to conditions, decided (1) that in order to ensure that Burgaz conserves its competitive value and to maintain supply continuity, production might be undertaken by Mey İçki San. ve Tic. in case of a significant decrease in the inventory, provided it was done under the supervision of the independent Burgaz management, and the

Competition Board was informed, that, if a potential buyer prefers, the manufacturing facilities and/or equipment of Burgaz might not be sold to the relevant buyer, and that the facilities and equipment had to be divested during the unbundling process, (2) that, in line with the Board decision dated 08.07.2010 and numbered 10-49/900-314, block sales of the assets to be unbundled might be more beneficial in terms of the establishment of a more competitive market structure; on the other hand, the assets to be unbundled might be split-up depending on the possible suitable buyers, and, that in such a situation, the expiration period mentioned in paragraph (iii) of Article (ix) of the aforementioned decision concerning the asset to be sold would not be implemented for the other assets to be unbundled, (3) that paragraph (iv) of Article (vi) of the Competition Board decision dated 08.07.2010 and numbered 10-49/900-314 maintained its validity concerning the assessment of the request for suitable buyers included in the unbundling Expert Agreement. (16.09.2010, 10-59/1203-M)

- The Competition Board, as a result of the examination conducted based on the request for the authorization of the acquisition of Toprak Karo Bozüyük Ticari ve İktisadi Bütünlüğü (Toprak Karo Bozüyük Commercial and Economic Entity) by Türkiye Vakıflar Bankası Anonim Ortaklığı (Türkiye Vakıflar Bankası Incorporated), decided that the acquisition of Toprak Karo Bozüyük Ticari ve İktisadi Bütünlüğü by Türkiye Vakıflar Bankası Türk Anonim Ortaklığı was not subject to authorization since the market share and turnover thresholds specified in Article 5 of the relevant Communiqué were not exceeded. (16.09.2010, 10-59/1217-460)
- The Competition Board decided that the acquisition of the shares of Bosphorus Gaz Corporation A.Ş., currently held by Tur Enerji A.Ş., by Gazprom Germania GmbH (20% of the shares), Metin ŞEN (8.5% of the shares), Ali Haydar ŞEN (1.99% of the shares) and Adnan ŞEN (8.5% of the shares) did not fall under the scope of Article 7 of Act no 4054 and Communiqué no 1997/1 since it did not lead to a change in the control of Bosphorus Gaz Corporation A.Ş. (16.09.2010, 10-59/1216-459)
- The Communiqué Pertaining to Mergers and Acquisitions for which Permission of the Competition Board is Required was published in

the Official Gazette dated 07.10.2010 and numbered 27722. This Communiqué will enter into force on 01.01.2011.

- The Competition Board authorized the acquisition by 3G Capital Partners Ltd. of all the shares of Burger King Holdings Inc. since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly as mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1. (14.10.2010; 10-65/ 1361-503)
- The Competition Board decided that the acquisition by NuStar Holdings BV of a 75% share of AVES Depoculuk ve Antrepoculuk Hizmetleri A.Ş. fell under article 7 of Act No. 4054 and Communiqué No. 1997/1, but was not subject to authorization due to the fact that the total market shares and turnovers of the parties did not exceed the thresholds provided in the same Communiqué. (14.10.2010; 10-65/1370-508)
- The transaction of gaining by Imtech N.V., Imtech B.V., Imtech 1 B.V., Imtech Marine Group B.V., Radio Holland Group B.V. of the shares forming the entire capital of Elkon Elektrik San. ve Tic. A.Ş. as of its date of closure was authorized by the Board since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly as mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1. (14.10.2010; 10-65/ 1359-502)
- The Competition Board authorized the acquisition by Finvus S.C.A of a part of the shares of AirTies Kablosuz İletişim San. ve Dış. Tic. A.Ş. through a capital increase and share transfer since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly as mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1. (14.10.2010; 10-65/1388-514)
- The Competition Board authorized the acquisition by Apollo Management L.P. of a 51% share of Omega Holdco B.V. since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly as mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1. (21.10.2010; 10-66/1396-517)

- The Competition Board authorized the acquisition by Vienna Insurance Group Wiener Stadtische Versicherung AG and TBIH Financial Services Group N.V. of shares equal to one more share of 10% share of the shares that Doğan Şirketler Grubu Holding holds in Ray Sigorta A.Ş. since it would not result in creating a dominant position or strengthening an existing dominant position and hence in reducing competition significantly as mentioned in article 7 of Act No. 4054 and in Communiqué No. 1997/1. (27.10.2010; 10-67/1410-528)
- The Competition Board authorized the acquisition by C.D Holding Internationale of Multinet Kurumsal Hizmetler A.Ş. whose shares are held by Tasarruf Mevduatı Sigorta Fonu (Savings Deposit Insurance Found), since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and thus in significant lessening of competition. (04.11.2010; 10-69/1455-555)
- The Competition Board authorized the acquisition by Alsim Alarko Sanayi Tesisleri ve Ticaret A.Ş. (Alsim Alarko Industry Facilities and Trade Inc.) of a 50% share of Altek Alarko Elektrik Santralleri Tesis, İşletme ve Ticaret A.Ş. held by Société Nationale d'Électricité et de Thermique, since it would not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054 and thus in significant lessening of competition. (04.11.2010; 10-69/1446- 546)
- The Competition Board decided that the establishment of a joint venture company between RCI Banque S.A and Ordu Yardımlaşma Kurumu (Army Solidarity Fund) with the title of “FOR Finansman Anonim Şirketi (FOR Financing Incorporated)” falls within the scope of Article 7 of Act No. 4054 and Communiqué No. 1997/1; however, it is not subject to authorization since the overall market shares of the parties and turnovers of the parties do not exceed the thresholds envisaged in the aforementioned Communiqué. (04.11.2010; 10-69/1461-559)
- The Competition Board authorized the acquisition by OMV Enerji Holding A.Ş. of a 54.14% share of Petrol Ofisi A.Ş. since it would not result in the creation or strengthening of a dominant position as

described under Article 7 of Act No. 4054 and thus in significant lessening of competition. (25.11.2010; 10-73/1520-581)

- The transaction for the acquisition of 51% of the 99.995% of the shares belonging to İpotek Financing S.A in Şeker Mortgage Finansman A.Ş. (Şeker Mortgage Financing Inc.) by Şekerbank Inc. has been authorized as the transaction would not result in creating a dominant position, or strengthening an existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (16.12.2010; 10-78/1599-610)
- The transaction for the acquisition by Nokia Siemens Networks B.V. of certain wireless network infrastructure assets of Motorola Inc. has been authorized as the transaction would not result in creating a dominant position, or strengthening the existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (16.12.2010; 10-78/1614-618)
- The transaction for the acquisition of 53.13% of the shares of Nortel Networks International Finance B.V. in Nortel Networks Netaş Telecommunications Inc. by OEP Rhea Turkey Tech B.V., a shareholding of One Equity Partners IV L.P., which is controlled by the JP Morgan Chase Group, has been authorized as the transaction would not result in creating a dominant position, or strengthening an existing dominant position as specified in Article 7 of the Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (16.12.2010; 10-78/1615-619)
- The transaction for the acquisition of the bonds of CMA CGM SA, which will turn into stock, by Yıldırım Holding A.Ş. (Yıldırım Holding Inc.) has been authorized as the transaction would not result in creating a dominant position, or strengthening an existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (23.12.2010; 10-80/1654- 629)
- The transaction for the acquisition by Caterpillar Inc. of the full control of MWM Holding GmbH and MWM GmbH through the channel of Caterpillar Investment GmbH&Co KG has been

authorized as the transaction would not result in creating a dominant position, or strengthening an existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (23.12.2010; 10-80/1666- 638)

- The Board decided that acquisition of the shares belonging to General Electric Capital Corporation, which provides the control of Doğuş GE Gayrimenkul Yatırım Ortaklığı A.Ş. (Doğuş GE Real Estate Investment Partnership Inc.) and which represent 25.5% of the company capital, by Doğuş Holding A.Ş. (Doğuş holding Inc.) has been authorized as the transaction would not result in creating a dominant position, or strengthening the existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (23.12.2010; 10-80/1656- 631)
- The transaction for the acquisition of 24.89% of the shares of Garanti Bankası A.Ş, by Banco Bilbao Vizcaya Argentaria S.A from Doğuş Holding A.Ş. and General Electric Capital Corporation has been authorized as the transaction would not result in creating a dominant position, or strengthening an existing dominant position as specified in Article 7 of Act No. 4054 and in Communiqué No. 1997/1 and thus in decreasing competition significantly. (29.12.2010; 10-81/1696-646)

Important Publications and Decisions in Privatization

- The Competition Board, as a result of the examination of the privatization of the sugar factories of Kastamonu, Çorum, Çarşamba, Kırşehir, Turhal and Yozgat (Portfolio C) pertaining to Türkiye Şeker Fabrikaları A.Ş. en bloc *via* the “sale of assets”, decided that it will be possible to apply to the Competition Board for authorization only if Konya Şeker Sanayi ve Ticaret A.Ş. owns all or some of the shares not included in the 51% of the shares to be owned by the members of the joint venture to be established as stated in the Declaration of Joint Venture. (21.01.2010; 10-08/65-29)
- The Competition Board, as a result of the examination conducted in relation to the privatization and transfer of all of the assets related to the salt production business of the Ayvalık Salt Enterprise Directorate of Tütün, Tütün Mamulleri, Tuz ve Alkol İşletmeleri A.Ş. *via* the “sale” and the “transfer of the operating rights” methods, decided to authorize the operation because it was within the scope of Article 7 of Act No. 4054 and Communiqué No. 1998/4. It was further decided that among the bidders only Cihanbeyli Madencilik Tuz Nakl. Kimya San. ve Tic. A.Ş. was subject to authorization, but this undertaking would also not result in the creation or strengthening of a dominant position as described under Article 7 of Act No. 4054, and thus there is no harm in authorizing the transaction. (11.02.2010; 10-16/182-69)
- The Competition Board conditionally authorized the acquisition of Burgaz Alkollü İçkiler ve İktisadi Bütünlüğü, which had been offered for sale by the Saving Insurance Döposit Fund by Mey İçki San. ve Tic. A.Ş., in its decision numbered 10-49/900-314 rendered on 08.07.2010 upon the final notification made on 24.03.2010.
- The Competition Board decided that the acquisition by Sebil Televizyon Yayıncılık A.Ş. and Er Televizyon Yayıncılık Hizmetleri A.Ş. of Maxi TV Commercial and Economic Entity, which were the two highest bidders in the tender for its sale by TMSF was not subject to authorization because it did not exceed the thresholds provided for in article 7 of the Act No. 4054 and the Communiqué No. 1998/4. (10.06.2010; 10-42; 737-242)

- The Competition Board, as a result of the examination made upon the authorization request for the acquisition of the shares and thus entire control of Amity Oil International Pty. Ltd., which is controlled by Zorlu Enerji Elektrik Üretim A.Ş. (Zorlu Energy Electricity Production Inc.) by TransAtlantic Worldwide Ltd., decided that the strategic cooperation to be realized as a result of the conclusion of the “Share Transfer Agreement”, the “Framework Gas Purchase Agreement”, the “Participation Agreement”, the “Gas Connection Agreement”, and the “Gas Storage Agreement” between the parties within the framework of the acquisition of the shares of Amity Oil International Pty. Ltd., which is controlled by Zorlu Enerji Elektrik Üretim A.Ş. and by TransAtlantic Worldwide Ltd. is under the scope of Article 4 of the Act No. 4054 and that this strategic cooperation will be given an individual exemption as it fulfils all of the conditions listed in Article 5 of the Act No. 4054. (05.08.2010; 10-52/1047 - 386)
- The Republic of Turkey’s Prime Ministry Privatization Administration has announced the privatization of 100% of the shares of Akdeniz Elektrik Dağıtım A.Ş., İstanbul Anadolu Yakası Elektrik Dağıtım A.Ş. and Toroslar Elektrik Dağıtım A.Ş. on 17.08.2010. According to the announcement, the privatization will be made by block selling. The deadline for pre-qualification applications is 17.09.2010.
- Resolution 2010/86 of 01.10.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 05.10.2010 and numbered 27720. Pursuant to this Resolution, the Council decided to sell 100% of the shares of Fırat Elektrik Dağıtım A.Ş. held by Türkiye Elektrik Dağıtım A.Ş. to Aksa Elektrik Perakende A.S., as a result of the final negotiation dated 18.02.2010 made by the Tender Committee.
- Resolution 2010/OIB-K-15 of 19.10.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 20.10.2010 and numbered 27735. This Resolution is in respect of the tenders of TCDD/Akçay Lodging and Zonguldak/Karaelmas immovable.

- Resolution 2010/88 of 15.10.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 20.10.2010 and numbered 27735. This Resolution is in respect of the inclusion of highways and bridges within the scope of privatization.
- The Decision of the Constitutional Court, E. 2008/50, K. 2010/84, Pertaining to the annulment of Temporary Article 22 of Law 5398 of 3.7.2005 that Amends Law 4046 of 24.11.1999 was published in the Official Gazette dated 22.10.2010 and numbered 27737.
- Resolution 2010/OIB-K-16 of 25.10.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 27.10.2010 and numbered 27742. This Resolution is in respect of the sale of certain immovables of Tobacco, Tobacco Products, Salt and Alcohol Enterprises A.Ş. (TTA).
- Resolution dated 27.10.2010 and numbered 2010/90 of the Supreme Council of Privatization was published in the Official Gazette dated 28.10.2010 and numbered 27743. This Resolution is in respect of the inclusion of Hamitabat Electric Generation and Trade A.S. within the scope of privatization.
- Resolution 2010/OIB-K-17 of 27.10.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 30.10.2010 and numbered 27744. This Resolution is in respect of the sale of an Afyonkarahisar immovable of Turkseker A.Ş.
- Resolution 2010/93 of 01.11.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 03.11.2010 and numbered 27748. This resolution is in respect of the privatization of Vangözü Elektrik Dağıtım A.Ş.
- Resolution 2010/ÖİB-K-18 of 11.11.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 12.11.2010 and numbered 27757. This resolution is in respect of the sale of partnership shares of certain companies which take place in the partnership portfolio of T. Halk Bankası A.Ş.
- The list of the bidders in the tender concerning the privatization of 100% of the shares of TEDAŞ in Akdeniz Elektrik Dağıtım A.Ş., İstanbul Anadolu Yakası Elektrik Dağıtım A.Ş. and Toroslar Elektrik Dağıtım A.Ş., which are affiliates of TEDAŞ, was published

in the official web site of the Privatization Administration, on 25.11.2010.

- Resolution 2010/101 of 20.11.2010 of the Supreme Council of Privatization was published in the Official Gazette dated 01.12.2010 and numbered 27772. Pursuant to this Resolution, some participation shares of the Social Security Institution have been included within the scope of privatization.
- Final negotiations related to the tenders of İstanbul Anadolu Yakası Elektrik Dağıtım A.Ş, Toroslar Elektrik Dağıtım A.Ş ve Akdeniz Elektrik Dağıtım A.Ş were completed on 07.12.2010. The highest bid submitted by MMEKA Makine İthalat Pazarlama ve Ticaret AŞ for İstanbul Anadolu Yakası Elektrik Dağıtım was 1.813 million dollars while the highest bids for Toroslar Elektrik Dağıtım and Akdeniz Elektrik Dağıtım AŞ were 2.75 million and 1.165 million dollars submitted by Yıldızlar SSS Holding and Park Holding.

Important Changes and Developments in Energy Law

- The Draft Regulation Amending the License Regulation on Liquefied Petroleum Gases (LPG) Market published in the Official Gazette dated 16.09.2005 and numbered 25938 has been submitted for public comment until 12.02.2010 by being published in the official website of the Energy Market Regulatory Authority on 04.02.2010.
- The Regulation on the Amendment of the Regulation on the Committee of Inspection of the General Directorate of Electric Power Resources Survey and Development Administration entered into force by being published in the Official Gazette dated 20.02.2010 and numbered 27499.
- The 10th revision of the Petroleum Market Legislation was published in the official website of the Energy Market Regulatory Authority on 24.02.2010.
- The 2009 Annual Sector Report on the Market of Liquefied Petroleum Gases (LPG) was published on the official website of the Energy Market Regulatory Authority on 04.03.2010.
- The Communiqué Amending the Communiqué on the Quality Standards Pertaining to the Waters in which Shelled Water Products are Farmed (Communiqué N. 2010/9) entered into force by being published in the Official Gazette dated 10.03.2010 and numbered 27517.
- The Regulation on the Amendment of the License Regulation on Liquefied Petroleum Gases (LPG) Market published in the Official Gazette dated 16.09.2005 and numbered 25938 was published in the Official Gazette dated 17.03.2010 and numbered 27524. This Regulation will enter into force on 01.04.2010.
- The Regulation on the Amendment of the Regulation Pertaining to the Audit of Natural and Legal Persons that Operate in Energy Market by Independent Audit Firms entered into force by being published in the Official Gazette dated 21.03.2010 and numbered 27528.
- The Draft Regulation on the Electricity Market Balancing and Settlement Regulation has been submitted for public comment until

08.04.2010 by being published on the official website of the energy market regulatory authority on 26.03.2010.

- The Communiqué on the Amendment of the Communiqué Regarding the Connection to Transmittal and Distribution Systems and System Usage in the Electricity Market entered into force by being published in the Official Gazette dated 30.03.2010 and numbered 27537.
- The Regulation on the Amendment of the Regulation Pertaining to the Technical Criteria that Apply to the Petroleum Market was published in the Official Gazette dated 01.04.2010 and numbered 27539. The 1st and 2nd Paragraphs replacing the 2nd and 4th paragraphs of Article 10 of the same Regulation will enter into force on 01.05.2010. All other articles will enter into force on the publication date.
- The Regulation on the Amendment of the Regulation on the Energy Performance of Buildings entered into force by being published in the Official Gazette dated 01.04.2010 and numbered 27539.
- The Regulation on the Amendment of the Petroleum Market License Regulation entered into force by being published in the Official Gazette dated 06.04.2010 and numbered 27544.
- The Regulation Amending the Technical Regulation of the General Directorate of State Hydraulic Works on Ground Waters entered into force by being published in the Official Gazette dated 11.04.2010 and numbered 27549.
- The Regulation Amending the Electricity Market Balancing and Settlement Regulation entered into force by being published in the Official Gazette dated 17.04.2010 and numbered 27555.
- The Regulation on the Amendment of the License Regulation on Liquefied Petroleum Gases (LPG) Market entered into force by being published in the Official Gazette dated 24.04.2010 and numbered 27561.
- The Communiqué repealing the Communiqué on the Standardization of Foreign Trade Pertaining to the Importation Audits of Fuel Products (N.2010/27) published in the Repeated Official Gazette

dated 31.12.2009 and numbered 27449 entered into force by being published in the Official Gazette dated 02.05.2010 and numbered 27569.

- The Competition Board authorized the acquisition of all of the shares of İçkale Enerji Elektrik Üretim ve Ticaret A.Ş. by Akenerji Elektrik Üretim A.Ş. and Raif Ali DİNÇKÖK, Gamze DİNÇKÖK YÜCAOĞLU and Alize DİNÇKÖK EYÜBOĞLU since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and thus in significant lessening of competition. (06.05.2010; 10-34/553-198)
- The Competition Board authorized the acquisition, by Incitec Pivot Explosives Holdings Pty Ltd. of the shares constituting 50% of the capital of the Nitromak DNX Kimya Sanayi A.Ş. since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and thus in significant lessening of competition. (06.05.2010; 10-34/565-199)
- The Competition Board authorized the acquisition of 9% shares of Turkland Bank A.Ş. by BankMed since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and thus significant lessening of competition. (12.05.2010; 10-36/576-206)
- The Competition Board authorized the acquisition, by Bain Capital Investors of all rights held by Styron LLC as a limited company as well as all partnership shares of Stryon B.V. from Dow Chemical Company and some of the affiliates of Dow Chemical Company since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1 and thus in significant lessening of competition. (12.05.2010; 10-36/608-211)
- The Communiqué on the Amendment of the Administrative Procedures Communiqué of Water Pollution Regulation entered into force by being published in the Official Gazette dated 12.05.2010 and numbered 27579.

- The 3rd and 6th Paragraphs of Article 4 of the Methods of Sample Taking and Analysis Communiqué of Water Pollution Regulation published in the Official Gazette dated 10.10.2009 and numbered 27372 was amended by the Communiqué on the Amendment of the Methods of Sample Taking and Analysis Communiqué of Water Pollution Regulation published in the Official Gazette dated 12.05.2010 and numbered 27579. This Communiqué entered into force at the publication date.
- The Communiqué on Recycling of Non-hazardous and Inert Wastes entered into force by being published in the Official Gazette dated 12.05.2010 and numbered 27579.
- The 4th Article entitled “Definitions” of the Electricity Market Peripheral Services published in the Official Gazette dated 27.12.2008 and numbered 27093 was amended by the Regulation on the Amendment of the Electricity Market Peripheral Services Regulation which was published in the Official Gazette dated 13.05.2010 and numbered 27580. This Regulation entered into force at the publication date.
- The Project which aims to amend the Electricity Market Eligible Consumer Regulation was submitted for the public opinion by being published in the official website of the Energy Market Regulatory Authority on 17.05.2010 until 04.06.2010.
- The Project which aims to amend the Electricity Market Customer Services Regulation was submitted for the public opinion by being published in the official website of the Energy Market Regulatory Authority on 20.05.2010 until 04.06.2010.
- The Competition Board, as a result of the examination conducted based on the request for the authorization of the restructuring, *via* the “Amendment Protocol” signed on 29.12.2009 of the control of Vienna Insurance Group Weiner Stadtische Versicherung AG and Kardan Financial Services B.V. over TBIH Financial Services Group N.V., in which they are shareholders and which operates within the insurance sector through Ray Sigorta A.Ş., decided that the notified transaction should be authorized since it would not result in the creation or strengthening of a dominant position as described under Article 7 of the Act No. 4054 and the Communiqué No. 1997/1

and thus in significant lessening of competition. (27.05.2010; 10-38/650-218)

- The Regulation on the Amendment of the Electricity Facilities Project Regulation entered into force by being published in the Official Gazette dated 01.06.2010 and numbered 27598.
- The Regulation on the Research on the Energy Sector – Development Projects Support Programs (ENAR) entered into force by being published in the Official Gazette dated 08.06.2010 and numbered 27605.
- The Regulation on Big Reburning Plants was published in the Official Gazette dated 08.06.2010 and numbered 27605. The limit values for the emission of sulphur dioxide set forth in Articles 6 and 11 of this Regulation will enter into force on 01.01.2012. The limit values for the emissions different from the limit values for the emission of sulphur dioxide set forth in Articles 10 and 11, as well as Articles 12, 13 and Provisional Article 3, will enter into force nine years after the publication date. As for the other Articles, they entered into force on the publication date.
- The Regulation on the Amendment of Türkiye Elektrik İletim A.Ş.’ Supervisory Board entered into force by being published in the Official Gazette dated 22.06.2010 and numbered 27619.
- The Regulation on the Amendment of the Regulation on the General Directorate of Electrical Power Resources Survey and Development Administration Supervisory Board entered into force by being published in the Official Gazette dated 24.06.2010 and numbered 27621.
- The Regulation on the Amendment of the Regulation Pertaining to the Regulation of the Electricity Market Distribution System and to the Supervision of the Materialization of the Plans published in the Official Gazette dated 07.01.2007 and numbered 26396 entered into force by being published in the Official Gazette dated 06.07.2010 and numbered 27633.
- “The Communiqué on the Amendment of the Communiqué Pertaining to Insurance Requirements in the Petroleum Market” was

published in the Official Gazette dated 10.08.2010 and numbered 27668.

- “The Regulation on the Amendment of the Petroleum Market License Regulation” was published in the Official Gazette dated 10.08.2010 and numbered 27668.
- “The Project of Regulation Amending the Natural Gas Market Interior Wiring Regulation” was published on the official internet site of the Energy Market Regulatory Authority from 19.08.2010 to 01.09.2010.
- The tender of distribution license of Aksehir Ilgin Natural Gas was canceled with the Council decision dated 26.08.2010 and numbered 2730-3.
- “The Regulation on the Amendment of the Electricity Market Customer Services Regulation” entered into force by being published in the Official Gazette dated 08.09.2010 and numbered 27696.
- “The Regulation on the Amendment of the Liquidated Petroleum Gas (LPG) Market License Regulation” entered into force by being published in the Official Gazette dated 15.09.2010 and numbered 27700.
- The Turkish Petroleum Corporation and the American petroleum company CHEVRON signed the Black Sea Corporated Operating Agreement on 20.09.2010.
- “The Competition Regulation Concerning the Applications Made for Establishment of Generation Facilities Based on Wind Power” entered into force by being published in the Official Gazette dated 22.09.2010 and numbered 27707. Pursuant to the Regulation, in case of the existence of several applications made for the establishment of generation facilities based on wind power in the same region and/or in the same transformer station, a competition will be held to determinate which will be codified to system.
- “The Draft of the Regulation on the Amendment of the Electricity Market License Regulation” was published on the official web page of the Energy Market Regulatory Authority on 23.09.2010 in order to receive opinions and suggestions until 08.10.2010.

- The Resolution of the Council of Ministers dated 27.08.2010 on the Ratification by law dated 15.07.2010 and numbered 6007 of the “Agreement on Cooperation for Building and Operation of a Nuclear Power Plant on the Akkuyu Site between the Government of the Republic of Turkey and the Government of the Russian Federation” signed in Ankara on 12.05.2010 was published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The Resolution of the Council of Ministers dated 13.09.2010 on the Ratification of the “Memorandum of Understanding Pertaining to the Sale and Shipping of Natural Gas between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Industry and Energy of the Republic of Azerbaijan” signed in Istanbul on 07.06.2010 was published in the Official Gazette dated 06.10.2010 and numbered 27721.
- The Regulation on the Amendment of the Electricity Market Peripheral Services Regulation entered into force by being published in the Official Gazette dated 15.10.2010 and numbered 27730.
- The “Regulation on the Amendment of the Electricity Market Balancing and Conciliation Regulation” was published in the Official Gazette dated 06.11.2010 and numbered 27751. The dates for entry into force are determined differently for the articles.
- The Resolution of the Council of Ministers dated 02.11.2010 on the Ratification by law of the “Memorandum of Understanding between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Industry and Commerce of Mongolia in the Field of Petroleum, Natural Gas and Mineral Resources” that was signed in Ankara on 02.11.2006 was published in the Official Gazette dated 11.11.2010 and numbered 27756.
- The Resolution of the Council of Ministers dated 18.10.2010 on the Ratification of the “Memorandum of Understanding that was Signed between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Petroleum and Mineral Resources of the Arab Republic of Syria” was published in the Official Gazette dated 13.11.2010 and numbered 27758.
- The “Draft Communiqué Pertaining to the Amendment of the Natural Gas Market License Communiqué” was submitted for public

comment on the official website of the Energy Market Regulatory Authority. Opinions concerning the draft may be submitted until 30.11.2010.

- The “Regulation on the Amendment of the Petroleum Market License Regulation” was published in the Official Gazette dated 01.12.2010 and numbered 27772, and entered into force by being published.
- The “Regulation Pertaining to Electricity Production in the Electricity Market without a License” was published in the Official Gazette dated 03.12.2010 and numbered 27774, and entered into force by being published.
- The Energy Market Regulatory Board published the Petroleum Market Sector Report for the First Nine Months of the Year 2010 on 08.12.2010.

Important Case Law

- The Constitutional Court deemed unconstitutional the first sentence of the first paragraph of the Provisional Article of the Law No. 4814 Amending the Law for the Regulation of Payments with Cheques and the Protection of Cheque Bearers, which states, “Before the date of entry into force of this Law” and rejected the Objection. (No: 2004/22; OG, 08.01.2010; 27456)
- The Constitutional Court ruled that the second paragraph of Article 114 of the Tax Procedural Law Numbered 213 was unconstitutional and annulled it. (No: 2006/124; OG, 08.01.2010; 27456)
- The Constitutional Court decided that the second sentence of the first paragraph of Article 28 of the Charges Law numbered 492 which states that, “No judgment can be rendered to the concerned person as long as the charge for decision and judgment is not paid” was unconstitutional and annulled it. The Court also decided that the first sentence of its Article 32 which states that, “As long as charges to be collected for jurisdictional operations are not collected, no subsequent operations will be realized” was not unconstitutional. (E. No: 2009/27) The decision of the Constitutional Court was published in the Official Gazette dated 17.03.2010 and numbered 27524.
- The Constitutional Court decided that the expression “...from women...” stated in the First Paragraph of the First Article of the Nursery Law numbered 6283 was unconstitutional and annulled it. The decision of the Constitutional Court was published in the Official Gazette date 19.03.2010 and numbered 27526.
- The Constitutional Court decided that the part “...the clinics which have not the character of dispensaries, infirmaries and polyclinics were excluded from this provision” of the 1st Paragraph of Article 24 of the Property Ownership Law numbered 634 was not unconstitutional and to the refusal of the objection (E. No: 2006/159). The decision of the Constitutional Court was published in the Official Gazette dated 18.05.2010 and numbered 27585.
- The Constitutional Court decided that the 3rd Paragraph of Article 5 of the Law on the Organization of a Council of Ethics for Public

Officers and Amendment of Some Laws numbered 5176 was not unconstitutional and to the refusal of the objection (E. No. 2008/38). The decision of the Constitutional Court was published in the Official Gazette dated 18.05.2010 and numbered 27585.

- It was decided to the annulment of certain articles of the Regulation on Control of Communication made *via* Telecommunication and the Follow-up of Confidential Investigation Measures and Technical Means Measures Provided by the Code of Criminal Procedure by the decision of the 10th Chamber of the Council of State dated 22.02.2010 and numbered 2007/2795 E. 2010/1399 K upon the lawsuit brought by the Directorate of the Istanbul Bar. (www.istanbulbarosu.org.tr)
- The Constitutional Court decided to annul the 5th Paragraph of Article 14 of the Municipality Law and to the entry into force of the annulment decision one year following its publication date. This decision of the Constitutional Court was published in the Official Gazette dated 22.06.2010 and numbered 27619. (E. No: 2008/27)
- The Constitutional Court ruled that the expression of “from the conclusion of the disciplinary investigation or...” set forth in the last sentence of the 1. Paragraph of Article 69 of the Attorney’s Act numbered 1136 was unconstitutional and annulled it. (E. No: 2008/73) This decision by the Constitutional Court was published in the Official Gazette dated 22.06.2010 and numbered 27619.
- The Judgment of the Constitutional Court, Numbered E. 2010/49, K. 2010/87 regarding “Annulment of Certain Paragraphs of Law Amending the Turkey Republic Constitution numbered 5982” was published in Official Gazette dated 01.08.2010 and numbered 27659.
- The Decision of the Constitutional Court, E. 2008/57, K. 2010/26 pertaining to the Annulment of certain Articles of Law 5763 of 15.05.2008 was published in the Official Gazette dated 22.10.2010 and numbered 27737.
- The Decision of the Constitutional Court, E. 2008/102, K. 2010/14 pertaining to the Annulment of Article 181 of Law 4721 of 22.11.2001 was published in the Official Gazette dated 22.10.2010 and numbered 27737.

- The Judgment of the Constitutional Court, E. 2009/67, K. 2009/119 Pertaining to the Annulment of the first paragraph of Article 14 of the Attorneyship Law was published in the Official Gazette dated 06.11.2010 and numbered 27751.
- The Judgment of the Constitutional Court, E. 2004/38, K. 2009/108 Pertaining to Disapproval of the Annulment of Article 306 and the second paragraph of Article 307 of the Turkish Civil Code was published in the Official Gazette dated 06.11.2010 and numbered 27751.
- The Judgment of the Constitutional Court, E: 2009/34 K: 2010/72 pertaining to the Annulment for Unconstitutionality of the first phrase of Temporary Article 5 of the Code of Administrative Law was published in the Official Gazette dated 30.12.2010 and numbered 27801.
- The Judgment of the Constitutional Court, E: 2010/29 K: 2010/90 pertaining to the Annulment of certain Articles of Law 5947 Pertaining to Full-Time Work by University and Medical Staff and the Amendment of Certain Laws was published in the Official Gazette dated 04.12.2010 and numbered 27775.

Important Changes and Developments in European Union

- Articles, sections, chapters, titles, and parts of the “Treaty on European Union” and of the “Treaty on the Functioning of the European Union” have been renumbered.
- From 01.01.2010, the structure of the Official Journal has been adapted in order to take into account of the entry into force of the Treaty of Lisbon. In particular, a distinction between “Legislative acts” and “Non-legislative acts” has been introduced in conformity with the Treaty of Lisbon.
- The EU Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreement and concerted practices was adopted by the European Commission. The Regulation was published in the Official Journal of the European Union dated 23.04.2010 and numbered L 102/1.
- Directive 2010/41/EU of the European Parliament and of the Council of 07.07.2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC was published in the Official Journal of the European Union dated 15.07.2010 and numbered L 180/6. This Directive will enter into force 20 days following the publication date.
- The European Commission Progress Report on Turkey concerning 2010 was published on the official website of European Commission on 09.11.2010.
- The European Commission adopted on 14.12.2010 the EU Antitrust Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements and will enter into force on 01.01.2011.

KAVRAM DİZİNİ

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