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PREFACE

We are very glad to share the Newsletter 2012 book with you. The Newsletter 2012 comprises the systematic gathering of articles published each month on the Erdem&Erdem website. Since the publishing of Newsletter 2010, the Newsletter book has garnered the attention of our business partners, clients and other legal practitioners. This has encouraged and motivated us to further develop and expand our book.

In Newsletter 2012, we abide by the same system as in previous years. 2012 was a year in which amendments made to statute laws entered into force and the obstacles faced in the practice of law were highly discussed and debated. Therefore, the Newsletter articles focus on updates to the Turkish Commercial Code and the Turkish Code of Obligations that entered into force in July 2012. Further, the secondary legislation prepared in order to provide guidance on the application of the Turkish Commercial Code is also assessed in detail, such that works related to the Turkish Commercial Code and its secondary legislation constitute a material part of the book. These works aim at clarifying theoretical matters as well as problems occurring in the practice of law. As is expected, Competition Law constitutes an important part of our publication of this year. The Legal Developments section includes important insights into material developments in international agreements, laws, regulations, communiqués, the decisions of the Competition Board and the Privatization Board, energy laws which were accepted in 2012 and key jurisprudence.

This book is the culmination of trusting, enthusiastic, dedicated and concerted work and effort by a very large team who has contributed to the writing of the articles, edited, proofread and checked the translated texts found in the articles and uploaded them to our website. We are sincerely grateful to and truly appreciate each and every colleague for his or her invaluable contribution to this publication, which is the accomplishment of an extremely pleasant teamwork.

To ensure that our readers receive accurate and the most up-to-date information, we re-edited the articles previously published on our website while putting together the book. For instance, the Competition Board recently updated its website and previous references to decisions published on the website were no longer valid. Therefore, we updated all references to its decisions in our articles which are both included in this book and published on our website. We also proofread the English articles to ensure unity of expression.

It is with great pleasure that we present Newsletter 2012, whose objective is to prove a useful resource for our clients, business partners and legal practitioners alike. We hope 2013 brings prosperity, joy and contentment to all our dedicated readers.

Nisantasi, January 2013

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SUMMARY OF CONTENTS

LIST OF ABBREVIATIONS*

Art.	:	Article
BRSA	:	Banking Regulation and Supervision Board
CB	:	Competition Board
CC	:	Civil Chamber
CMB	:	Capital Markets Board
CPC	:	Civil Procedure Code
E.	:	File
EBC	:	Execution and Bankruptcy Code
EMRA	:	Energy Market Regulatory Authority
etc.	:	Et cetera
et seq.	:	Et sequentes
EU	:	European Union
fn.	:	Footnote
IAA	:	International Arbitration Act
IPCPL	:	International Private and Civil Procedure Law
ISE	:	Istanbul Stock Exchange
K.	:	Decision
No.	:	Number
p.	:	Page
PLI	:	Professional Liability Insurance
TCC	:	Turkish Code of Commerce

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

TCO	:	Turkish Code of Obligations
TTRG	:	Turkish Trade Registry Gazette
V.	:	Volume

COMMERCIAL LAW

Amendments Made in the New Turkish Commercial Code with the Law No. 6335*

Prof. Dr. H. Ercument Erdem

The New Turkish Commercial Code ("New TCC") entered into force on July 1st, 2012. The Law on the Amendment of the Turkish Commercial Code and Law on the Entry into Force and Application of the Turkish Commercial Code numbered 6335 ("Law no. 6335") is promulgated by the Turkish Grand National Assembly on June 26, 2012 and published in the Official Gazette on June 30, 2012. In this article, we shall analyze the significant amendments made in the New TCC by Law no. 6335.

Requirement to Use a Trade Name

Article 39 of the New TCC which regulates the requirement to use a trade name is among the articles amended by Law no. 6335. Prior to the amendment, the second paragraph of the relevant article used to regulate that the registry number, trade name, registered office, the subscribed and paid-in capital for equity companies, the internet address and number of the webpage of the merchant shall be indicated in all papers and documents used in relation to the enterprise of the merchant. Additionally, with regards to joint stock companies, limited liability companies and limited partnerships divided into shares, the names and surnames of the chairman and members of the board of directors, directors and managers should have been indicated. With the amendments made with Law no. 6335, the expression of "all papers and documents" is clarified as "commercial letters drafted in relation to the enterprise of the merchant and the documents on which the registrations to commercial ledgers are based". Furthermore, the informa-

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* ***Article of July 2012***

tion that is required to be indicated on these documents are limited to the registration number, trade name, registered office and the registered internet address in case the merchant is subject to the requirement to have a webpage. Consequently, problems which could have arisen by the requirement to include all information in all documents related to the business of the merchant prior to the amendment are prevented.

Abolishment of the Operational Auditor

One of the new concepts introduced by the New TCC was the operational auditor. The operational auditor is the auditor responsible for the audit of qualified operations within the company such as incorporation, capital increase and decrease, merger, spin-off, conversion of type and issuance of securities. The operational auditor is abolished with Law no. 6335 and the references made to the operational auditor have been excluded from the New TCC accordingly.

The operational auditor was an appropriate concept aiming at the audit of important transactions and safeguard of the interests of relevant persons such as shareholders and creditors of the companies. As the operational auditor has been abolished, the said qualified transactions are no longer audited. The operational auditor would have audited whether the ratio of exchange, breakaway fee and equalization payment were fair or not. Since the operational auditor has not been replaced by any other means of auditing, the said operations are left outside of the scope of auditing.

Prohibition of Indebtedness towards the Company

Article 358 of the New TCC regulates the prohibition of indebtedness towards the company in joint stock companies. Pursuant to the said article prior to amendment introduced by Law no. 6335, the shareholders could not become indebted towards the company, except the debt with regards to subscription of capital. A debt arising from a transaction made with the company in relation to the enterprise of the shareholder and falling within the scope of activities of the enterprise of the company, which is subject to the same or similar conditions with similar operations, constitutes an exception to this rule. Pursuant to the said article, the shareholders may not be indebted towards the compa-

ny except for this case. According to the justification of the New TCC for this article, this article aims to prevent that the shareholders from misusing the resources of the company for their operations and transactions and making their personal expenses by this means, and from withdrawing money from the company. The shareholders withdrawing money from the company was indeed a common practice, which indisputably causes many inconveniences.

Pursuant to the amendments made in Article 358 with Law no. 6335, the shareholders may not be indebted towards the company, unless they perform their due debts resulting from subscription of capital, and unless the profit of the company together with independent reserve funds cover the loss of the company for previous years. As is seen, the conditions of the debt arising in relation to the enterprise of the shareholder and being subject to the same or similar conditions with similar operations are abolished. Accordingly, it is sufficient to fulfill the following conditions of the shareholders performing the debts resulting from subscription of capital, and the profit together with the independent reserve funds of the company cover the loss of the previous year. This provision moderates the prohibition of indebtedness towards the company. Given the possibility of distributing advance dividends and the principle of preservation of capital, the accuracy of enabling indebtedness to the company without any limitations may be questionable.

Qualification of the Members of the Board of Directors

Article 359 of the New TCC governs the number and qualifications of the members of the board of directors ("BoD") in joint stock companies. Pursuant to the relevant article prior to amendments introduced under Law no. 6335, at least one BoD member entitled to represent the company was required to be a Turkish citizen and to reside in Turkey. Additionally, pursuant to third paragraph the said article, at least one fourth of the BoD members should hold a university degree.

Law no. 6335 abolished the requirement of at least one BoD member being a Turkish citizen and residing in Turkey. I find this amendment to Article 359 which contradicted the essence and the possibilities provided by the New TCC to be positive.

Article 628 which provided that at least one director of limited liability companies, who is entitled to solely represent the company, was required to reside in Turkey was abolished, in line with the above amendment.

Joint Stock Companies Subject to Auditing

Article 397 of the New TCC regulates the auditing of joint stock companies. The said article prior to amendments used to regulate that the financial statements of joint stock companies and group companies shall be audited by an auditor, in accordance with Turkish Auditing Standards which are compatible with international auditing standards. Law no. 6335 regulated that the said article would be applicable only to joint stock companies which are subject to auditing. Joint stock companies which are subject to auditing shall be specified by the Council of Ministers, pursuant to Article 397/4 of the New TCC. With the amendments made in the New TCC with Law no. 6335, all joint stock companies are not subject to auditing. However, the external auditing was one of the most significant innovations introduced by the New TCC and replaced the statutory auditing which was not functional anymore. The fact that some joint stock companies are totally out of the scope of auditing may give raise to problems with regards to the principle of preservation of capital in joint stock companies, and the guarantee of the rights of shareholders and creditors.

Another article amended by Law no. 6335 is Article 400 of the New TCC which regulates the persons who may be qualified as auditors. Pursuant to the said article prior to amendments, the auditor could only be an independent audit company whose shareholders are certified financial advisers or independent financial advisers. The companies of medium and small scale may appoint one or more certified financial advisers or independent financial advisers as their auditor. Law no. 6335 regulated that auditors may be certified financial advisers or independent financial advisers certified in accordance with Law on Independent Financial Advisers and Certified financial advisers dated 1/6/1989 and numbered 3568 and who are authorized by Public Surveillance, Accounting and Auditing Standards Authority, and/or companies whose shareholders have the said qualifications.

Privileged Shares

Law no. 6335 inserted a fourth paragraph to Article 478 of the New TCC which regulates privileged shares, and introduced certain limitations with regard to privilege rights. Pursuant to the new provision, shares, shareholders that form a group, groups of share and minorities may not be granted privilege rights regulated under the New TCC in joint stock companies with more than the half of its capital owned individually or collectively by the State, special provincial administration, municipality and other public legal persons, syndicates, associations, foundations, cooperatives and their superior entities; as well as the subsidiaries with more than the half of their capital owned by such joint stock companies with the same capital percentage; without prejudice to the privilege rights held by the said institutions. Consequently, the amendments made in Article 401 of the Turkish Commercial Code numbered 6762 with Law no. 6215 have been included in the New TCC as well.

Crimes and Punishments

Important amendments have been made with Law. No. 6335 in Article 562 of the New TCC which governs crimes and punishments. The punishment of imprisonment pertaining to infringement of the first and fourth paragraphs of Article 199 of the New TCC pertaining to the reports of subsidiary and parent companies is abolished. Additionally, the punishment of imprisonment concerning the persons who refuse to give the ledgers, registrations and documents and the relevant information which are required to be kept in accordance with the New TCC to persons who are authorized to audit, persons who prevent the auditors to perform their duties is abolished. Article 563 of the New TCC which regulates that the said crimes would be pursued ex officio is also deleted. Therefore, the criminal provisions criticized by the public are moderated.

Incorporation of Limited Liability Companies

With the amendments made with Law no. 6335, the requirement of payment of the capital in cash at once and in full in limited liability companies pursuant to Article 585 of the New TCC is abolished.

Similar to joint stock companies, the possibility for one fourth of the capital of limited liability companies to be paid at the stage of incorporation, and the rest to be paid within twenty four months is introduced. Additionally, it has been regulated that the provisions with regards to the payment of capital shares, place of payment, performance obligation, results of non-performance and transfer of shares whose value has not been totally paid for joint stock companies shall be applied by analogy. I am of the opinion that this provision is positive.

Website

Article 1524 of the New TCC provides a disposition regarding the website. While this article regulated, prior to being amended, that all equity companies were obliged to establish a website, as a result of the amendments introduced under Law no. 6335, the website requirement shall be applied to equity companies which are subject to auditing pursuant to Article 397/4 of the New TCC. The said companies shall open their websites in three months following their registration to trade registry. Additionally, pursuant to Provisional Article 8 adopted by Law no. 6335, equity companies subject to auditing which have been incorporated prior to the entry into force of Article 1524 shall establish their websites within three months and allocate a section of the site to the publication of the issues provided under the relevant article.

Amendments Made in Law no. 6103

Law no. 6335 introduced important amendments in Law on the Entry into Force and Application of the Turkish Commercial Code numbered 6103 ("Law no. 6103").

Article 22 pertaining to amendments of articles of association has been amended, and it has been regulated that the said amendments shall be made within 12 months following the entry into force of the New TCC. Prior to amendments, the said article regulated that the amendments of articles of association shall be made in 18 months following the publication of the New TCC, which provided a shorter period of time, and was widely criticized by the scholars.

Pursuant to amended article 26 of Law no. 6103, the references made in the articles of association to the Turkish Commercial Code numbered 6762 with regards to meeting and resolution quorums in the articles of association shall be readjusted through amending the articles of association within 12 months following the entry into force of the New TCC. Article 28 pertaining to voting rights, privileged voting rights and transfer limitations of registered shares states that the relevant provisions of the New TCC shall enter into force in 12 months following the entry into force of the New TCC.

Conclusion

Many important amendments have been made in the New TCC with Law no. 6335 a short time before the entry into force of the New TCC, and the New TCC has been amended before becoming effective. This is not an ordinary situation for such a principal code as the New TCC whose preparation took almost ten years with regards to the legislation technique, it is very difficult to deem convenient that many new and principal concepts (such as operational auditor and external auditing) introduced by the New TCC are rapidly abolished or amended without leaving room for necessary debates. Additionally, most of the secondary legislation foreseen in the law are not yet enacted, which causes many problems, especially before Trade Registries. It would have been more appropriate for these amendments to be made opened to discussion in advance. We hope that the inconveniences which we pointed out will be eliminated and the practices pursuant to the New TCC will become clearer as soon as possible.

Jouissance Shares for the Founders in Turkish Commercial Code*

Prof. Dr. H. Ercument Erdem

Introduction

Jouissance shares are the securities, different from the share certificates, which do not provide its holder with any shareholder right but which carry some financial rights. Art. 503 of the Turkish Commercial Code numbered 6102 ("TCC") clearly points that the holders of jouissance shares cannot be provided with shareholders rights.

The jouissance shares, in general, are regulated in art. 502 of the TCC. Pursuant to this article, the general assembly may decide to issue jouissance shares in accordance with the articles of association or by amending it, in favor of the creditors, the holders of the shares which value is legally paid off or similar relevant persons to the company. These jouissance shares may be issued to the order of someone specific or to the order of the bearer.

Art. 502 of the TCC stipulates that art. 348 of the TCC shall be applied to the jouissance shares. Art. 348 of the TCC regulates the interests of the founders and the limitations regarding the payments to holders of jouissance shares. Pursuant to this article, at most 10% of the distributable dividends can be paid to the founders holding jouissance shares after the legal reserves are made and 5% of the dividend is reserved for the shareholders.

The Issuance of Jouissance Shares for the Founders

Article 502 of the TCC regulates that jouissance shares may be issued in accordance with the articles of association or by amending it. Art. 402 of the Turkish Commercial Code numbered 6762 ("former TCC") which is abrogated on July 1, 2012, similarly regulated the jouissance shares. However, art. 402/2 of the former TCC set forth that the jouissance shares for the founders cannot be issued unless it has been stipulated in the first articles of association of the company.

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* ***Article of October 2012***

On the other hand, the issuance of jouissance shares for the founders in the event of capital increase was accepted even it had not been stipulated in the first articles of association. This opinion was based on art. 392 of the former TCC regulating the capital increase. This article states that capital increase by means of issuance of new shares is subject to the provisions regarding incorporation. Accordingly, the issuance of jouissance shares for the founders in cases of capital increase was accepted both by the doctrine and the High Court of Appeal.

As seen, TCC contains certain differences with relation to the former TCC. Therefore, the cases where jouissance shares for the founders can be issued should be discussed with regards to TCC which entered into force on 1 July 2012.

While the TCC accepts the issuance of jouissance shares in accordance with the articles of association or by amending it, and removes the obligation to stipulate the jouissance shares for the founders in the first articles of association. Nevertheless, it is not possible to issue jouissance shares for the founders with any kind of amendment in the articles of association, because of the *raison d'être* of the jouissance shares for the founders, since the purpose of the jouissance shares for the founders is to reward the persons who contributed their efforts and to encourage the founders for incorporation.

Jouissance shares for the founders cannot be issued in the event of capital increase made in accordance with the TCC since art. 392 of the former TCC, which stated that the capital increase is subject to incorporation transactions, is not present in TCC. In the TCC, contrary to the former TCC, specific references are made to certain articles regarding incorporation instead of a general reference to incorporation. Within this scope, it is stated that the art. 353 (Lawsuit for Termination), art. 354 (Registration and Announcement of the Company), art. 355 (Incorporation), art. 342 and 343 (Subscription of Capital in kind), art. 344 and 345 (Payment of the Fees), art.346 (The Shares subject to Public Offering), art. 347(Shares with Premium) regarding information will be applied to the capital increase transactions by analogy. However, there is no article regarding the possibility to issue jouissance shares for the founders during the capital increase.

Rights Granted to the Holders of the Jouissance Shares for the Founders

Article 503 of the TCC stipulates that holders of jouissance shares cannot be provided with shareholding rights but they can be entitled to a percentage of net profit, the capital surplus (if any) upon liquidation of a company or to the right to purchase new shares to be issued by the company. This article repeats art. 403 of the former TCC. Therefore, the discussions for former TCC regarding the meaning of "net profit" or "capital surplus upon liquidation of a company" are still in force.

Art. 348/3 of the TCC stipulates that, in case the company has distributable profits, the holders of jouissance shares may be entitled to payments even the company did not adopt a resolution on payment of dividends to the shareholders.

The Position of Holders of Jouissance Shares in Mergers

The doctrine accepts that the holders of jouissance shares are not entitled to block the resolutions of the general assembly. The purpose of this opinion is to protect the company interests from blocking intentions of those who are not shareholders. However, it is also necessary to protect the holders of jouissance shares who have financial rights in the company. To that end, art. 140/5 regulates the position of holders of jouissance shares in merger of the company with another.

Pursuant to said article, the transferor company must provide the holders of jouissance shares of the transferee company with equal rights or to purchase the jouissance shares over the price at the date of the merger agreement. Accordingly, the current rights of the holders of jouissance shares available in the transferee company shall be protected exactly in the same way in the transferor company. In this situation, it is a legal obligation to provide jouissance shares to the current holders of jouissance shares in the transferee company.

Article 142 of the Turkish Commercial Code must be also taken into consideration in the course of a merger. The said article states that, for the protection of the shareholder's rights, it is necessary to make capital increase. Even though this article regulates the protection of the shareholder's rights, this article must be applicable for the protection of the holders of jouissance shares rights by analogy and the capital

increase must be made by taking into account the holders of jouissance shares.

The Position of Holders of Jouissance Shares in Public Offering

In a merger transaction, if the transferor or transferee company is a publicly held joint-stock company, the resolutions of the general assembly cannot be executed unless the approval of the holders of jouissance shares is granted upon a resolution adopted by them in a special meeting. However, the procedure for adopting this resolution should be discussed. As known, pursuant to former TCC, general assembly of holders of jouissance shares was regulated with reference to the general assembly of bond holders. However, TCC does not regulate general assembly of bond holders and it does not have a specific regulation regarding the holders of jouissance shares' general assembly. Therefore, it may be opined that the approval of the holders of jouissance shares' general assembly stipulated under the capital market law is now without a legal basis.

On the other hand, art. 348/2 of the TCC also should be mentioned for public offering. The aforesaid article states that the joint stock companies incorporated following the entry into force of the TCC will invalidate the jouissance shares for the founders without paying any fee before the public offering; otherwise the jouissance shares for the founders will be deemed invalid ipso facto. This article was accepted and entered into force even though it has been criticized in the doctrine for the reason that it will discourage the founders of the company. Consequently, the joint-stock companies incorporated after July 1, 2012 and which issue jouissance shares for its founders shall invalidate the jouissance shares for founders in case the company decides on public offering; otherwise these shares will be deemed invalid ipso facto.

The Termination of the Shares

As explained above, the jouissance shares do not grant shareholding rights to its holders. It is accepted that there is a contractual relation between the holders of jouissance shares and the company. As a consequence, the jouissance shares may be terminated with the consent

of the holders which are a party to the contract. Along with this, a jouissance share issued for a definite period of time will expire at the end of this period. However jouissance shares do not expire in cases of merger or conversion, unless they have been purchased by the company over their real prices on the date of the merger (art. 140/5 of TCC). Accordingly, the jouissance shares may expire in case of a public offering pursuant to article 348/2 of the TCC mentioned above.

Conclusion

The amendments made through the TCC in the provisions of the former TCC regarding the jouissance shares for founders result in restriction of the cases where jouissance shares for founders can be issued and in non-issuance of jouissance shares in the course of capital increase. It is uncertain whether these results are preferred by the legislator. However, the legal provisions in force require the acceptance of these results.

Provisions of the Turkish Commercial Code Concerning Securities*

Prof. Dr. H. Ercument Erdem

While the provisions in the New Turkish Commercial Code ("New TCC") concerning securities maintained the basic principles, as they were set forth in the Turkish Commercial Code ("TCC"), new provisions have also been introduced aiming a robust and well-functioning system that is more business aligned. Amongst other things, with the printing requirement for bearer and registered securities upon request of minority shareholders, it will now be possible to exercise shareholding rights in a more efficient and conducive manner. Additionally a new kind of financial instrument -securities containing right to purchase or exchange-, which had not been regulated under the TCC, has been introduced to the Turkish Law with the New TCC.

Share Certificates

Article 484 of the New TCC regulates share certificates. This article reaffirms the basic principle set forth in Article 409 of the TCC, which allows share certificates to be issued either as registered or bearer share certificates. However, the New TCC has coined a new wording with regards to the term of share certificate, and opted to use the term "share certificate" instead of "stock certificate".

Pursuant to Article 484/2 of the New TCC, bearer share certificates may not be issued for the shares which are not fully paid-up. The bearer share certificates, which have been issued contrarily to this rule are void, on the other hand, compensation rights of bona fide persons are reserved.

Pursuant to Article 485 of the New TCC, unless stated otherwise in the articles of association, the type of a share certificate may be modified by means of conversion. The relevant article clarifies the issue, which had been left obscure to understand by the TCC, and

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* ***Article of January 2012***

states that the conversion may only be realized by amendment to the articles of association. Moreover, the Article 485 of the New TCC regulates that, in the event that the conversion is a legal requirement, it shall be done through a board of directors' resolution, and it shall be reflected to the articles of association at a later stage.

Pursuant to Article 486 of the New TCC regulating the principles pertaining to the printing of share certificates, similarly to Article 412 of the TCC, share certificates printed prior to the incorporation of the company are void; however, obligations resulting from the undertakings of subscription remain valid. Additionally, those who print share certificates prior to incorporation are required to compensate the damages resulting therefrom. The second and third paragraphs of Article 486 of the New TCC contain new provisions that were not included in the TCC. Accordingly, for bearer certificates, the board of directors shall, within three months following the payment in full of the share price, print the share certificates and deliver them to shareholders. With the said provision, a printing requirement with regards to bearer share certificates has been adopted. The board of directors' resolution pertaining to printing the bearer share certificates shall be registered and announced, and published in the website of the company. Moreover, the relevant article regulates that temporary share certificates may be issued until the issuance of original share certificates, which shall be subject to the same the provisions as registered share certificates.

Pursuant to Article 486/3 of the New TCC, upon request of minority shareholders, registered share certificates shall be printed and delivered to shareholders holding the registered shares. This provision is one of the innovations brought by the New TCC. The printing possibility of registered share certificates may prevent problems arising from share ledgers not reflecting the shareholding. A very unbecoming practice, especially in closely-held joint stock companies, that not printing share certificates may cause considerable obstacles to shareholders of proving shareholding status. In the justification of the New TCC of the relevant article, it is stated that in case of infringement of the said article, shareholders are endowed to initiate a lawsuit. By this way, shareholders may benefit from an efficient statutory protection.

Articles in the New TCC concerning the rules for the form of share certificates and worn-out and defaced certificates reaffirm the relevant articles in the TCC.

Transfer of Share Certificates

The innovations in the New TCC concerning share transfers have been examined in our article of July 2011 titled "Innovations Concerning the Transfer of Shares in the New Turkish Commercial Code". Therefore, only the basic principles with regards to transfer of shares shall be handled in this article.

Pursuant to Article 489 of the New TCC, the basic principle concerning the transfer of ownership of bearer share certificates is that the transfer of the share is only valid with regards to the company and third persons by the transfer of possession of the share. The relevant disposition is identical with Article 415 of the TCC. While the term "delivery" was used instead of the term "transfer of possession" in the TCC the New TCC preferred the latter term in order to describe the concept more clearly.

Pursuant to Article 490 of the New TCC governing transfer of registered share certificates, the transfer of registered share certificates is realized with the convey of possession of the registered and endorsed share certificate. This article clarifies that the mandatory requirement of the transfer of possession of the endorsed share certificate applies for transfers through a (legal) transaction. With this article, confusions about the requirement for the transfer and endorsement for statutory transfers are prevented.

Dividend Right Certificates

Provisions concerning dividend right certificates are set forth in Articles 502 and 503 of the New TCC. Pursuant to Article 502 of the New TCC, the general assembly may, in accordance with the articles of association or by amending the articles of association, decide on the issuance of dividend right certificates in favor of the shareholders whose shares have been extinguished pursuant to legal provisions, creditors of or persons related to the company. In the relevant article, the basic principle laid down under Article 402 of the TCC is repeated. However,

unlike the TCC, the New TCC Article 502/2 regulates that the dividend right certificates may be issued as bearer or promissory certificates.

Article 503 of the New TCC contains dispositions similar to Article 403 of the TCC. Pursuant to the said article, holders of dividend right certificates cannot be granted with shareholding rights; however, they may be granted with other rights to participate to the net profit, to the remaining amount after liquidation, or to acquire newly issued shares.

Debt Instruments and Securities Containing Right to Purchase and Exchange

Article 504 and following articles of the New TCC regulate debt instruments and securities containing right to purchase and exchange which were not regulated under the TCC.

Upon the exercise of the right to purchase or to exchange of the holders of the securities granting such rights, the capital of the company shall increase in proportion to these rights. The capital increase upon the exercise of the right to purchase or right to exchange occurs automatically, without necessitating any further operation. Right to purchase and right to exchange are creative rights. Therefore, the relevant declaration generates its consequences once it is received by the other party, it cannot be revoked and it cannot be bound to a specific condition.

Pursuant to Article 504 of the New TCC, debt instruments such as bills of exchange and commercial bills, securities bearing right to purchase and right to exchange and all other types of securities may be issued upon the resolution of general assembly, unless stated otherwise by legal provisions. Article 504 of the New TCC makes reference to Article 421/3 and 421/4 with regards to the resolution of general assembly to be adopted. Pursuant to the said provisions, these resolutions should be adopted by the votes of shareholders holding at least seventy five percent of the capital or their representatives. In the event that this quorum is not reached in the first general assembly meeting, the same quorum should be obtained for the following meetings. However, a provision on the contrary may be regulated under the articles of association (New TCC Article 504). Pursuant to the justification

of the New TCC for the article, it is possible to increase or decrease the quorum provided by the relevant article.

The general assembly resolution pertaining to issuance of a security is required to contain all relevant terms and conditions of securities

The security certificates issued in accordance with Article 504 of the New TCC may be bearer, or promissory certificates and with a nominal value. The general assembly and, in case it is authorized, the board of directors are competent to determine the nominal value. The last sentence of Article 504 contains a provision which regulates debt instruments only. Accordingly, the payment method of debt instruments should be in cash and it should be paid at the time of delivery.

Pursuant to Article 505 of the New TCC, unless otherwise regulated by law, the general assembly may authorize the board of directors with regards to issuance of security, determination of the terms and conditions related thereto for a maximum term of fifteen months. In the justification of the articles of the New TCC, it is stated that the provision of a maximum term has been introduced for convenience purposes. Reference is made to Articles 421/3 and 421/4 with regards to quorums which shall be applied to resolutions pertaining to authorizing the board of directors. Accordingly, the resolutions shall be adopted with the votes of shareholders holding at least seventy five percent of the capital or their representatives and in the event that this quorum is not reached in the first general assembly meeting, the same quorum should be obtained for the following meetings.

Article 506 of the New TCC provides a limit concerning the total value of the debt instruments to be issued in accordance with the articles above. This value shall not exceed the sum of the company's capital and reserve funds which appear on the balance sheet. Pursuant to Article 506/2 of the New TCC, provisions of the Capital Market Law are reserved.

Conclusion

As detailed in the above, while the provisions in the New TCC concerning securities maintained the basic principles set forth in the

TCC, new provisions aiming at eliminating certain problems arising in the application of the TCC have been adopted. The term “share certificate” is used in the New TCC instead of “stock certificate”. With the printing requirement for bearer shares and the printing possibility for the registered shares upon request of minority shareholders, shareholders will be able to exercise their shareholding rights in a more efficient manner. The securities containing right to purchase or right to exchange, which were not foreseen under the TCC, are now regulated under the New TCC. With these innovations, the New TCC aims to prevent the obstacles that used to occur with the implementation of TCC, and to establish a better functioning system.

Innovations in the New Turkish Commercial Code Concerning Financial Statements and Reserve Funds*

Prof. Dr. H. Ercument Erdem

Financial statements are among the matters subject to major amendments with the New Turkish Commercial Code numbered 6102 ("New TCC"). The New TCC has adopted the Turkish Accounting Standards ("TAS") which are compatible with International Financial Reporting Standards ("IFRS"), which were not regulated under the Turkish Commercial Code numbered 6762 ("TCC"). Consequently, the financial statements will be prepared in conformity with the financial standards adopted by industrialized countries and uniform in practice will be achieved. Additionally, competition in international markets is aimed at and Turkish markets will be more globalized. As per reserve funds, basic principles in the TCC have been maintained with the New TCC.

In General

Financial statements are defined as presentations of the financial status and performance of an enterprise. Financial statements of general purpose aim to provide information about the financial status, performance and cash flows of an enterprise in order to facilitate the adoption of financial decisions of large masses. Additionally, financial statements show the efficiency of usage of resources entrusted to directors.

Financial statements include information about assets, foreign resources, equity, profit and loss; modifications in equity and statement of cash flow of the enterprise.

Pursuant to Article 514 of the New TCC, the financial statements and annual activity report of the company shall be prepared by the Board of Directors ("BoD"). The BoD shall prepare the financial statements and its appendices as well as the annual activity report regulat-

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* ***Article of February 2012***

ed under the TAS with regards to the previous accounting period within the first three months of the accounting period following the balance sheet date, and present to the General Assembly ("GA"). With the said article, the financial statements would be presented to the GA within a certain time period

True and Fair View Principle

Article 515 of the New TCC regulates the true and fair view principle. This principle with Anglo-Saxon origins has been included in the New TCC as "honest reflection".

The true and fair view principle envisages that the financial statements shall reflect the financial status of the company in a true, accurate and fair manner and in accordance with the facts. This article regulates that the financial statements shall be prepared in compliance with TAS. Financial statements shall be complete, comprehensible, comparable to previous years, compatible with needs of the enterprise, transparent and trustworthy. Therefore, the conditions of the company shall be reflected clearly and in a comprehensible manner. It is possible to say that the financial statements take a picture of the financial status of the company.

Annual Activity Report of the BoD

Article 516 of the New TCC regulates the annual activity report. The annual activity report presents the activities of the company for the relevant year and its financial status in all aspects. In the activity report, the activities of the company and financial status shall be reflected accurately, completely, directly, fairly and in accordance with the actual status. The justification of Article 516 also states that the annual activity report shall provide a true view in accordance with Article 515 of the New TCC, and reference is made to the true and fair view principle.

In the annual activity report, the financial status of the company shall be evaluated in accordance with financial statements. The BoD shall also state in the report the details about the company's development and the risks that might be encountered.

Article 516/2 of the New TCC regulates the key elements that should be included in the annual activity report. Pursuant to the said

article; significant events that took place after the end of the activity year, research and development activities of the company, pecuniary benefits of BoD members and executive managers such as remuneration and premiums, various expenditures, real and pecuniary opportunities, insurance and similar securities shall be detailed in the annual activity report.

Pursuant to Article 516/3 of the New TCC, the mandatory content of the annual activity report shall be regulated by a regulation of the ministry of Industry and Commerce.

Articles 517 and 518 of the New TCC bring similar dispositions with regards to financial statements and annual activity report of group of companies. Pursuant to article 517 of the New TCC, TAS shall determine the enterprises obliged to prepare consolidated financial statements and enterprises which fall within the scope of consolidation, and relevant issues. Article 518 of the New TCC regulates that the annual activity report with regards to group of companies shall be prepared with the BoD of the parent company, pursuant to Article 516 which regulates the annual activity report.

Reserve Funds

Articles 519-523 of the New TCC regulate reserve funds. Article 519 of the New TCC which regulates the general statutory reserve funds is similar to the corresponding disposition of the TCC. Pursuant to Article 519/1 of the New TCC, five percent of the annual profit shall be reserved as general reserve fund until this sum reaches twenty percent of paid-in capital. After reaching this threshold, figures listed under Article 519/2 shall be added to general statutory reserve funds. General statutory reserve funds shall be spent only on recovering losses, maintaining the activities of the enterprise or preventing unemployment, unless it exceeds half of the share capital or the issued capital.

Article 520 of the New TCC provides a new disposition which was not included in the TCC. Pursuant to Article 520/1 of the New TCC, the company shall reserve funds equivalent to the amount of the shares acquired by the company, in the event that the company acquires its own shares. These reserve funds may only be spent in proportion with the acquisition value of the bought back shares once transferred or

extinguished. Article 520/2 of the New TCC regulates that revaluation funds and other funds included in the liabilities of the company may be spend when converted into capital and when the assets re-evaluated are amortized or transferred.

Reserve Funds on the Discretion of the Company

Article 521 of the New TCC is entitled as "reserve funds on the discretion of the company". This title has replaced the term "optional reserve funds" regulated by Article 467 of the TCC. Pursuant to this article, the articles of association may regulate that more than five percent of the profit may be reserved as reserve funds, and that reserve funds may exceed twenty percent of the paid-in capital. Additionally, the articles of association may provide other reserve funds and determine their allocation and in which conditions they may be spent. This article is similar to Article 467 of the TCC.

Article 522 of the New TCC regulates the reserve funds in favor of employees and workers. While this article has been regulated mainly through adapting Article 468 of the TCC, it also brings some additional dispositions. Pursuant to the said article, funds may be reserved in order to found and maintain charitable organizations in favor of directors, employees and workers of the company, or in order to be given to public legal entities which have similar purposes. Directors of the company were not regulated within the scope of this article in the TCC, unlike the relevant provision of the New TCC.

Article 522/2 of the New TCC regulates that cooperatives may be founded besides foundations by separating the funds reserved for charitable purposes and other assets. The third paragraph of the said article regulates that, in case fees have been collected by the company for this purpose, and the employees and the workers could not benefit from the relevant reserve funds at the end of the employment relationship, the fees paid by employees shall be refunded to them with legal interest accrued starting from the date of payment. The New TCC foresaw the application of statutory interest instead of interest fixed to 5% under the TCC.

Relation between Profit Share and Reserve Funds

Article 523 of the New TCC has adopted limitations with regards to reserving funds other than specified by legal provisions and articles of association. Pursuant to the second paragraph of the said article, the GA may resolve on reserving funds other than specified by legal provisions and articles of association if necessary for providing assets and if it may be deemed suitable with regards to permanent development and stable profit distribution, taking into account the benefits of all shareholders. While this article aims to protect shareholders with regards to profit share, certain problems encountered with the TCC could not be eliminated. It is in the discretion of the GA to reserve funds other than those specified by legal provisions or the articles of association, and the only right the shareholders have against the GA resolution is requesting its annulment.

Miscellaneous Provisions

Article 524 of the New TCC regulates a new provision with regards to the publication of financial statements. Pursuant to this article, the financial statements of the company and the group of companies and the annual activity report, the GA resolution pertaining to profit distribution and the GA resolution with regards to decision of the auditor shall be published in the Trade Registry Gazette and in the website of the company within six months following balance sheet date. In case of failure to comply with this obligation, penal sanctions regulated under the Article 562/6 of the New TCC shall be applicable.

Article 526 of the New TCC regulates summary financial statements. Pursuant to this article, small scaled joint stock companies and Turkish branches of companies with a head office abroad may publish summary financial statements.

Pursuant to Article 527, which regulates the confidentiality obligation, those who examine commercial ledgers and documents of a joint stock company are under the obligation of confidentiality and privacy. Persons failing to comply with this obligation shall compensate the material and moral damages of the company. The second paragraph of this article reserves the articles of criminal legislation pertaining to denunciation of crimes.

Conclusion

The innovations brought by the New TCC with regards to financial statements aim to adopt the standards applied in industrialized countries. The New TCC provides that the financial statements of the company shall be prepared in accordance with the TAS which is compatible with IFRS. The true and fair view principle has been included in the New TCC and the financial statements of the company shall reflect the current financial status of the company. With respect to reserve funds, the basic principles of the TCC have been maintained. With these amendments, the financial status of the company shall be reflected in accordance with the current financial status and Turkish markets would be harmonized with foreign markets.

Funds to be added to the Share Capital of Companies and Re-Assessment of Fixed Assets*

Att. Berna Asik Zibel

Provisions of the New Turkish Commercial Code on Capital Increase from Internal Sources

Article 462 of the new Turkish Commercial Code numbered 6102, which entered into force on 01.07.2012 ("NTCC") sets forth the provisions regarding the authorized capital increases through addition of internal sources to the capital. As per this article;

- capital reserve funds, which are set aside for contingencies but not allocated for a special purpose,
- the parts of the statutory reserves which can be freely disposed and
- the funds, which are permitted by the law to be indicated in the balance sheet and to be added to the capital;

may be converted into share capital and the share capital can be increased by utilizing those internal sources.

In the event that the company has funds which are permitted by the law to be added to the share capital; the share capital cannot be increased by means of subscription.

According to the procedure, the amount, which will cover the increased part of the share capital, should be attested with the approved annual balance sheet and a clear written statement given by the board of directors. If more than six months passed from the date of the balance sheet, a new balance sheet shall be issued and approved by the board of directors. The capital increase becomes final upon the registration of the general assembly and board of directors resolutions and the amended articles of the articles of association to the related trade registry. As per the last paragraph of article 462 of the NTCC, the cur-

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* ***Article of August 2012***

rent shareholders of the company should automatically acquire the newly issued gratis shares pro-rata to their shareholding in the share capital of the company. The right to acquire gratis shares cannot be overruled, restricted or waived.

The secondary legislation with respect to the funds which are permitted to be added to the share capital has not yet been set forth as per the NTCC. Considering the secondary legislation under the Turkish Commercial Code numbered 6762, there is an Internal Trade Communiqué on Incorporation and Amendment of Articles of Associations of Joint Stock and Limited Liability Companies numbered 2003/3 which was announced in the Official Gazette dated 25 July 2003 by the Ministry of Industry and Trade ("Communiqué nr. 2003/3"). When this Communiqué nr. 2003/3 is reviewed, it is seen that Annex 2 of this Communiqué nr. 2003/3 sets forth the documents requested for the registration of the capital increase and within these documents, the ways of capital increase by utilizing internal sources is listed as "inclusion of share certificates, addition of value increase funds, value increase funds of affiliates, cost increase funds, profits from sales of affiliate shares or immovable properties".

The legal doctrine suggests that with respect to the funds permitted to be added to the share capital, article 462 of the NTCC provides merits to the tax rules set forth by the Tax Procedure Law numbered 213 ("TPL") under articles 298, reiterated article 298 and provisional article 25 on inflation accounting[1]. Therefore, those articles of TPL shall be evaluated in that regard.

Tax Procedure Law Provisions on Re-assessments and Secondary Legislation

The provisions of the TPL regarding the recordation of value increases to the balance sheet or addition to the share capital as a result of a re-assessment have been eliminated with reiterated article 298 which is entered into force with the "Law regarding the Amendments on Tax Procedure Law, Income Tax Law and Corporate Tax Law"

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1 **Pulaşlı, Hasan**; Yeni Şirketler Hukuk Genel Esaslar, Adalet Yayınevi, Ankara 2012, 1. Edition, p. 859.

numbered 5064 which was announced in the Official Gazette dated 30.12.2003 and numbered 25332 ("Law nr. 5064"). With this Law nr. 5064, inflation adjustment system is accepted under amended articles of TPL and the re-assessment system is overruled, thus the accounts regarding the "Increases upon Re-assessment of Fixed Assets" and "Increases upon Re-assessment of Affiliates" set forth in the balance sheets are no longer applicable. Similarly, since article 38/4 of the Income Tax Law numbered 193 ("ITL") has also been eliminated; the "Cost Increase Funds" which previously were permitted to be added to the share capital have also lost its applicability.

On the other hand, before those amendments made with Law nr. 5064, the ways of capital increase by utilizing the internal sources has been listed in the Annex 2 of the above mentioned Communiqué nr. 2003/3 and no correction has been made in this Communiqué after the law amendment. Therefore, it has been seen that the trade registries organized under the Ministry of Customs and Trade and the tax offices organized under the Ministry of Finance have conducted different implementation which are contrary to each other. Some trade registries have continued to register this kind of capital increases which are made upon re-assessment of fixed assets based on the certified accountant reports as per Communiqué nr. 2003/3.

Given the circumstances, this kind of capital increases should not be registered since the law is a higher legislative act than the communiqué and the discrepancies in the communiqué should be corrected.

Upon the amendments made by Law nr. 5024, the determination of the Company's equity can be requested from the court for only following circumstances;

- for the contribution of an enterprise to a company as share capital (in other words, change of type, merger, de-merger transactions set forth under ITL 81, CPL 18, 19 and 20) and
- in a situation where a company lost its entire share capital, for the determination whether the assets of the company is sufficient to cover the liabilities and whether the company becomes bankrupt or not.

Even though the circulars legalized under the NTCC indicate that the Communiqué nr. 2003/3 will be in force until the secondary legislation based on NTCC is approved, since the expression under the Communiqué nr. 2003/3 is contradictory to TPL, the capital increases based on this expression should not be accepted.

Istanbul Tax Authority declared a similar opinion in its private ruling dated 19.08.2011. According to this private ruling, the re-assessment system was eliminated with the inflation correction provision which was set forth under the reiterated article 298 of TPL by the Law nr. 5024 and it is no longer possible to make a re-assessment other than the inflation correction. Therefore, even the companies procure the re-assessment of their immovable properties; these re-assessed values cannot be accepted as values according to the tax procedure legislation. In addition, the excessive values determined as per the re-assessment can be recorded to the accounts solely for information purposes. On the basis of the foregoing, the re-assessment funds or cost increase funds are no longer accepted with the law as the funds that can be added to the share capital; therefore it is no longer possible to add these funds to the capital.

Accounting Principles and Provisions Regarding the Re-assessment under New Turkish Commercial Code

The 5th Chapter of the NTCC under articles 64 et seq. regulates the provisions on accounting principles, balance sheets and assessment.

As per article 72 of the NTCC, in an enterprise; all assets, debts, all costs paid and income received in cash; in technical words all term defining accounts and all income and costs, are mandatory to be shown as truly assessed.

The assessment provisions regarding the company assets are set forth under articles 78-80. In general, the principles set forth under Turkish Accounting Standards are applicable for the assets and debts indicated in the financial statements. The values indicated in the closing balance sheet of the previous term should be equal to the values to be indicated in the opening balance sheet of the term of activity. On the closing date of the balance sheet, the assets and debts should separate-

ly be assessed and the method applied for the previous year should be preserved.

As per articles 79 and 80, the assessment of the fixed assets shall also be made according to the Turkish Accounting Standards.

The "principle of true and fair view" is accepted by article 515 of NTCC. According to this principle, the financial statements of a joint stock company should set forth all assets, debts and obligations, equity and the results of its activity in an understandable, comparable, transparent, trustworthy manner as convenient as to its needs and scope of activity in accordance with the Turkish Accounting Standards and should reflect the truth exactly, adequately and same as original.

In light of the above provisions, it seems possible to choose "true view method" for the assessment of the asset values in accordance with the accounting principles. On the other hand, since the secondary legislation with respect to the accounting principles is still pending and the link between the Turkish Accounting Standards and tax accounting system as per the Turkish tax procedure law has not yet been clearly defined, the reassessment of the fixed assets as per the "true view method" should be re-examined after those steps are taken.

The Consequences of the Non-Compliance

In the event of a capital increase by way of re-assessment of fixed assets contrary to reiterated article 298 of TPL and article 462 of NTCC; the following consequences may occur:

1- Non-approval of the Capital Increase Resolution by the Ministry Commissar or Non-registration of the Capital Increase Resolution by the Trade Registry:

Even though a re-assessment of the fixed assets was made before the court, the excessive value was recorded to the balance sheet as value increase funds and a capital increase was made by addition these funds to the share capital, since such a resolution will be contrary to the law, it is possible for the Ministry of Customs and Trade commissar not to approve the resolution or for the second step, it is also possible for the trade registry not to register the resolution.

2- Statements regarding the Capital Increase and the Audit

As per article 457 of the NTCC, for the capital increase procedures in a joint stock company, the board of directors shall sign a statement and in this statement, one of the issues that should be verified is legality, validity, existence and disposability of the funds, if such capital increase is made by addition the internal funds. Accordingly, for a capital increase from internal sources, the company board of directors shall declare and guarantee that the funds are the type of funds that are permitted to be added to the share capital as per the law. Otherwise, if there is a capital increase from funds that are not permitted, the statement of the board will be false and thus, the liability of board may arise and civil and penal sanctions will become applicable against the board of directors.

Article 398 of the NTCC sets forth that the audit of the company financial statements and annual board of directors' report also covers the audit on whether those are kept in compliance with the Turkish Accounting Principles, the law and the articles of association of the company. As per article 403, the auditor should provide an opinion letter and indicate any matter with respect to the financial statements causing any liability in this opinion. Non-compliance to these audit provisions and not-indicating the reservations and problems in the audit report may lead the liability of the auditor and may cause civil and penal sanctions.

3- Claims Against the Registered and Announced Capital Increase

As per article 456 of the NTCC, the incorporation provisions under article 353 are also applicable for capital increases by analogy. If this article is interpreted solely with its wording, same as incorporation, the capital increase resolution cannot be declared as null and/or void. As per the analogical interpretation, it would be possible to claim the termination of the capital increase which endangers or breaches the interests of the creditors, shareholders of the public with a legal action initiated by the creditors, board members, shareholders or the Ministry of Customs and Trade before the competent court. This legal action shall be filed within three months upon the registration and announce of the capital increase as per article 353/4.

On the other hand, there is a counter-doctrine, which states that claiming the nullity or voidness of the capital increase is possible[2]. In such case, these claims have no statute of limitation. The implementation of such article will be defined by the case law of High Court of Cassation in the future.

4- Liability and Sanctions

a. Civil Liability Provisions

Articles 549 et seq. of the NTCC set forth the provisions of civil liability for joint stock companies. As per the general provision under article 549, in the event that there are false, misleading or missing information or breach of law in the documents, declaration, undertakings or guaranties regarding the incorporation, capital increase or decrease, merger, de-merger, change of type or issuance of securities; the people who prepare those documents or who provide those statements are liable for their fault.

In addition, according to article 550, the people, who lead false and misleading impression with respect to the share capital, are liable for their fault and the fictional shares which cause the false impression shall be undertaken and paid jointly by those who are liable.

Therefore, should there be a capital increase by utilizing the funds that are not permitted to be added to the share capital, the current board members who provide the statement and other people who cause the wrong impression (e.g. the certified accountant who gives a positive report) will be liable and will be responsible for the losses against the company, the shareholders and also the company creditors.

As per article 554, the auditors or special auditors are also liable for their faults during fulfillment of their duties, for the losses against the company, the shareholders and also the company creditors. Therefore, should there be a capital increase by utilizing the funds that are not permitted to be added to the share capital, the current auditors, who do not point out this discrepancy, will be liable for it.

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2 **Kendigelen, Abuzer**; Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, XII Levha, İstanbul 2011, p. 310, fn. 133.

According to article 559 of NTCC, the liability of the board members, auditors regarding the incorporation or capital increases shall not be waived or released within four years upon the relevant registration. The claim of indemnification is subject to a statute of limitation of two years as of the date on which the loss and the liable person are learned and at most five years as of the date on which the action lead to loss is occurred. Should there be a longer statute of limitation under Turkish Penal Code for the same action, this statute of limitation shall apply the civil legal actions as well. The legal action shall be filed before the court where the company headquarters is registered.

b. Penal Liability Provisions

According to article 562 of the NTCC regarding the penal liability and sanctions, the above discrepancies set forth under article 549 regarding the incorporation, capital increase or decrease, merger, demerger, change of type or issuance of securities, the people who prepared fictional documents and who make false and misleading records shall be subject to a penalty of 1-3 years imprisonment. In addition, as per article 550, the people, who cause wrong and misleading impression regarding the share capital, shall be subject to a penalty of 3 months – 2 years imprisonment or judicial fine.

Conclusion

In the light of the above, the increase of the share capital of a company by utilizing internal courses which are recorded as re-assessment funds upon a re-assessment of the fixed assets shall not be legally possible according to the reiterated article 298 of TPL which was amended with the law nr. 5024. Therefore, a capital increase conducted contrary to the relevant provisions of law may lead civil and penal liability of the board members, auditors or any related people.

The State Audit over Corporations*

Prof. Dr. H. Ercument Erdem

Introduction

The authority of the Ministry of Industry and Trade to audit corporations (limited to joint stock companies) was stipulated for the first time in Article 274 of the former Turkish Commercial Code no. 6762 ("Old TCC"). The scope of auditing practice has been extended with art. 210 of the new Turkish Commercial Code no. 6102 ("New TCC") which entered into force on 1 July 2012 and the audit has become an obligation for all commercial corporations.

Before the New TCC entered into force, a number of amendments were made to both the TCC and the Act on the Implementation and Entry into Force of the Turkish Commercial Code ("Act of Implementation") by the Act on Amendment of the Turkish Commercial Code and Act on Implementation and Entry into Force of Turkish Commercial Code ("Act no. 6335"). Act no. 6335 introduced a number of amendments to provisions that were criticized by business organizations and scholars. More detailed information can be found in our article published in July 2012.

Article 210 of the New TCC has been amended by Act no. 6335, which introduced the following wording; *"principles and procedures of auditing and the transactions subject to audit shall be regulated by a regulation to be prepared by the Ministry*."

In accordance with the New TCC, the Regulation Pertaining to the Audit of Corporations by the Ministry of Customs and Commerce ("Regulation") was published in the Official Gazette dated 28 August 2012.

The Regulation regulates the scope and procedures of the auditing of companies and it is composed of five sections.

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* ***Article of August 2012***

The Scope of Audit

The purpose of this Regulation is to determine the principles of auditing, how it will be conducted and the transactions subject to audit. Within this scope, the Regulation provides certain definitions.

Pursuant to the Regulation, the Ministry of Customs and Trade (the "Ministry") is the public institution authorized to conduct the audit. Even before the amendments of Act no. 6335 were enacted, it was already accepted that all references in Article 210 of the New TCC to the Ministry of Industry and Commerce were, in fact, made to Ministry of Customs and Trade. The Regulation embraced the amendment of terminology introduced by the Act no. 6335.

Article 210 of the New TCC states that not only joint stock companies but all corporations shall be evaluated within the scope of audit, contrary to the Old TCC. Accordingly, the section of the Regulation regarding definitions refers to all corporations. Moreover, Article 13 of the Regulation also states that the Ministry may audit any corporations who no longer are legal entities.

Transactions Subject to Audit

Transactions subject to audit are enumerated in Article 5 of the Regulation. These are incorporation actions, transactions which are necessary for the existence of the commercial enterprise (those relative to the registration with the trade registry and announcements, with respect to the trade name and enterprise name, and those concerning the commercial ledgers), as well as mergers and acquisitions, de-merger, type conversion transactions and actions regarding group companies. Moreover, the transactions regarding the general assembly and administration of the company, acts regarding the appointment of the auditor and those concerning the amendment of the articles of association are also within the scope of auditing. Transactions concerning shares and the obligation of subscription of capital, stock exchange transactions, and transactions related to alteration of capital, financial statements, annual activity reports and reserve funds, and also transactions about profit, dividend and liquidation shares are among the long list of transactions subject to auditing. Transactions related to electronic and knowledge-based society services are also within the scope

of the audit provisions pursuant to the understanding of electronic transparency in the New TCC. The transactions concerning the termination of a company and lastly regulatory transactions based on the New TCC are audited by the Ministry.

It is understood that the audit includes all activities from the moment a company is established. With this broad auditing competence, the New TCC aims to ensure accountability and transparency in commercial transactions.

The Purpose of Auditing

The aim of auditing is expressed in art. 4 of the Regulation. Auditing targets to ensure all commercial companies realize their transactions in accordance with the law. In that way, the Regulation stipulates that the compliance of *"all transactions realized from the establishment until the termination of commercial companies with the Code and the regulatory transactions pursuant to the Code" shall be audited "by the Ministry"*. Firstly, remedial aspect of auditing is put forward. Therefore, it is stipulated that the Ministry shall provide guidance to remove any improprieties in practice. Secondly, auditing has another aspect, which is providing sanctions. Following completion of an audit, it is regulated that persons, whose criminal liability is detected, shall be directed to the competent authorities. Persons whose legal responsibility arises, the relevant persons are identified to the board of directors and included in the agenda of the general assembly. Lastly, the preventative role of auditing is emphasized. The Regulation stipulates that precautions will be taken in order to prevent inconveniences arising in practice.

Principles in Auditing

Auditing is based on the principles of impartiality, equality, honesty, confidentiality, and professional diligence. These principles are valid in all phases of auditing, in other words, from collecting evidence to evaluating the consequences of the results. Moreover, the principle of confidentiality prevails until the result of auditing becomes definite.

Procedure of Auditing

The third part of the regulation defines how the audit will take place. The decision to undertake an audit is at the discretion of the Ministry and it is performed at the registered office of the company, at the commercial enterprise, and if necessary at a branch office by the audit personnel of the Ministry. If the technological infrastructure of the company is significant and the auditing personnel does not deem an audit at the registered office necessary, the investigation may be conducted only on files after obtaining the approval of the Ministry. The Ministry may take the auditing decision ex officio or upon request, notice, or complaint by shareholders or third parties. However, separate approval of the Ministry is required for expansion of the audit of the audit personnel so as to include subsidiaries and affiliated companies.

An auditor shall conduct the audit compliant to a certain procedure. On the other hand, the audited entities are also imposed certain obligations. One of these obligations is to facilitate the works auditors. The second obligation is to make available in a timely manner to the auditors all kinds of written or electronic documents, even if they are confidential, upon requests during audit. The audited entities failing to fulfill this requirement will be warned. If the requested documents do not arrive on time or are incomplete, the Regulation refers to Article 562 (4) of the New TCC and concludes that such act will result in criminal liability. The sanction in this case is a judicial fine not less than three hundred days provided the act does not constitute another crime requiring a higher sanction. Along with the audited entity, state institutions and organizations, professional institutions in the form of public entities, associations concerning public welfare, notaries, banks, insurance companies and other real persons or legal entities shall provide any and all documents requested for audit.

Techniques of Auditing

Techniques of auditing are not listed exhaustively in the Regulation. Auditors decide on the utilization of advised techniques by themselves, but this authority does not provide an unlimited right of selection. It is essential to gather adequate evidence following the uti-

lized techniques. Within this scope, the Regulation suggests techniques such as observation and affirmation.

Preparation of the Audit Reports

The reports indicated by the Regulation are prepared at the end of the audit. Article 9 stipulates the content of these reports. The inspection report includes the conformity of the corporation's acts with the law. The investigation report is prepared only if there is a crime resulting in criminal liability. Finally, the survey report regulates all other issues, which are not addressed in the other reports.

As specified under New TCC Article 210(3), the Ministry may file a suit for the termination "*of the companies engaging in acts which are contrary to the public order or its field of operation or preparatory acts or engaging in acts and activities which constitute a simulation*" within one year of being informed of the relevant activity. In order to file suit for annulment, an investigation report shall be prepared. Moreover, the investigation report shall state that situations giving raise to the legal responsibility of persons should be included in discussion on the general assembly agenda and the shareholders shall be informed about such situations, and the report shall include other issues regarding the application of administrative monetary fines, and other determination and opinions of matters which fall within the scope of the authorization of other ministries, institutions and organizations which require taking of certain measures.

Conclusion

The Regulation sets out the auditing criteria in a detailed way for all commercial companies. The establishment, operations, and termination of a commercial company are subject to audit pursuant to certain procedures. Such detailed auditing will increase transparency and keeping of records and will be a factor while fighting against the off-the-record economy. Still, the Ministry needs qualified and experienced personnel both in the provinces and in the cities in order for the active auditing of commercial companies which are increasing day by day and whose accounts become more complex. Without these personnel it would be naïve to anticipate an efficient auditing.

Dissolution and Liquidation of Joint Stock Companies*

Prof. Dr. H. Ercument Erdem

The New Turkish Commercial Code numbered 6102 ("New TCC") entered into force on July 1, 2012 without any postponements, as amended by the Law on Amendment of the Turkish Commercial Code and the Law on Entry into Force and Application of Turkish Commercial Code numbered 6335.

The dispositions of the New TCC pertaining to termination and liquidation are regulated considering the needs which occurred under the Turkish Commercial Code numbered 6762 ("TCC"). The New TCC adopted the possibilities of termination with justified reasons, additional liquidation and revocation of liquidation.

Dissolution

Article 529 of the New TCC regulates the grounds for dissolution of joint stock companies. Pursuant to sub-paragraph (a) of this article, joint stock companies shall be dissolved at the end of the term stipulated under the articles of association unless the company has implicitly become a company for an undetermined term by continuing its activities despite the fact that the term expired. This disposition clarified a debate under the TCC. As a matter of fact, the status of the companies which continued their activities although their term expired was not regulated under the TCC. The Turkish Court of Cassation stated that the company which continued its activities despite the fact that its term expired would become a company for an undetermined term and the articles of association of the company should be amended accordingly. The New TCC ended the said controversy.

Pursuant to sub-paragraph (b) of Article 529 of New TCC, realization of the purpose of the company or the fact that its realization becomes impossible is also accepted as ground for dissolution. The phrase "purpose of the company" under the TCC is replaced by "scope of operation" under the New TCC.

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* ***Article of June 2012***

Articles 530 and 531 of the New TCC regulate specific types of dissolution. Pursuant to Article 530, in case of non-existence of one of the legally required organs of the company or in case the general assembly ("GA") cannot be convened, the commercial court of first instance located at the registered office of the company shall allow a cure period in order to render this situation compliant with the law. If the compliance is not achieved within such time, the company will be dissolved. Since joint stock companies can be established with only one shareholder under the New TCC, the fact that the number of shareholders is less than five is no more a ground for dissolution.

Article 531 of the New TCC regulates dissolution due to justified reasons, which was not regulated under the TCC. Pursuant to this article, shareholders representing at least one tenth of the capital or one twentieth of the capital of the public companies may request the dissolution of the company before the commercial court of first instance located at the registered office of the company. This right is regulated as a minority right. The article does not define which circumstances may be classified as justified reason. However, the court may, instead of dissolution of the company, rule on squeeze-out of the claimant shareholder through payment of the real value of its shares on the closest date to the date of decision, or decide on another convenient and acceptable solution.

Pursuant to Article 532, the dissolutions will be registered and announced by the board of directors ("BoD") to the trade registry in case the dissolution resulted from reasons other than bankruptcy or court decision. The dissolved company shall undergo liquidation proceedings; notwithstanding certain legal exceptions. Article 533/2 of the New TCC clearly stipulates that the competences of the organs shall continue limited to realizing the liquidation. The liquidation and the status of the company organs in case of bankruptcy are regulated similarly with the provisions of the TCC.

Liquidation

Article 536 and following articles of the New TCC regulate the liquidation. Pursuant to Article 536 pertaining to liquidators, the liquidation shall be conducted by the BoD unless other liquidators are nomi-

nated under articles of association or by a GA resolution. The BoD shall register to trade registry and announce the liquidators. Pursuant to the third paragraph of the said article, the liquidator shall be appointed by the court in case the court decides on the liquidation of the company. The liquidation proceedings were conducted by the BoD, even in the event of a court decision, prior to the New TCC. At least of the liquidators having representative authority must be a Turkish citizen and reside in Turkey.

Pursuant to Article 537/1 of the New TCC, the GA may always dismiss the appointed liquidators or the members of the BoD who conduct the liquidation. Pursuant to the second paragraph of the same article, a court decision is sufficient for the registration and announcement of the liquidators which are appointed by the court. In case none of the liquidators are Turkish citizens or reside in Turkey, the court may appoint a person fulfilling such qualities as a liquidator upon the request of shareholders, creditors of the company and Ministry of Customs and Trade.

Article 539 of the New TCC regulates limitation and extension of the authorities of the liquidators. The authorities of the liquidators cannot be transferred; however, they may grant another liquidator or a third person representative authority for realizing certain transactions. The transactions which the liquidator realizes with third persons apart from the liquidation proceedings shall be binding on the company unless the third person is aware or it is impossible that the third person to not be aware that the relevant transaction is not within the scope of liquidation. The registration and announcement of liquidation is not sufficient for proving the said circumstance.

First inventory and balance sheet within the scope of the liquidation proceedings shall be immediately prepared by the liquidators once they take office. The New TCC, unlike the TCC, stipulates that the experts may be requested in order to evaluate the value of the company assets, if necessary.

Article 541 of the New TCC includes provisions regarding the convocation and protection of creditors. The creditors whose addresses are known shall be invited by registered letter. Other creditors shall be invited to declare their receivables by an announcement to be made

three times per week in the Trade Registry Gazette and on the website of the company as stipulated under the articles of association. The second paragraph of this article states that the receivables of the creditors who did not notify their receivables shall be deposited in a bank account to be determined by the Ministry of Customs and Trade.

Article 543 of the New TCC regulates how the distribution following the liquidation shall take place. Pursuant to this article, the remainder assets of the company in liquidation following payment of its debts and the refunding of the share value to the shareholders, shall be distributed to the shareholders in proportion to the capital share they paid for and their privileges, unless stipulated otherwise under the articles of association. In case a privilege for liquidation share is stipulated, the provisions of the articles of association shall apply. Thus, the New TCC regulates that firstly the paid-up share values shall be reimbursed, and consequently, the remaining asset shall be distributed in proportion with the paid-up capital and privileges of the shareholders, unless regulated otherwise under the articles of association.

Following the completion of the liquidation, the ledgers and the documents including those related to liquidation shall be kept pursuant to Article 82 of the New TCC which regulates principles of keeping the documents and the term that the documents shall be kept. Upon the completion of liquidation, the trade name shall be deleted from the trade registry upon the request of the liquidators and, upon request; this deletion shall be registered and announced.

Pursuant to Article 546 of the New TCC, the disputes between the shareholders and liquidators shall be resolved under simplified proceedings. The court shall resolve within 30 days. Thus, the disputes shall be resolved quickly and the decision will be available within a determined term.

Additional Liquidation

New TCC introduces two new concepts with regard to liquidation. Article 547 of the New TCC regulates the additional liquidation. Pursuant to this article, in case an additional liquidation is deemed necessary following the closing of the liquidation proceedings, the last liquidators, BoD members, shareholders or creditors may request from

the commercial court of first instance located at the registered office of the company, to re-register the company until the additional liquidation proceedings are completed. Thus, it is possible to request the registration of the company anew even it was deleted from the register if additional measures are necessary even after the completion of the liquidation. The justification of the article states that certain situations, such as some of the assets not being taken into account during the liquidation, violation of certain the legal requirements during the distribution of the assets filing a lawsuit for liability against the organs of the company may be considered as situations which necessitate an additional liquidation. The justification of the article also stipulates three conditions for additional liquidation: the request of re-registration shall be based on a justified interest to be protected, the re-registration should be the only way to resolve the problem and a lawsuit should be filed in order to cancel the decision to delete the registration provided that existence of a receivable or asset of the company is sufficiently proven by documents.

Pursuant to Article 547/2, in case the court deems the request appropriate, it will rule on re-registration of the company, it will appoint the last liquidators or one or more other persons as liquidators and procures the registration and announcement.

Revocation of Liquidation

Another concept introduced by the New TCC is the revocation of liquidation, which is regulated under Article 548 of the New TCC. With this possibility of revocation of liquidation which will be exercised by a GA resolution, the company will no longer be in liquidation process and will transform back to being a company having the purpose of obtaining profit. The GA may resolve on the continuation of the company, as long as the process of distribution of assets did not commence, in the event the company is dissolved due to the lapse of the term stipulated for the company expired or by a GA resolution. This resolution must be adopted by the votes representing at least sixty percent of the capital. However, this quorum may be increased or other measures may be stipulated under the articles of association. The resolution for revocation of liquidation shall be registered and announced by the liquidator.

Conclusion

The dispositions of New TCC concerning dissolution and liquidation of joint stock companies are regulated bearing the needs and deficiencies under the TCC in mind. It is clearly stipulated that the company whose term has expired shall not be dissolved in case the company continues its activities. The New TCC adopted the possibility of dissolution under justified reasons, which was not foreseen under the TCC. Additional liquidation and revocation of liquidation are foreseen as new possibilities for joint stock companies in the phase of liquidation. We hope that the New TCC, which is in force as of July 1, 2012 shall facilitate the dissolution and liquidation procedures.

The Prohibition against Financial Assistance under the New TCC*

Att. Ozgur Kocabasoglu

In general, share buybacks activity of companies is forbidden under the Turkish Commercial Code numbered 6762 ("TCC") except from certain exceptional cases. The Turkish Commercial Code numbered 6102 ("New TCC") introduces an important innovation enabling the companies to buy back their shares or to accept as a pledge thereon under certain conditions. Nevertheless, article 380 introduced prohibition on a company to provide an advance funding, loan or security to third persons, for the purchase of its own shares (briefly, the "prohibition of financial assistance"). This provision entering into force as of 1 July 2012 is of a significance with respect to the future and validity of company share sale and purchase transactions through benefiting from the company assets which frequently took place (leveraged buy-out). The prohibition of financial assistance, which concerns the companies and private equity investors, shall be analyzed in our newsletter article.

Share Buyback of Companies and the Prohibition of Financial Assistance

Article 329 of the TCC prohibits the share buybacks or acceptance of pledges on the shares by companies except from five exceptions specified under the article. The New TCC limits the scope of the current prohibition. Pursuant to article 379 and the following articles of the New TCC, joint stock companies may buy back their own shares (directly or indirectly through third persons). The possibility for the companies to buy back their shares is reviewed in another article in our newsletter.

New TCC sets out certain limitations and conditions to the share buyback. For instance, shares acquired pursuant to article 379 shall not exceed ten percent of the share capital of the company. The legislative

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* ***Article of April 2012***

intent of the code states that Article 380 has been introduced to prevent any bypassing of such limitations. Pursuant to this article, the provision of advance funding, loan or securities to third persons by target companies in order for such third persons to acquire shares of the company is prohibited. The justification of this article states that such transactions will be deemed as an indirect share buyback of companies.

The Reasons of Promulgating Article 380

The justification of the Article 380 of the New TCC imposing ban on financial assistance states that the Second Council Directive numbered 77/91 of the European Union[1] with respect to companies ("Directive") has been taken as basis for this article. In England, numerous companies have declared bankruptcy during the financial crisis of 1920-21 after entering into leveraged buy-out transactions by using the funds of the target company after the First World War. As a result of these events, the financing of share purchases provided by the company for the acquisition of its shares has been considered dangerous and a rule prohibiting such financial assistances has been established in the British Company Act promulgated in 1929. The EU Law and EU member states adopted this rule, which is still in force in English Law.

Consequently, pursuant to the Directive prior to the amendment made on 2006, a company was not able to provide any advance funding, loans or security to third persons for purchasing its own shares. Nevertheless, facilities granted as part of the ordinary business activities of banks and other credit institutions; and advance funding, loans or security to the employees of the company (and subsidiaries) for their acquisition of company shares are not within the scope of this prohibition. Article 380 of the New TCC has adopted these provisions and stated that the transactions contradicting with this provision will be invalid.

Nevertheless, this ban has been criticized for limiting the possibilities of financing to an extent exceeding the pursued aims and objectives. Therefore the Directive has been amended with the directive

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1 Second Council Directive 77/91/EEC dated 13 December 1976.

numbered 2006/68/EEC[2]. As a result of this amendment, the European Union member states are provided a gateway to financial assistance as long as the conditions set forth in the Directive are satisfied. Pursuant to this amendment, the advance payment, loan or security provision transactions must be on an arm's length basis; a report about the transaction must be prepared by the management body and submitted to the company; the company shall approve this financial assistance transaction with the votes cast of two thirds of shareholders; the assets of the company shall not be less than the non-distributable reserves of the company after the granted financial assistance. Besides, equal amount of reserve shall be put aside and the benefits of the company shall be protected.

The New TCC did not adopt these amendments. Nevertheless it should be noted that the implementation of the amended Directive within member states of the European Union is left at the discretion of each member states, to either allow or prohibit financial assistance in their national law. Therefore, the New TCC has opted to adopt a criticized and inflexible system nevertheless the current text of article 380 does not constitute a violation of the *acquis communautaire* of the European Union.

The Financial Assistance Prohibition and Consequences of its Breach

The financial assistance transactions prohibited under article 380 of the New TCC are the provision of advance funding, loans or security to third persons to acquire the target company shares. Any type of transaction governing the provision of advance funding, loans or security is deemed to fall within the scope of the prohibition.

Either granting interests directly to the third persons acquiring company shares or providing financial assistance through indirect means to such persons may fall within the scope of this article. Bearing the costs of legal and financial due diligence, audit and consultation received for the share purchase transaction, repayment of a facility extended for the payment of the share price by using another facility

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2 Directive 2006/68/EC of the European Parliament and of the Council dated 6 September 2006.

extended by providing company assets as collateral, and financial assistance transactions by the intervention of other companies are considered to fall within the scope of the prohibition of financial assistance in the practice of European Union member states[3].

Article 380, further states the consequences of acting contrary to financial assistance prohibition is sanctioned as being null and void. For the invalidity of financial assistance transaction, it is not necessary for the company to have incurred of any losses. Therefore any financing or assistance of the target company, in the absence of which would cause the assisted person to not enter into the purchase transaction, is subject to the prohibition under article 380 and is null and void.

Where a financial assistance is concerned, there are two transactions, one being the transfer of shares and the other being the financial assistance for the payment of the share price. Article 380 only foresees that the financing transaction shall be null and void, and didoes not regulate any consequences to the share transfer. Therefore, we are of the opinion that the share transfer transaction carried out with the financial assistance transaction which will be deemed invalid, shall continue to be valid and binding. Furthermore, Article 385 of the New TCC foresees the obligation to dispose of shares purchased in violation of articles 379. 380 and 381 governing company share buybacks, rather than rendering such transactions invalid (void). From this expression, it is understood that the share purchases in violation of article 380 may be realized. Therefore the only transaction that is invalid is the financing transaction.

Exceptions to the Prohibition of Financial Assistance

Article 380 regulates two exceptions to the prohibition of financial assistance. The first exception governs the transactions normally executed by the credit and financial institutions' as a part of their field of operation. The second exception governs the advance payment, loan or security provision transactions in which shares are acquired by or for employees of the company or its subsidiaries. Such transactions shall

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[3] **Gül Okutan Nilsson**, Anonim Şirketlerin Kendi Hisselerini İktisabı Bağlamında Finansal Yardım Yasağı, Anonim Şirketler ve Sermaye Piyasası Hukukunda Güncel Gelişmeler Türk - Alman Uluslararası Sempozyumu (25-26 Haziran 2010), p. 96-97.

not however decrease the reserves of the company, and shall comply with articles 519 and 520 governing the deposit and usage of reserves. The justification for article 380 states that the financing should be provided from the available assets of the company with even where financial assistance is permitted. The transactions falling within the scope of these exceptions are allowed and are not null.

The exception governing the credit and financial institutions has been introduced by adopting the provisions in the Directive; nevertheless the scope of this exception is disputed. Some views in the doctrine declare that the banks may grant a facility to third persons for the acquisition of the shares of a company, with the company providing collateral to the bank for this transaction. Nevertheless, bearing in mind both the purpose and the justification of article 380, and the practice in the European Union, it must be stated that the dominant opinion in the doctrine regarding this exception to be limited to the banks providing facility and financing to third persons in order for such persons to acquire their own (the bank's) shares.

Conclusion

Article 380 of the New TCC has a material impact to the future of the leveraged buy-out transactions. In general the financial assistance by a company for acquisition of its own shares has been prohibited, save for the financing provided to third persons by banks for them to acquire the bank's shares and the financing provided to company employees for them to acquire the company's shares. Any transaction of the company providing advance funding, loan or security (the financing transaction) to third persons for the acquisition of its own shares, other than the aforementioned exceptions, are deemed null and void.

This provision creates a material obstacle with respect to financing of share purchase transactions. The Directive has been amended in the year 2006 to enable such financing under certain conditions in order to circumvent this obstacle. Nevertheless, the New TCC has not adopted this amendment.

In the light of this provision, the assets or resources of the company may not be used or presented as collateral for the sale and purchase of its own shares.

Share Buyback of Companies Pursuant to the New TCC*

Att. Leyla Orak

The Turkish Commercial Code numbered 6102, which will come into force on 1 July 2012 ("New TCC"), has introduced important reforms through article 379 and the following articles. As of the entry into force of the New TCC, the companies will be able to acquire their own shares or accept as pledge in exchange for securing a debt. This article shall briefly analyze the current prohibitive measures on share buyback instrument and the easing off provisions to the stringent rules of the capital markets legislation and then shall focus on the possibility introduced by the New TCC, the conditions of share buyback of the companies and the consequences for the transactions in violation of the code.

TCC and the Principle Resolution of the CMB

Pursuant to article 329 of the Turkish Commercial Code numbered 6762 ("TCC"), it is forbidden for the joint stock companies to buy back its own shares in exchange for any consideration or accept pledges thereon. Transactions in violation of this prohibition shall be null and void. This prohibition was intended to protect the structure of share capital, interest of creditors and unequal treatment of shareholders of the companies and aims to prevent inconveniences such as the main shareholder charging its capital market debts to the company and the withdrawal of share capital. Nonetheless, the possibility of the company to protect itself (for example prevention of manipulation) through share buybacks is also abrogated by this prohibition[1].

Article 329 exhaustively lists exceptions to this prohibition. These exceptions are the share buyback for the purpose of share capital reduction to boost leverage -any money paid to company to acquire

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* ***Article of April 2012***

1 See **Prof. Dr. Ünal Tekinalp**, *Yeni Anonim ve Limited Ortaklıklar Hukuku ile Tek Kişi Ortaklığının Esasları*, 2. Bası, İstanbul, 2011, par. 9-18 to 9-21; Dr. Alihan Aydın, *Anonim Ortaklığın Kendi Paylarını Edinmesi*, İstanbul, 2008, p. 66 onwards, for the advantages and disadvantages of share buybacks.

share is returned to the shareholder and any relevant shares are cancelled leading to decreased number of shares and increased value for per share earning-, for the purpose of hedging corporate debt with company receivables other than subscription (equity participation contract), through total transfer of assets or an establishment; in the event the ordinary scope of activity of the company is engaging in such buyback transactions, in the event the board members, directors or officers of the company pledge their shares as security for their obligations or if such buyback is made free and not in exchange for any consideration. The shares bought back pursuant to one of these exceptions shall not be represented in the general assembly of the company.

The Capital Markets Board ("CMB") regulated the principles of share buyback for listed companies whose shares are traded on the Istanbul Stock Exchange ("ISE") through its resolution dated 10 August 2011 and numbered 26/767 published in the weekly bulletin of the CMB numbered 2011/31. Pursuant to this principle resolution of the CMB, a company whose shares are traded on the ISE may authorize their board of directors for buyback of the shares traded on the ISE, provided that the acquired shares do not exceed 10% of the issued/paid-up share capital and that such shares will be held in its possession for a maximum period of three years[2]. The assets of the company may not be less than the share capital of the company together with the non-distributable reserves, after deducting the repurchased share price. The resolution regulates the timeframe of the buyback transactions, which situations necessitate public disclosure of special events and the content of such disclosures in detail.

Although this resolution of the CMB enables the share buyback transactions of listed companies on the ISE prior to the entry into force of the New TCC, the validity of this resolution is disputable. The CMB has permitted a transaction prohibited by the TCC and not expressly allowed under the Capital Markets Law, through a principle resolution which is a regulatory provision. Nevertheless, the regulatory provi-

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2 It may be seen that the CMB has taken the draft of the new TCC as a basis to this principle resolution. Please see **Yrd. Doç. Dr. Hayrettin Çağlar**, *Türk Ticaret Kanunu Tasarısına Göre Anonim Şirketin Kendi Paylarını İktisap Etmesi*, Kazancı Hakemli Hukuk Dergisi, www.doktrinbank.com for further details.

sions shall be in compliance with the law; and in the event of inconsistencies, the provisions of law, which has a higher ranking in the norms hierarchy, shall be applicable. Especially bearing in mind that transactions violating the share buyback prohibition under the TCC are null and void, this principle resolution of the CMB is borne to serious problems. There is a risk that the CMB principle resolution constitutes a violation of the TCC other than the exceptions regulated under article 329 of the TCC and the transactions based thereon are null and void[3].

The New TCC Regime

The New TCC regulates the possibility for a company to buy back its own shares in the article 379 and the following articles. The justification of the New TCC states that the source for these articles is the Directive 77/91 of the European Union regarding the companies. Below is an overview of the situations where the companies may buyback or accept pledges on their shares pursuant to the New TCC.

Pursuant to article 379, a company may buy back or accept pledges on its shares in exchange for a consideration as long as the total amount of shares do not exceed 10% of its share capital or issued capital. Acquisitions made by third persons on and the account of the company and acquisitions of subsidiary companies shall be taken into consideration in calculation of this percentage.

The company may authorize the board of directors for a maximum term of five years in order to realize transactions by determining the total number of, total nominal value of and the maximum and minimum amount, which may be paid for such shares[4]. Thus, the general assembly is granted an opportunity to exercise control on the buy-

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3 Please see **Prof. Dr. Veliye Yanlı, Doç. Dr. Gül Okutan**, *Şirketin Kendi Paylarının İktisabına İlişkin 10.08.2011 tarih ve 26-767 sayılı SPK İlke Kararının 6762 Sayılı TTK Çerçevesinde Değerlendirilmesi*, 10 Şubat 2012, Arslanlı Bilim Arşivi, www.arslanlibilimarsivi.com (accessed on 28.01.2012) stating that the CMB principle resolution is in violation of the law to the extend it exceeds the scope of the provision under article 329 of the TCC and that the share buyback transactions shall be null and void and acquisitions of third parties acting in good faith shall not be preserved.

4 The justification of the article further states that the general assembly may delimit the authorization for entering into buyback transactions to a specific cause.

back[5]. After deduction of the repurchased share price, the assets of the company shall be at least equal to the sum of the share capital or the issued capital and the non-distributable reserves pursuant to the law or the articles of association. The repurchased share pursuant to this article must be totally paid up. In order to circumvent any concerns with respect to protection of the capital, article 388 expressly provides that a company may not subscribe to pay its own shares.

Article 381 regulates the share buyback not subject to the general assembly authorization decision, which is one of the conditions under article 379. Pursuant to this article, the board of directors may buy back shares in order to circumvent a serious and probable loss, without an authorization. Nevertheless, the board of directors shall inform the company in the first following general assembly meeting with respect to the purpose of this purchase, total number of shares and total nominal value of the shares bought back as well as their percentage to the share capital, the total amount paid and the conditions of payment.

Under article 382, the exceptional cases where the company may buy back its shares without being subject to the conditions and restrictions set forth above have been regulated, which is similar to article 329 of the TCC. These exceptional cases are the share buybacks of the companies for capital reduction, as a result of transactions involving the transfer of business as a whole, in order to collect a receivable from execution proceedings or levied by security companies.

Lastly, article 383 foresees that a company or its subsidiary will be immune from the ten percent threshold band as long as such purchase is made without paying any consideration (gratuitous).

The New TCC article 389 has a provision similar to the provision in the TCC with respect to the consequences of the shareholder rights in cases of share buyback of a company. Such shares (bought back) shall not be taken into consideration in the calculation of general assembly quorums. Apart from the shares repurchased gratuitously pursuant to article 383, the repurchased shares shall grant no shareholder rights to the company.

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5 **Prof. Dr. Ünal Tekinalp**, *ibid*., par. 9-29.

In addition to enabling the share buyback of a company, the New TCC introduces the prohibition of financial assistance under its article 380 in order to prevent bypassing the relevant provisions governing buyback. Pursuant to this article, which should be specifically analyzed, a company may not enter into transactions related to providing a prepayment, loan or security to a third persons in order for such third persons to acquire shares of the company; such transactions shall be null and void.

Disposing of the Repurchased Shares

Pursuant to article 329 of the TCC, repurchased shares for the capital reduction shall be immediately cancelled and repurchased shares under other circumstances shall be disposed of in the earliest convenient opportunity. There is no provision, governing disposal of repurchased shares in violation of this provision, as such transactions are deemed null and void. The principle resolution of the CMB regulates that repurchased shares in accordance with this resolution shall be disposed of within three years; whereas repurchased shares in excess of the ten percent threshold band of the share capital must be disposed of within six months.

As per the New TCC, there is no obligation regarding the dispose of all of the repurchased shares as long as the buyback is executed in compliance with law. The obligation of disposal regulated under article 384 is applicable solely to the repurchased shares in excess of the ten percent of the share capital. Pursuant to this article, repurchased shares in the exceptional cases numbered under article 382 (apart from the share capital reduction where the bought back shares are destroyed) and shares gratuitously as per article 383 shall be disposed of in the earliest opportunity which does not result in the company incurring any losses and at the latest within three years.

Article 385 regulates the consequences of share buybacks in violation of the provisions of articles 379 and 381. The repurchased shares in violation of law shall be disposed of, or pledges established thereon shall be removed within six months. Although it has not been expressly regulated under the New TCC, it may be deduced from this article 385 that buyback transactions in violation of law are valid. Contrary to

article 329 of the TCC, the New TCC has not contemplated that buy-back transactions shall be null and void if they are in violation of the provisions set forth hereinabove[6]. To the contrary, it has been foreseen that such shares will be disposed of, therefore it has been accepted that a company may acquire its shares by violating these provisions.

Conclusion

The TCC has prohibited and declared the share buyback of companies null and void, save for certain exceptions. It is disputed whether public companies may or may not buyback their shares traded on the ISE as per the principal resolution of the CMB dated 10 August 2011, since it violates the share buyback prohibition set forth under the TCC.

The New TCC has introduced an important reform by enabling the companies to buy back its shares through authorizing its board of directors for acquisition of its own shares not in excess of 10% of the share capital. Furthermore, the board of directors may realize such transactions without any authorization in the event there is a risk of a serious and probable loss to be incurred by the company. The possibilities for the company to buy back its shares in exceptional cases such as capital decrease or total transfer of assets or gratuitous acquisitions have been preserved.

As it has been discussed in detail above, to cope with any loophole breakdown of share buyback provisions, financial assistance in acquisition financing transactions has been prohibited. Pursuant to this prohibition, the financial assistance transactions of the company in order for the third persons to acquire shares of the company shall be null and void. This regulation will be analyzed in a separate article of our newsletter

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6 See **Dr. Alihan Aydın**, *ibid*., p. 313 onwards for discussions on the consequences of violating the mandatory provisions under article 379 and the following articles.

Cumulative Voting in Non-Public Joint Stock Companies*

Att. Fatih Isik

Introduction

Following the entry into force of Turkish Commercial Code numbered 6102 ("TCC"), the cumulative voting system is permitted to be practiced in non-public joint stock companies in accordance with art. 434 of the TCC regulating voting rights of the shareholders. During the period of the Turkish Commercial Code numbered 6762, the cumulative voting was possible only for the publicly held joint stock companies.

Legal Framework

Art. 434/4 stipulates that cumulative voting in non-public joint stock companies may be regulated by a communiqué to be published by the Ministry of Customs and Trade ("Ministry"). The article, by its text, presents that the Ministry is not legally obliged to publish such communiqué and the Ministry has the discretion to regulate or not to regulate the cumulative voting system. However, the justification of the Article does not grant such discretion and grants the Ministry only the authority to regulate the cumulative voting system.

Despite the inconsistency between the Article and its justification, the Communiqué on the Principles Concerning Practice of Cumulative Voting in General Assemblies of Non-Public Joint Stock Companies ("Communiqué") entered into force through publication in the Official Gazette dated 29.08.2012 and numbered 28396.

Entry into Force of the Provisions Regarding Cumulative Voting

The date for entry into force of the Communiqué is stated, in its art. 9 titled as "Entry into Force", as the date of publication. However, art. 28 of the Act on Entry into Force and Implementation of Turkish

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* ***Article of August 2012***

Commercial Code ("Act of Implementation") modified by Act numbered 6335, the entry into force of art. 434 of the TCC, –which is the legal base of the Communiqué–, is determined as 12 months later following the publication. Thus, the entry into force for the provisions of cumulative voting is differently stipulated in Act of Implementation and the Communiqué.

The Provisions of the Communiqué

The cumulative voting system is a practice in joint stock companies, which shall ensure effective participation and representation of the minority shareholders to administration of the company by affecting appointment of the board of directors. This function of cumulative voting is also reflected to the first article of the Communiqué stating the purpose of the Communiqué. Pursuant to this article, the purpose of the Communiqué is to regulate procedures and principles for practice of cumulative voting which shall ensure that the shareholders who do not hold the majority shares make elect a member for board of directors. The scope of the Communiqué is stated in art. 2 as regulation of the cumulative voting in election of the members for board of directors. Within the light of these two articles, it is possible to envisage that the cumulative voting is only possible for appointment of the board of directors' members and other resolutions of the general assembly cannot be adopted by practice of cumulative voting.

Pursuant to the Communiqué, the cumulative votes shall be calculated by multiplication of the votes of the shareholders in the general assembly with the number of the board of directors' members to be appointed. However, the practice of cumulative voting is held subject to some conditions within the Communiqué.

In art. 5 of the Communiqué, positive and negative conditions are regulated for practice of cumulative voting. The positive conditions are; the articles of association must accept practice of the cumulative voting and the number for board of directors' members shall be determined as a fixed number, which is not less than three. The negative conditions are; the articles of association shall not stipulate any provision regarding representation of some groups in the board of directors and/or regarding determination of a candidate for board of directors

within the scope of art. 360 of the TCC and it shall not stipulate a privilege in voting pursuant to art. 479 of the TCC.

The method for practice of the cumulative voting is stipulated in art. 6 of the Communiqué. According to this article, cumulative votes need to be cast with written ballots. These ballots show the distribution of the votes and include the name, signature and number of votes the shareholder has and these written ballots are submitted to the chairmanship. However this article reserves the provisions regulating the general assemblies to be electronically held.

In order to be in harmony with the provisions of TCC regulating voting with proxy, art. 7 of the Communiqué regulate cumulative voting in proxy voting. Pursuant to this article, in case the collective voting shall be a mandatory voting upon the request of other shareholders or their proxies, the representative shall also practice the cumulative voting, even there is no clear statement in its proxy. In case there is no instruction regarding distribution of the cumulative votes, the distribution amounts shall be decided by the representative.

The Communiqué obliges respect to the provisions regarding cumulative voting and holds the board of directors liable for non-application and blocking the application or lightening the effect of the practice of the cumulative voting.

Conclusion

As stated above, before the entry into force of TCC, the cumulative voting was possible only for the publicly held joint stock companies. However, there was no legal reason to grant this possibility only to publicly held joint stock companies and not to the non-public joint stock companies. Therefore, the fact that the cumulative voting can be also practiced in non-public joint stock companies which shall ensure participation of the minority shareholders to administration of the company is a favorable solution of TCC.

Regulation Pertaining to the General Assembly of Joint Stock Companies to be Held via Electronic Means*

Att. Naciye Yilmaz

Introduction

Turkish Commercial Code numbered 6102 ("TCC") which came into force on 1 July 2012, is designated to meet the needs of the market, to provide compliance with European Union's regulations in membership stage, to target the transparency. TCC brings innovations required by the information society such as e-government and e-company. Among these innovations, one of the most important and profitable example could be extracted as making general assembly and board of directors meetings via electronic means. In accordance with the changes of the TCC, Regulation pertaining to the General Assembly of Joint Stock Companies to be held via Electronic Means ("Regulation") is published in the Official Gazette numbered 28395 and dated 28.08.2012 and shall enter into force on 01.10.2012.

Content and the Aim of the Regulation

The provision that sets forth general assembly meeting via electronic means is Article 1527 of the TCC. According to the related provision, "*attending to the general assembly via electronic means, giving opinion and voting result in all judicial conclusions of voting and attending physically*". The Regulation stipulates principles regarding attending to the general assembly via electronic means, giving opinion and voting; example of the provision required to be in the articles of association regarding attending to the general assembly via electronic means, principles of voting by the right-holder or his/her representative, principles related to running of the system of electronic general assembly and the obligations of its participants.

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* ***Article of August 2012***

The Example and Application of the Provision of Articles of Association Related to Attending to General Assembly via Electronic Means and Voting

Pursuant to the Article 5 of the Regulation, companies which desire to apply the system of electronic general assembly are required to stipulate a related provision in their articles of association. In this framework, related provision is as follows:

"Attending to general assembly meeting via electronic means; the right-holders who have rights to attending company's general assembly meeting may also attend to general assembly meeting via electronic means according to the TCC, Article 1527. As the company set out the general assembly system that allows the right-holders to attend general assembly via electronic means, give opinion and make suggestions pursuant to Regulation, in the meantime it may get service from the systems made for this purpose. Pursuant to this provision of articles of association, the right-holders and their representatives could use their signified rights indicated in aforesaid regulation provisions via this organized system for all general assembly meetings".

This provision must take part in the articles related to general assembly meetings. Companies, which allow right-holders and their representatives for attending the general assembly meeting and voting, should stipulate this provision without any change in the articles of association. Moreover, companies having the related provision in their articles of association should supply the right-holders and their representatives the option of attending the general assembly via electronic means and voting in each general assembly meeting.

Supplying the Access of Information and Documents Related to General Assembly

According to the Article 6 of the Regulation, the companies which apply the system of general assembly via electronic means, should comply with the obligation that the invitations should be made pursuant to TCC and articles of association related to general assembly meeting, the documents required to be submitted the right-holders before the general assembly and the documents related to agenda of the meeting with secure electronic signature in a given period set forth in the TCC should be present in system for the right-holders' access.

Declaration of Attending to the General Assembly via Electronic Means and Attending to the Meeting

Articles 7 and 8 of the Regulation regulate declaration of attending to the general assembly via electronic means and attending to the meeting. Pursuant to these provisions, right-holders who demand to attend to general assembly via electronic means by themselves or with their representatives should state their choice to the system. It is an obligation that, the ID of the representative, who attends to general assembly instead of his/her right-holder should be registered to system. The right-holder could generally appoint his/her representative or authorize him/her for each points separately either. The representative of the right-holder shall vote in accordance with the given authority. The right-holder who gives the information about his/her attendance via electronic means has possibility to retrieve his request on the system. However, in case the right-holder or his/her representative doesn't retrieve his request, this right-holder or his/her representative cannot attend to general assembly meeting physically.

Attending to the general assembly via electronic means could be realized with secure electronic signatures of right-holders or their representatives via accessing the system.

Giving Opinion in General Assembly held via Electronic Means and Voting

Giving opinion in general assembly held via electronic means and voting are set forth by the Articles 10 and 11 of the Regulation. The right-holder or his/her representative gives his/her opinion during general assembly meeting, which is attended via electronic means. Related right-holders use their voting rights via electronic means by the system.

The participants who attends general assembly meeting via electronic means have the possibility vote via system after the head of the meeting inform that voting has started related to the agenda topic. Each topic is voted separately after the head of the meeting's notice. Neither the right-holder nor the representative may change his vote.

Obligations of Companies

According to Article 13 of the Regulation, companies that apply the system of attending to general assembly meeting via electronic means and voting system have several obligations. In this framework, companies shall detect and register whether the system is convenient with this Regulation and TCC. Moreover, companies shall keep all records and ID's of the participants who attend general assembly via electronic means for a period of ten years.

Conclusion

This Regulation stipulates principles regarding attending to the general assembly via electronic means, giving opinion and voting. It could be mentioned that the TCC brings several innovations related to business life and one of them is making general assembly meeting via electronic means. It is much easier to supply shareholders' participation in companies' administrative part by answering today's world technological requirements by the current provisions.

Advance Dividend*

Att. Nilay Celebi

Advance dividend is regulated under Turkish Commercial Code numbered 6102 ("TCC numbered 6102") and under the Communiqué concerning Advance Dividend Distribution ("Communiqué") published in the Official Gazette on August 9, 2012. The communiqué comprises companies which are not subject to Capital Markets Law, limited liability companies and limited partnerships divided into shares.

Pursuant to Article 5 of the Communiqué, for the distribution of advance dividend by the companies, it is required that:

a) A resolution must be taken by the general assembly of the company on advance dividend distribution, and

b) Profit must be made according to the interim financial statements of 3, 6 or 9 months prepared in the accounting period in which advance dividend will be distributed.

Article 6/1 of the Communiqué regulates the content of the resolution taken by the general assembly of the company. Pursuant to this article, in case general assembly of the company resolves to distribute advance dividend, the following must be stated in this resolution as well;

a) In the end of the related accounting period, if net profit which shall cover the advance dividend distributed within the year does not occur, advance dividend exceeding the net profit shall be deducted from the free reserve funds stated in the previous year's balance sheet

b) In cases where the amount of free reserve funds does not cover the advance dividend, the overpaid advance dividend shall be returned to the company by the shareholders upon notice of the Board of Directors

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* ***Article of September 2012***

c) If loss occurs at the end of the related accounting period;

1) General legal reserve funds and free reserve funds, if any, included in the previous years' balance sheet shall be primarily used for the deduction of the loss. If these reserve funds do not cover the loss, the whole advance dividends distributed within the period shall be returned to the company by the shareholders upon notification by the Board of Directors,

2) After the deduction of the general legal reserve funds and free reserve funds from the loss for the financial year, remaining amount of free reserve funds shall be extracted from advance dividends. In consequence of extraction, if the amount of advance dividend distributed within the financial year exceeds remaining amount of free reserve funds the exceeding part shall be returned to the company upon the notification by the Board of Directors.

In order to resolve for the distribution of advance dividend, the general assembly convenes with the presence of the shareholders or their representatives holding at least one fourth of the capital and this quorum must be maintained throughout the meeting. The resolution is taken with the majority of the votes present in the meeting.

It is required that the advance dividends paid before the related accounting period must be deducted from the net profit of the related year. The general assembly cannot resolve to distribute dividends or to pay dividends without completing this transaction.

Pursuant to Article 8 of the Communiqué, advance dividend is paid to the shareholders in proportion to their shares (pro rata) as of the distribution dates, without taking into account the privileges of the privileged shares. Advance dividend cannot be paid to the dividend shareholders, the members of the board of directors who are not shareholders and persons participating in the profit other than shareholders.

If shareholders are in debt to the company other than capital subscription, the aforesaid debt is deducted from the advance dividend paid to the shareholder.

Furthermore, Article 8 of the Communiqué states the required principles in cases the company desires to re-distribute advance dividend in the same accounting period if the relevant companies subsequently concluded capital increase in that accounting period. Pursuant to such article, new shareholders are given priority in the payment of advance dividend after the capital increase. This priority continues until the total amount of advance dividends received for each share within a period by the old and new shareholders are equalized. After the equalization of the total amount of advance dividends received for each share within a period by the old and new shareholders, remaining amount of advance dividend or the amount of advance dividend to be paid in the following interim period is paid to the shareholders in proportion to their shares.

Article 9 of the Communiqué states the duties of the board of directors. Pursuant to this Article, those below shall be performed respectively,

a) A report relating to advance dividend distribution is prepared and in this report it is indicated that:

  1) The interim period financial statements forming a basis on advance dividend distribution are prepared in accordance with the principles stated under Article 515 of the Law numbered 6102,

  2) The amount of advance dividend to be distributed is calculated pursuant to Article 7 of the Communiqué. The documents forming the basis of performance of the calculations and other conditions are added to this report.

b) Board of directors resolves on the payment of advance dividend determined in the report to the shareholders and the procedures regarding these payments.

c) The advance dividend is paid to the shareholders within 6 weeks following the resolution at the latest pursuant to Article 8 of the Communiqué.

The board of directors provides necessary assurance during the payment of advance dividend to the bearer shareholders.

In cases where the circumstances explained above in Article 6/1 of the Communiqué arises, board of directors carries out the actions regarding the repayment of the advance dividends paid in extra by collecting them from the shareholders to the company.

For the companies distributing advance dividend regarding the accounting period of 2012, the calculation of the amount of advance dividend is based on the balance sheets prepared pursuant to Turkish Commercial Code numbered 6762. In the report prepared by the board of directors pursuant to Article 9 of the Communiqué, it is clarified that the interim balance sheet forming the basis of advance dividend distribution is prepared in compliance with real situation.

Conclusion

As is explained in detail hereinabove, advance dividend distribution is possible within the scope of rules stated in the Communiqué and with the resolution of the general assembly.

Communiqué Pertaining to the Principles related to the Registered Capital System for the Non-Public Joint Stock Companies*

Att. Naciye Yilmaz

Introduction

One of the novelties that the Turkish Commercial Code No. 6102 ("TCC") brings is the adoption of the registered capital system for the non-public joint stock companies. The Communiqué Pertaining to the Principals related to the Registered Capital System for the Non-Public Joint Stock Companies ("Communiqué") was published in the Official Gazette dated 19.10.2012 and numbered 28446, and entered into force by being published.

Registered capital system may be defined as the system where it is possible by a board of directors' resolution to increase the capital of the company until the capital cap determined and stipulated in the articles of association. Therefore, the legal dispositions related to the capital increase in the principal capital system while increasing the capital, shall not be applied.

The outline of the registered capital system for the non-public joint stocks companies is regulated under the article 460 of the TCC while detailed provisions and rules are set forth with the relevant Communiqué.

Scope and Purpose of the Communiqué

The relevant Communiqué shall be applied to the non-public joint stocks companies which have been adopted the registered capital system.

The purpose of the Communiqué is set forth in the first article as follows: *"this communiqué aims to establish procedure and principles pertaining to the adoption of the registered capital system, capital*

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* ***Article of October 2012***

increase in this system, increase of the registered capital cap, leaving the system, issuance of preferential shares and shares with premium, limitation of the pre-emptive rights and pertaining to the other issues".

Adoption of the Registered Capital System

Conditions for the adoption of the registered capital system are set forth under the article 5 of the Communiqué. In this framework, minimum initial capital at the establishment of the company should be at least 100.000 Turkish Liras. Moreover, for the acceptance of the registered capital system at the establishment, the initial capital should be fully paid. However, for the joint stock companies of which the initial capital for the establishment is higher than 100.000 Turkish Liras, if the entire initial capital should be fully paid or if the payment of 100.000 Turkish Liras should be sufficient, is not clear.

The companies which shall adopt the registered capital system not during the establishment but by way of amendment of the articles of association at a later stage should be fully paid the issued capital and no capital loss should be in question.

These companies should set forth the following matters under their articles of association:

- initial capital,
- term (this term should be maximum five years), beginning and ending dates of this term related to the power granted to the board of directors for the capital increase until registered capital cap,
- registered capital cap, and
- publication procedure of the board of directors resolution pertaining to the capital increase.

The relevant registered capital cap may not exceed fivefold of the initial capital.

Moreover, in case authorities such as issuance of preferential shares or shares with premium, limitation of the pre-emptive rights shall be granted to the board of directors, provisions on these authorities should be also stipulated under the articles of association.

Authorization of the Ministry of Customs and Trade

Pursuant to the article 6 of the Communiqué, the joint stock companies which shall adopt or accept the registered capital system should apply to the General Directorate of Domestic Trade and should obtain authorization from the Ministry of Customs and Trade.

The General Directorate of Domestic Trade shall be taken into consideration the criteria such as *"general purpose and principles of the TCC, dispositions of the Communiqué, requirements of the market, purpose of the registered capital system, rights and benefits of the shareholders, compliance with the legal obligations"* for the evaluation of the applications.

Capital Increase in the Registered Capital System

Pursuant to the article 9 of the Communiqué, the board of directors should mention the amount of the increased capital, nominal value of the new shares to be issued, their number, types, whether these shares are preferential and with premium or not, whether the pre-emptive rights are limited or not, conditions and term for the use of these rights and other necessary issues if any, in the resolution pertaining to the capital increase.

The board of directors is also obliged to publish the resolution pertaining to the capital increase, new disposition of the articles of association which states the issued capital, nominal value of the new shares, their numbers, types, whether these shares are preferential and with premium or not, limitations pertaining to the preferential shares and pre-emptive rights, conditions for use of these rights, and their term, any records pertaining to the premium and principles for the application of the premium pursuant to the publication procedure set forth under the articles of association.

In principle, the capital may be increased until the registered capital cap by the board of directors' resolutions. This cap may not be exceeded. However, while the capital increase is realized by the internal resources, the registered capital cap may be exceeded.

The Communiqué also regulates that it is not possible to increase the capital by the board of directors' resolutions in case the registered

capital cap have been reached and no further new determination is realized for the registered capital cap.

Exit from the Registered Capital System

Pursuant to the article 5/6 of the Communiqué, joint stock companies which have not amended the articles of association with regard to the authorization period of the board of directors with a general assembly resolution during the year where this period is expired, shall be considered as out of the registered capital system.

Additionally, article 8 of the Communiqué regulates the situations where the companies may exit or removed from the registered capital system.

The companies which use the registered capital system contrary to the purpose of this system, which use this system by abusing their shareholders and other relevant third parties holders of rights, the companies which are able to increase their capital with ease due to their corporate structure and without need to registered capital system and the companies which have lost other qualifications for the adoption of the relevant system may be removed from the registered capital system.

The companies may exit from the registered capital system by their own decision before the expiration of the determined period by the articles of association. In this case, a draft for the amendment of the articles of association shall be prepared and an application shall be made to the General Directorate of Domestic Trade. Authorization of the Ministry of Customs and Trade and a resolution of the general assembly are also required.

Conclusion

Adoption of the registered capital system for the non-public joint stock companies created a more compatible structure between these companies and public companies. In this framework, it is possible to mention that Capital Market legislation shall be applied to the public joint stock companies while related provisions of the TCC and this Communiqué shall be applied to the non-public joint stock companies.

Prohibition on Loans by Companies to Their Shareholders Pursuant to the New Turkish Commercial Code*

Att. Leyla Orak

Introduction

The Turkish Commercial Code numbered 6102 ("New TCC") has been enacted by the Grand Turkish National Assembly on 13 January 2011. Among other novelties, the New TCC prohibits grant of personal loan or any other advance funding to its directors and shareholders. The novelties introduced by the New TCC have attracted many criticisms between the date of enactment and the date of entry into force of the New TCC, which is 1 July 2012.Consequently, the New TCC has been amended initially by the Act numbered 6335 amending the Turkish Commercial Code and the Act on the Entry into Force and Application of the Turkish Commercial Code ("Amendment Act") which was enacted prior to the entry into force of the New TCC, and the Act numbered 6353 Amending Certain Laws and By-Laws enacted by the Grand Turkish National Assembly on 4 July 2012. The Amendment Act introduces provisions which minimize the scope of prohibition of indebtedness to the company to a great extent. This month's newsletter article shall assess the provisions of the New TCC governing this prohibition on loans by the company and the changes introduced by the Amendment Act thereto. The changes introduced by the Amendment Act and related assessments shall be analyzed in another article of our Newsletter.

Prohibition on Loans to the Shareholders by the Company

Article 358 of the New TCC regulates the prohibition on loans to the shareholders by the company. While the enacted article makes it unlawful for shareholders to borrow any fund from the company, the provision amended by the Amendment Act allows lending activity by the companies subject to certain conditions. Below, initially the prohibition of indebtedness of the shareholder to the company pursuant to

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* ***Article of July 2012***

the provisions of the New TCC –prior to amendments introduced by the Amendment Act– shall be assessed and then changes brought by the Amendment Act shall follow.

The System Introduced by the New TCC

The New TCC bans shareholders to obtain credit or loan from their company apart from their indebtedness arising from their capital subscription. Prior to the amendment introduced by the Amendment Act, the relevant article aimed at protecting other shareholders whom are not at executive level in the company and the creditors of the company. The justification of this provision stated that the practice prior to the entry into force of the New TCC whereby the shareholders could borrow from the company resulted in inconvenient situations, thus the article aimed to prevent shareholders from using the capital of the company for their personal business.

Nevertheless, the relevant article permits the shareholder to borrow from the company as a result of certain transactions executed by the shareholder. The article 358 does not prohibit bona fide business loans to the shareholders resulting from transactions entered into with the company, which both fall within the scope of activities of the company and is necessary to be executed in relation to the commercial enterprise of the shareholder. This exception aims at preventing any problems arising from the rigid application of this provision.

Article 24 of the Act numbered 6103 on the Entry into Force and Application of the Turkish Commercial Code ("Application Act") foresees an adaptation period for the shareholders who had already borrowed from their company prior to the entry into force of the New TCC. Such indebted shareholders are obliged to repay their debts in cash to the company within three years as of the date of entry into force of the New TCC. Non-compliance with this obligation shall result in the shareholder being faced with the sanction foreseen under the New TCC. The New TCC regulates that shareholders, acting contrary to the ban shall be faced with judiciary monetary fine of at least three hundred days.

The Amendment Introduced by the Amendment Act

The Amendment Act amended both the provision governing the prohibition on loans to shareholders by the company and the provision

foreseeing the sanction for violation. Pursuant to amended article 358, the shareholders of the company may not be indebted to the company if (a) the shareholder does not fulfill its due obligation arising from capital subscription and (b) the company's profit, including the free reserves is not sufficient to recoup the losses from previous years. The article of the Application Act governing the three year adaptation period is abrogated by the Amendment Act.

The justification for this amendment introduced by the Amendment Act states that the prohibition is not completely lifted. From now on, shareholders will be entitled to refer to the property of the company in the presence of urgent funding necessities.

The Amendment Act also amends the provision foreseeing the sanction in the event the prohibition on granting loans to shareholders by the company is violated. Accordingly, shareholders assuming debt in violation of this prohibition shall not be faced with any sanctions. Persons lending the property of the company to the shareholders in violation of this agreement shall be faced with judiciary monetary fine of at least three hundred days.

Even though the justification of the provision of the Amendment Act limiting the scope of prohibition states that the possibility provided thereunder shall be used only for the immediate and urgent funding needs of the shareholders and executive officers, we believe that the provision exceeds this purpose. Pursuant to the relevant article, shareholders who pay all their due capital subscription debts may be in a state of being indebted to companies whose income covers the loss from previous years, regardless of whether there is an urgent need or not. Notwithstanding however, the justification of the Amendment Act also states that shareholders and executive officers, using company property for long periods of time in large amounts may be deemed to have "emptied the company" which may constitute the crimes of abuse of confidence or fraudulent bankruptcy under the Turkish Penal Code.

Prohibition on Company Loans to Members of the Board of Directors

Article 395 of the New TCC which governs the prohibition to enter into transaction with the company foresees the prohibition on loans to

members of the board of directors for the first time in Turkish Law. The enacted article prohibits board members from being indebted to the company in cash or any other non-cash benefit. The Amendment Act, in line with the amendment to the prohibition on loans to shareholders by the company, minimizes the scope of this prohibition. Below, the prohibition on borrowing of board members from the company prior to the amendment shall be analyzed and then the amendment introduced by the Amendment Act shall be assessed.

The System Introduced by the New TCC

With a provision similar to the provision governing prohibition imposed on shareholders to borrow from their company, the New TCC prohibits board members; persons within lineal kinship to the board members, spouses and relatives to third degree (third degree included) of the board members, the private unlimited companies of those in which they are partners and corporations in which they hold at least twenty percent of the share capital of a company to borrow from the company. The scope of the prohibition with respect to persons concerned is very broad. These persons may not borrow from the company in cash or get any non-cash benefit, moreover, the company may not provide any surety, guarantee, and collateral for these people; assume any obligations or their debts for such persons. The article regulates one exception to the prohibition stating that companies which are member of a group of companies may become sureties or guarantors for one another.

There is a double punishment foreseen for the violation of this prohibition. In the event the persons mentioned in the article borrows from the company (or the company assumed any of the obligations stated above) in violation of the prohibition, the creditors of the company may initiate proceedings against these persons -for the lent amount. Furthermore, persons, who violate this rule by borrowing from the company, shall be faced with a judicial monetary sanction of at least three hundred days.

The Amendment Introduced by the Amendment Act

The Amendment Act narrows the scope of prohibition with respect to the related persons. The prohibition shall not be applicable to the

board members and their relatives specified in the article, who are shareholders in the company. Furthermore, reference to unlimited companies and capital companies, to which the board members and their relatives are members, has been completely abrogated. Therefore, only the board members and their relatives who are not shareholders in the company are prohibited from borrowing the company and the company may not provide guarantee, surety ship or other collateral, assume obligations or debts for such persons.

The Amendment Act does not amend the provision on granting the creditors of the company the authority to pursue persons indebted to the company in violation of the prohibition. Nonetheless, the provision of the New TCC, granting authority to pursue caused criticism, since the Enforcement and Bankruptcy Code already grants the creditors to claim from company debtors to pay their debts within the scope of execution up to the receivable amount. The New TCC only reaffirms this possibility and, being a statutory provision entering into force at a later date; it may even result in the provision of the Enforcement and Bankruptcy Code no longer being applicable.

The sanction of judicial monetary fine of at least three hundred days for persons violating this article is not amended either. It is apparent that, board members and their relatives who are shareholders in the company may be indebted to the company in compliance with article 358 analyzed hereinabove, otherwise they will be subject to the sanctions foreseen for the violation of the article.

Conclusion

The New TCC, as enacted, includes provisions, which prohibit companies to grant any personal loan to the shareholders, board members and relatives of board members as well as unlimited and capital companies in which the board members and their relatives are partners. Persons violating such prohibitions shall be faced with judicial monetary fines of at least three hundred days. These provisions were severely criticized due to not allowing indebtedness even in the presence of urgent needs. The Amendment Act narrows the scope of this prohibition to a great extent.

Shareholders are now granted the right to borrow from the company whereby shareholders having paid their due capital subscription obligations may assume debts to companies whose profit is sufficient to cover its loss. In the event of violation of these conditions, the persons loaning the debt instead of the shareholder shall be faced with judicial monetary fines of at least three hundred days. Although the amendment aims only to enable borrowings in the presence of urgent needs, we are of the opinion that the shareholders will be able to become indebted to companies as long as it does not constitute crimes of abuse of confidence or fraudulent bankruptcy, regardless of whether the necessities are urgent or not.

Furthermore, the Amendment Act narrows the scope of persons related to the prohibition on loans with regards to board members and their relatives. As per the amended provision, board members and their relatives who are shareholders in the company may borrow from the company as long as the conditions set forth hereinabove are satisfied. The provision including the unlimited and capital companies to which the board members and their relatives are partners within the scope of the prohibition is abrogated. Only the board members and their relatives who are not shareholders in the company are prohibited from being indebted to the company.

Limited Corporations under Turkish Commercial Code Numbered 6102*

Att. Nilay Celebi

The New Turkish Commercial Code Numbered 6102 ("New TCC") and the Act numbered 6103 on the Entry into Force and Application of the Turkish Commercial Code[1] ("Application Act") which will be effective on 01.07.2012 has been amended by the law numbered 6335 by the Parliament ("Law No: 6335").

As per article 22 of the Application Act amended by Law No: 6335, the limited liability companies are allowed a statutory time limit to adapt their essential components of company structure and adhere to the articles of association format set out by the New TCC within 12 months following its effective date (until 01.07.2013). Failure to do so will result in the application of the provisions of the New TCC instead of the provisions of the companies' own articles. If it is foreseen necessary, the Ministry of Customs and Commerce may extend this period only once for one more year.

After a quick update regarding such an important change, we would like to express that, the New TCC introduces new aspects for the limited corporations. In general, the provisions of the New TCC governing the joint stock companies are also applicable to the limited corporations therefore; it can be assumed that the New TCC has taken an overlapping approach to establish closer correspondences between the limited corporations and joint stock companies. In the below, a brief guidance outlines the new aspects of the limited corporations under the New TCC.

The New TCC followed "single member company" trend, which became a popular company structure in other jurisdictions in recent years and allowed Turkish limited corporations, be formed with one or

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* ***Article of June 2012***

1 Published in the Official Gazette dated 14 February 2011 numbered 27846 *(Türk Ticaret Kanunu'nun Yürürlüğü ve Uygulama Şekli Hakkında Kanun).*

more members (shareholders). After enactment of the New TCC, the limited corporations, which had been established with more than one member may decrease the number of members of a shareholders to one with a notification that will be made to the director(s) of the company and continue to operate with just a sole member. The director should apply to the trade registry for the registration and announcement of the company's new structure within 7 days from receipt of such notification. The name, residence and nationality of the single shareholder should also be notified to the trade registry. The company management shall be liable for noncompliance of this application requirement.

With respect to structure of limited corporations' share capital; the New TCC increased minimum authorized share capital amount from TRL 5,000 to TRL 10,000. The existing limited corporations, that had incorporated before enactment of the New TCC should increase their share capital up to TRL 10,000 –if the share capital of is below this threshold– within 3 years of the publication of the New TCC. The par value of the shares should be at least TRL 25.

The limited corporations should have registered shares and should be represented with share certificates.

Unless otherwise stated in the articles of association (AoA), as a general rule the general assembly should grant consent to any share transfer transaction. The general assembly may reject to grant its consent without giving any reasons. The AoA may include secondary rights such as right of first refusal.

The board of directors and general assembly meetings may be held via electronic means (video or telephone conference) to the extent stated in the AoA of the company.

The AoA of a limited corporation may indicate a right for the shareholders to leave the company or list conditions to leave. The AoA also may determine and list the reasons for the squeeze out of a shareholder by a general assembly decision.

Unless the AoA states otherwise or the board of directors consist of more than one directors the representation of the company can be denoted by a joint signature. The directors may delegate the represen-

tation powers to one or more executive manager or appoint third parties. The manager may be a legal entity.

Article 628 of the New TCC, which required at least one Turkey domiciled director has been repealed by the Law No: 6335. Consequently, the extension of repealed provision, which empowers such director having sole authorization to represent the company, will no longer be effective.

The limited corporation must keep a share ledger reflecting the following; names/titles and addresses of the shareholders, number of shares held by the shareholders, share transfers, nominal value of shares, share groups (if any), encumbrances over the shares and the information regarding the beneficiaries of such encumbrances formed over the shares.

Another renovated area introduced by the New TCC is regarding the company accounts. As per article 610 of the New TCC, the provisions of the joint stock companies governing the financial tables and reserve funds (art. 514-527) shall be applicable to limited corporations.

The limited corporation is obliged to keep the commercial books indicating the commercial transactions and asset structure of the company. The limited corporations shall apply Turkish Accounting Standards (which is an adaptation of International Financial Reporting Standards-IFRS) announced by the Turkish Accounting Standards Board.

The manager(s) of limited corporations must prepare and submit to the attention of the general assembly the financial charts, appendices and the activity report of the company for the preceding accounting period. This must be done in accordance with the Turkish Accounting Standards and within the first 3 months of the relevant financial period following the balance sheet date.

The provisions governing the auditing for joint stock companies also apply to the limited corporations. Briefly, the limited corporations should also have independent auditors who are either chartered or certified public accountants.

Limited corporations must have and maintain a web-site. Financial statements and resolutions, other important documents (*i.e.* signature circular) and information should be published in the website.

As per article 643 of the New TCC, the provisions governing the winding-up for joint stock companies also apply to the limited corporations.

Corporate Governance Rules*

Att. Nilay Celebi

Introduction

The Capital Markets Board of Turkey ("CMB") issued the Communiqué on the Principles Regarding the Determination and Practice of Corporate Governance Rules, Serial: IV, No: 54[1], however, this communiqué caused an extensive argument in the public. Then, the CMB issued a draft Corporate Governance Rules and submitted it to the public for discussions and suggestions. CMB issued the Communiqué on the Principles Regarding the Determination and Practice of Corporate Governance Rules, Serial: IV, No: 56[2] ("Communiqué") by obtaining suggestions from the public, which is published on the Official Gazette numbered 28158, dated 30.12.2011.

Corporate Governance Rules

The Communiqué is applicable to the listed companies. Listed companies are defined as the public companies traded in Istanbul Stock Exchange.

According to the Communiqué, the listed companies are subject to articles 1.3.1; 1.3.2; 1.3.7; 1.3.10; 4.3.1; 4.3.2; 4.3.3; 4.3.4; 4.3.5; 4.3.6; 4.3.7; 4.3.8; 4.3.9; 4.4.7; 4.5.1; 4.5.2; 4.5.3; 4.5.4; 4.6.2; 4.6.4 of the Rules. The listed companies shall explain in the report with regard to the application of the Rules, whether or not they apply the other provisions of the Rules. As per the Communiqué, listed companies are distinguished in 3 groups. There are certain Rules that are not applicable for the 3rd Group. As a brief summary of the Rules;

All shareholders shall be treated equally. All shareholders shall have information and examination right and such right cannot be limited or cancelled.

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* ***Article of March 2012***

1 Published on the duplicated Official Gazette numbered 28081, dated 11.10.2011.

2 Published on the Official Gazette numbered 280158, dated 30.12.2011.

Request of special audit is a part of the information right. A right for the shareholders to request a special audit from the general assembly in order to examine specific issues even though this request is not stated in the agenda of the general assembly provided that the right to obtain information and examination has been formerly used, can be inserted to the articles of association.

The announcement of the general assembly meeting shall be made at least 3 weeks prior to the meeting, to reach all shareholders and via any possible communication equipment including electronic communication; the provisions of the relevant legislation shall be reserved.

General assembly meetings shall be convened by causing the high participation of the shareholders at the minimum expense and shall not result in any inequality. Therefore, the general assembly shall be convened at the place where the majority of the shareholders reside provided that such provision is in the articles of association.

The general assembly should consent on whether, the shareholders holding the management control, board members, managers and their spouses or persons with blood or affinity relationship (to the second degree) may compete with the company or its affiliates or perform a transaction with them which may have a conflict of interest.

The affirmative vote of majority of the independent board members for certain 'important transactions' to be resolved in the board, is required provided that the decision does not require a general assembly decision with respect to the applicable legislation. Important transactions are defined as follows: transferring all or substantial part of assets, creating encumbrance over them or leasing them, purchasing substantial assets or leasing them, granting privileges or changing the scope of the privileges, or delisting.

The decision shall be submitted to the general assembly in case the affirmative vote of majority of the independent board members is not met or such transaction is desired to be performed besides the opposition of the independent board members. The opposition of the independent board members shall be disclosed to the public, notified to CMB and such opposition shall be notified to the shareholders at the general assembly. For the purposes of this provision the meeting quorum for the general assembly is not required and the decision shall be

made with a simple majority. This provision shall be reflected in the articles of association.

For the purposes of determining the criteria of 'importance'; any of the following shall be taken into consideration:

a) 20% of the total assets disclosed in the last financial tables to the public,

b) 40% of the relevant account group disclosed in the last financial tables to the public,

c) 25% of the equity disclosed in the last financial tables to the public,

d) 20% of the gross sales revenue disclosed in the last financial tables to the public.

General assembly meetings may be opened to the beneficiaries and media having no right for them to comment therein. Such provision may be inserted to the articles of association.

Applications that complicate the usage of the voting rights and privileges in the voting rights shall be refrained. In case of privileges in the voting rights, the privileges that prevent the public shares to be represented in the management should be cancelled.

Minority rights may be granted to the persons who hold less than 1/20 of the share capital by a provision in the articles of association, and the capacity of the minority rights may be extended in the articles of association.

The company shall have a profit distribution policy. Such policy shall be submitted to the consent of the shareholders at the general assembly, stated in the annual report and disclosed to the public via website of the company.

Applications limiting or complicating the free transfer of the shares traded in the stock exchange shall be refrained from.

The website of the company shall be actively used for public disclosure and any and all information shall be updated therein.

The following information shall be stated in the website of the company (alongside with the required disclosure as per applicable

law): information on the trade registry, current shareholding and management structure, details regarding the privileged shares, current articles of association together with the trade registry gazettes where any changes were announced, disclosures, financial reports, annual reports, prospectus and offering circular, agendas of the general assembly meetings, attendant list, meeting notes, power of attorney forms, information forms on the collection of shares and power of attorney for mandatory call, policy for purchasing its own shares, profit distribution mechanism, information policy, information on the transaction with related persons, ethical rules, questions, notices and information requests and their responses under frequently asked questions.

Beneficiaries are the employees and entities *(i.e.* clients, creditors, suppliers) related in achieving the objectives or business of the Company. The rights of beneficiaries shall be secured.

The board shall consist of at least 5 members. The board shall have at least one female director. The board shall consist of non-executive and executive members. The non-executive members shall include independent board members.

A clear distribution of duties between the chairman of the board and the executive chairman/general manager shall be made in the articles of association. The shareholders shall be informed in the general assembly meeting if the chairman of the board and the executive chairman/general manager are decided to be the same person and shall be explained in the annual report.

At least 1/3 of the members of board shall be independent board members. The fractions shall be completed to the following number. The number of the independent board members may not be less than 2.

A member who complies with the following criteria shall be deemed as an 'independent board member':

a) He shall have no employment, capital or commercial relationship, direct or indirect, with the company, a person related with the company or with the legal entities having a management or capital interest by the shareholders holding 5% (direct or indirect) of the share capital and the member or any spouse or persons with blood or affinity relationship (to the third degree) within the last 5 years,

b) He shall not have been employed in the firms conducting, in whole or in part, the business and organization of the company, especially audit firms or consulting firms, and he shall not have served as a director in such companies within the last 5 years,

c) He shall not have been employed in the companies who supply significant services or products to the company and he shall not have been a shareholder or have served as an employee or a director in such companies within the last 5 years,

d) He shall not hold more than 1 % of the share capital and such share shall not be privileged,

e) He shall have the knowledge, education and experience in order to duly perform its duties in the board,

f) To the extent possible by applicable law and except for the academics, he shall not be working as a full time basis in the governmental offices, at the time of the nomination and during its office,

g) He shall be a resident in Turkey in accordance with the Income Tax Law.

h) He shall have the ethical standards and occupational reputation and experience in order to give positive contribution to the company business and to keep his independency.

i) He shall give his time to company business in order to duly perform his duties.

The board shall establish committees such as Audit Committee, Corporate Governance Committee, Committee of Early Determination of Risks, Nomination Committee, and Remuneration Committee. The Corporate Governance Committee may perform the duties of Nomination Committee, Committee of Early Determination of Risks, and Remuneration Committee if such committees cannot be established.

The Nomination Committee has important duties with regard to the nomination of the independent board members. It shall evaluate whether the nominees for the independent board member seat have the relevant criteria and provide a report to the board. The independent

board member candidate shall submit a representation letter with regard to its independency.

The board shall submit the list of the independent board member candidates to the CMB at least 60 days prior to the general assembly meeting. The CMB shall submit its negative opinion, if any, within 30 days. If the CMB provides a negative opinion with regard to the nominee, such person cannot be nominated as the independent board member at the general assembly.

The affirmative vote of majority of the independent board members is required with regard to any and all related person transactions; and transactions for granting security, pledge and mortgage in favor of third parties. If the majority of the independent board members do not consent on such transactions then this shall be disclosed to the public along with all necessary details of the transaction and shall be submitted to the general assembly. The parties of the transaction and related persons may not vote in the decision of such transaction. The participation of the other shareholders shall be ensured. For the purposes of this article, the meeting quorum for the general assembly is not required and the decision shall be made with a simple majority. Any decisions adopted by the board or the general assembly without respecting this mandatory provision shall be void. Such provision shall be reflected to the articles of association.

Meeting and decision quorum of the board shall be determined in the articles of association.

The remuneration and other benefits given to the board members and the managers shall be disclosed to the public via annual report.

Conclusion

The Communiqué and the Rules provide mandatory provisions or advisory provisions for the listed companies to apply. In any case, the listed companies shall disclose whether the Rules are being applied or not; the reasons of non-application (if any); the conflict of interest which may arise in case of non-application and whether the company is planning to change its corporate governance principles in accordance with the Rules, in their annual report.

Procedures and Principles of General Assembly Meetings of Joint Stock Companies*

Att. Naciye Yilmaz

The Regulation pertaining to the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Representatives of the Ministry of Customs and Trade (the "Regulation") was published in the Official Gazette dated 28.11.2012 and numbered 28481.

Scope

Pursuant to article 2 of the Regulation, the scope of the regulation is set as *"the determination of the general assembly meetings of joint stock companies to which the representative of the Ministry (of Customs and Trade) shall attend, the procedures and principles applicable to general assembly meetings of joint stock companies, the duties, authorities and qualifications of the Ministry representative which will be present at the meetings and payments to be made to them, the minimum content of the internal regulation which comprises the rules governing the principles and procedures of the functions of the general assembly of the companies, participation in the general assembly, persons who have deposited shares or share certificates who shall exercise their voting rights and the principles and procedures such deposited persons are bound by and the content of the representation certificate"*.

This newsletter article shall assess the procedures and principles applicable to the realization of the general assembly meetings.

Types of Meetings

The Regulation lays out the details governing the general assembly meetings which are regulated in general under the Turkish Commercial Code No. 6102 ("TCC"). Accordingly, ordinary and

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* ***Article of December 2012***

extraordinary general assembly meetings, as well as the special assembly of privileged shareholders' meetings, are specified as the relevant meetings to be held within joint stock companies.

Election of company bodies, financial statements, annual activity reports, matters related to profit, acquittal of members of the board of directors and other matters related to the relevant activity term deemed necessary shall be discussed in ordinary general assembly meetings.

Extraordinary general assembly meetings, on the other hand, are the meetings, other than the ordinary meetings, held if necessary and urgent for the company.

In addition to such meetings, in the event there are privileged shares among the shares of the company and an amendment to be made to the articles of association may restrict the rights of the privileged shareholders, the special assembly of privileged shareholders shall convene to approve the relevant amendment resolution. However, in the event that 60% or more of the share capital represented by privileged shares was represented at the relevant general assembly meeting in person by the shareholders or by proxy and the majority gives affirmative votes at the general assembly for the amendment of the articles of association, it is not necessary for a separate special assembly of privileged shareholders' meeting to be held.

Time of Meeting

Pursuant to Article 7 of the Regulation, the ordinary general assembly meetings shall be held within 3 months as of the end of each account term. Extraordinary general assembly meetings on the other hand are not subject to any time restraints as they are held when deemed necessary.

The special assembly of privileged shareholders' meetings shall be convened to meet within 1 month as of the date of the resolution, in the event a resolution is adopted for the amendment of the articles of association as explained above. In the event the special assembly of privileged shareholders' meeting is not held, the general assembly resolution shall be deemed approved.

Place of Meeting

Unless regulated otherwise under the articles of association of the company, the general assembly meetings shall be held within the borders of the territorial unit (*i.e.* city, municipality, and district) where the company headquarters is located. The possibility of holding the meeting at another place or abroad must be specified as an explicit regulation under the articles of association.

The convocation for the meeting announced should include an accurate and detailed explanation of the meeting place.

Convocation for the Meeting

Those who are authorized to convene the general assembly and the court's authorization, regulated under various articles of the TCC, are regulated together under the same Article 9 of the Regulation. Subsequent articles of the Regulation cover the convocation procedure, the content of the announcement regarding the convocation of the general assembly and the principles governing meetings that were not convoked.

Accordingly, in principle, the general assembly shall be convoked by the board of directors. In the event there is no board of directors, the board of directors cannot convene or its meeting quorum cannot be met, the general assembly may be convened by any shareholder who obtains the approval from the court pursuant to Article 410 of the TCC.

The shareholders constituting the minority of the company (shareholders holding at least 10% of the company share capital, 5% of publicly offered companies or a smaller percentage if stipulated under the articles of association) may also request the board of directors to convene a meeting of the general assembly. This request shall be made through the notary public and in writing.

Additionally, pursuant to Article 9(5) of the Regulation the trustee, or in the event the company is being liquidated pursuant to Article 9(6), the liquidation officers may convene a meeting of the general assembly.

Pursuant to Article 10 of the Regulation, a meeting of the general assembly shall be convoked at least 2 weeks prior to the meeting date. The dates of announcement and meeting shall not be counted in the calculation of the 2 week period.

Article 11 of the Regulation regulates in detail the content of the announcement whereas Article 12 regulates the general assembly meeting held without convocation. Accordingly, *"all shareholders or their proxies may convene as the general assembly without abiding by the convocation procedures, provided that none of them object"*.

Participation in the Meeting and Voting Rights in the Meeting

Shareholders or their proxy present on the list of attendants to be prepared by the board of directors may participate in the general assembly. The proxy is not required to be a shareholder and provisions of the articles of association requiring the proxy to be a shareholder are null and void.

Each shareholder has at least one voting right at the general assembly. Notwithstanding, in order for the voting right to be generated, at least one fourth of the share price, or a higher price if stipulated under the articles of association should be paid-in.

Cease of the Requirement That the Ministry Representative be Present

In principle, the requirement to procure the presence of the ministry representative at general assembly meetings is no longer preserved. However, it is required for the ministry representative to be present for the meetings specified below:

- All general assembly meetings of companies whose incorporation and amendments to the articles of association are subject to the approval of the Ministry;
- The general assembly meetings of other companies whose agenda include any of the following items:
  - Increase or decrease of the capital;
  - Adopting or leaving the registered share capital system;
  - Amendments to the articles of association regarding the increase of the registered capital or the scope of activities;
  - Merger, spin-off or conversion of type;

- General assembly meetings of companies which implement and allow participation in the general assembly meeting via electronic means;
- All general assembly meetings to be held abroad;
- All special assembly of privileged shareholders' meetings to be held abroad.

Entry into Force

The provisions of the Regulation shall enter into force on the date of its publication save for Article 19/2(b) which provides that privileged voting rights may not be exercised for the acquittal of the board of directors or for the initiation of a lawsuit to hold the board of directors responsible as well as the provisions governing the requirement of announcements on the website of the company. The relevant articles shall enter into force respectively on 01.07.2013 and 01.10.2013.

Transfer of Assets along with Liabilities as in Transfer of Enterprise/Business*

Att. Berna Asik Zibel

Enterprise Concept in Light of TCC and NTCC

The term of "commercial enterprise" is defined under Turkish legal doctrine as conducting commercial activity under an organization, which contains capital, labor and management[1]. Under Turkish Commercial Code numbered 6762 ("TCC"), the most important factor for defining a commercial enterprise is indicated as "being commercially operated -going concern".

As per art. 11/I of TCC, *"the enterprises such as businesses, factories or others that are being commercially operated are considered as commercial enterprise"*. Although TCC is considered the commercial operation term as a cornerstone, it does not contain a sufficient definition or illustrate the factors of it but only enumerates its kinds. Under art. 12 and 13, some types of activities, the conduct of which are considered as business or other types of commercial enterprises.

On the other hand, even if an enterprise conducts activities listed under TCC art. 12 and 13, the important criterion scale is whether there is a level commercial activity, which could be considered as higher than commercial activities of a craft type or micro enterprises. This rule is set forth under art. 14/II of Trade Registry By-laws as "the activities, which do not target for revenue, which are not going concern and level of which are not higher than the one of a craft or micro enterprises set forth under art. 17 of TCC shall not be considered as commercial enterprise. In addition, in the decisions of Court of Appeal, it is also accepted that in order to be deemed as a commercial enterprise, an enterprise shall have the necessary business volume -above a certain threshold- and importance, which requires a commercial accounting. On the basis of the foregoing, "having higher activity level than the

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* ***Article of February 2012***

1 **Poroy/Yasaman**; Ticari İşletme Hukuku, Vedat Kitapçılık, İstanbul 2010, 13th Edition, p. 27-28.

craft or micro business" is accepted as a fundamental factor of determining the concept of "commercial enterprise" under art. 11 of the new Turkish Commercial Code numbered 6102 ("NTCC").

Transfer of Enterprise/Business Concept and Discussions of Transfer of Assets Along with Liabilities

Under the currently applicable laws, "transfer of commercial enterprise" concept is governed by Turkish Code of Obligations numbered 818 ("TCO"). According to Article 179 of the TCO, in case the "whole of an enterprise" is transferred including all assets and liabilities thereof, the transferee automatically becomes liable for the debts of the said enterprise, starting from date of the notice to the creditors or the publication of newspaper advertisements to that effect.

In addition, there is a complementary provision under Turkish Labor Act numbered 4857 ("TLL"). As a general rule of the Turkish Labor Act, the employees of a business place are automatically transferred and become the employees of the new employer, when such business place is transferred to a new owner, who will keep the business running.

Theoretically, in order to qualify an asset transfer as a "transfer of business" or "transfer of commercial enterprise", it is necessary for the transferee to obtain the entirety of such business or a separable (stand-alone) part of a business ("line of business") including all assets and liabilities thereto. Therefore, if the transferor only transfers certain assets (e.g. immovable properties, vehicles, etc.), but retains the obligations and liabilities arising out of or in connection with such assets, in general the transaction is not considered as a "transfer of business", but merely as transfer of certain assets.

On the other side, as per the established doctrine[2] and the Court of Appeal decisions[3], even if some components of a business or commer-

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[2] **Poroy/Yasaman**; s. 46; Ülgen/Teoman/Helvacı/Kendigelen/Kaya/Nomer/Ertan; Ticari İşletme Hukuku, Vedat Kitapçılık, İstanbul 2006, 1st Edition, p. 170.

[3] Court of Appeal 21. Civil Chamber E. 2005/1077 K. 2005/1752 T. 1.3.2005; Court of Appeal 21. Civil Chamber E. 2004/6582 K. 2004/6965 T. 14.9.2004; Court of Appeal 21. Civil Chamber E. 2001/6728 K. 2001/6742 T. 15.10.2001; 15. Civil Chamber E. 1995/1063 K. 1995/1252 T. 6.3.1995.

cial enterprise are not transferred, in case the transferred components are sufficient to continue commercial activities as an enterprise, it is accepted that such transaction is an enterprise/business transfer as per art. 179 of TCO. Moreover, art. 179 of TCO is considered as a mandatory provision of law and decisions are given which are restricting the transfer of entire assets of a business without having the liabilities.

In light of the above, the transfers, the subjects of which are fundamental components -equipments, fixtures and fittings- of a business are considered as "*implicit transfer of business*" even if it does not contain the liabilities.

In other words, transferring certain aspects of a business in parts or in separate steps would not prevent the transferee to inherit the liabilities attached to the business and the transferee would not be able to avoid the legal consequence of a "business transfer".

As indicate above, art. 179 of TCO is accepted by the established opinions as mandatory provision of law. Therefore, it is also indicated in the established decisions of Court of Appeal that the declaration of nullity for the decisions contrarily taken to conduct asset transfers which contain fundamental components of a business without transferring liabilities could always be claimed by any person who has a legal interest[4].

On the other side, there are voices under Turkish legal doctrine who are not participate such opinion. As per the contrary opinion, transfer of fundamental components of an enterprise/business are not necessarily requires the transfer of assets along with liabilities. This opinion claims that in order for the transfer of liabilities, the transfer of a business with the entirety of its assets and liabilities, however, it does not restrict the transfer of its assets without the liabilities and art. 179 of TCO shall be read as indicated. In other words, transfer of whole assets or fundamental components of the assets of an enterprise shall not necessarily be considered as the transfer of liabilities along with such assets. According to this, assets of a commercial enterprise could be transferred without transferring the debts and liabilities[5].

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4 Court of Appeal 11. Civil Chamber E. 1978/3158 K. 1978/3661 T. 6.7.1978.

5 **Mehmet Fatih Arıcı**, Ticari İşletmenin Aktifi ve Pasifi ile Devri, Vedat Kitapçılık, İstanbul 2008, p. 79, 148, 156, 157, 165.

According to another opinion, in the transfer agreement, the transfer of liabilities may be agreed by the parties either explicitly or implicitly[6]. Unless otherwise explicitly indicated in the agreement, the transferee shall also bear the liabilities of the business while transferring it. However, for such a conclusion, the business shall be transferred entirely with its assets and liabilities[7].

The most important argument of the established opinion, which considers art. 179 of the TCO as mandatory provision and restricts the transfer of entire assets of a business without the liabilities, is that the transfer of the assets of an enterprise without the liabilities will harm the enterprise, the creditors or other person who has legal benefits or even, such a transfer can only be made for such purpose.

On the other hand, the contrary opinion stressed that if sufficient value is paid in accordance with the market conditions, the transaction for transferring the assets of the business shall be considered as valid. Because the market value of business assets transferred along with the liabilities shall not be equal to the market value of business assets transferred without the liabilities.

As per Article 280 of the Execution and Bankruptcy Code ("EBC"), all transactions realized by a legal entity, whose equity is not sufficient to cover its liabilities, with the intention of not compensating its creditors, are deemed null and void, provided that the other parties of the transactions in question are aware of the economic situation of the transferring legal entity and its intention of defeating its creditors, or if there is explicit evidence which would require such third parties to be aware thereof. Moreover, pursuant to the third paragraph of the same article, in case an enterprise (as a whole) or significant part of its assets are transferred, the transferee is automatically deemed to be aware of the economic situation of the transferor and transferor's intention of defeating its creditors. In order to enforce this provision under the aforementioned Article 280 of EBC, the transferor legal entity must have been subject to an attachment or bankruptcy which is initiated

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6 **Abuzer Kendigelen**, Hukuki Mütaalalar IV, p. 12.

7 **Arıcı**. 75 Claus-Wilhelm Canaris, Hendelsrect, 24., vollstandig neu bearbeitete Auflage, München, C.H. Beck'sche Verlagsbuchhandlung, 2006, 8, II, N. 11.

within two years as of the transaction by a specific creditor claiming annulment of the above mentioned transaction within five years statute of limitations following the date of such transaction. As is seen, in order to claim that a transaction null and void according to EBC, the transfer of assets without the liabilities is not indicated as a matter, however, it is necessary that occurrence of an adverse economic situation which requires certain conditions and intention of damage during the execution of the transaction are required.

This provision of EBC is in supportive nature to the contrary opinion which claims that art. 179 of TCO is not mandatory for the transfer of assets along with liabilities.

The ultimate goal of the parties is the decisive factor in determining whether a transfer is only an "asset transfer" or a "business transfer".

When reviewing the provisions of the new Turkish Code of Obligations numbered 6098 ("NTCO"), which will enter into force on 1 July 2012, art. 202 relevant to the transfer of business, it is possible to say that the provision is repetitive when compared with art. 179 of TCO. On the other hand, since the NTCO embrace a more simplistic language, it is easier to claim that in order to transfer the business; the law does not make it mandatory to transfer assets along with the liabilities. As per art. 202 of NTCO, a transferee who acquires a business will bear the liabilities if he transfers the business assets along with the liabilities. In other words, in light of the provision of NTCO, it will be possible to claim that the transferee will only transfer the assets but not the liabilities.

The common practice for transfer of enterprise/business is to enter into a framework "asset/business transfer agreement". However, as per the provisions of TCO and the TCC which are still in effect, at the closing stage each asset constituting the acquired business must be transferred through a different procedure e.g. in case of a conveyance of an immovable, such conveyance must be conducted before the land registry office, or in case of transfer of vehicles, such transfers shall made before a notary public and shall be registered before the traffic registry branches or offices of the police departments whereas title to moveable assets are conveyed through invoicing.

As per art. 13/III of the NTCC, which will enter into force on 1 July 2012: *"The commercial enterprise will be transferred as a whole which will not necessitate conducting the legally required transactions for the transfer of each asset separately. Unless otherwise indicated, the transfer agreement is considered as covering the fixed assets, enterprise value, tenancy rights, trade name and other intellectual property rights, and other assets which are permanently attached to the business. The transfer agreement and other agreements subject to which is a whole enterprise shall be in written form and shall be registered and announced with the trade registry."*

On the basis of the foregoing, the above mentioned provision of NTCC supports the claim that for transfer of commercial enterprise, the togetherness of assets and liabilities are not mandatory and it is possible for parties to freely determine the components of a transaction. Because, the relevant article explicitly indicates that otherwise may be agreed and there is no reference to any debt and liability in such article.

Conclusion

As discussed above in detail, the provisions of both NTCO and NTCC related to the transfer of enterprise/business is in a nature supporting the idea that it is not mandatory to transfer assets and liabilities together for a transfer of enterprise. However, we will simply see how Court of Appeal will interpret and evaluate the actual situations which will occur after the new laws enter into force.

Agency Contracts under Turkish Law and Newly Regulated Matters*

Att. Berna Asik Zibel

Legal Framework of Agency Contracts

The agency contracts are regulated under the new Turkish Commercial Code numbered 6102 ("NTCC") in a more detailed concept and some legal issues which were not set forth by the law but regulated as per Supreme Court of Cassation's decisions are reflected to the text of code for the first time. Therefore, while we are herein reviewing the general provisions of the new law on agency contracts, we also evaluate the new issues regulated in the new law.

Pursuant to article 102 of the NTCC, *"he/she whoever takes as profession the permanent carrying out of negotiation activities (i.e. intermediation activities) for contracts relating to a commercial enterprise or conclusion of such contracts on behalf of such commercial enterprise in a specific place or territory without an ancillary role such as a commercial intermediary, mercantile agent, sales clerk or employee shall be deemed to be an agent."*

In view of this definition, the main elements of an agency relation may be briefly summarized as follows:

- The agent must negotiate and/or conclude contracts relating to a commercial enterprise;
- there must be an underlying agreement that constitutes the basis of the agent's negotiation or contracting activities; and
- such activities must show permanence and the agent must pursue these activities as a career.

In this respect, an agent carries out brokerage activities for businesses relating to the commercial enterprise of the principal, or performs such activities on behalf of the principal. The relationship between an agent and a principal is deemed as a form of "special rep-

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* ***Article of October 2012***

resentation". A real person or legal entity agent is legally required to conduct the agency operations in compliance with the principal's instructions and in a manner consistent with the interests of the principal.

Freedom of contract principle is also relevant for the agency contracts. In the absence of such contractual arrangement, provisions on agency contracts laid down in the NTCC shall apply. In the cases where, there is no provision in the articles of the NTCC on agency contract, the provisions concerning the occasional intermediaries under the new Code of Obligations numbered 6098 ("NTCO") will be applied to the commercial agencies who act as intermediaries and the provisions concerning commissioners will be applied to the commercial agencies who conclude contracts; if there are no such provisions, then the provisions about representation will be applied.

Certain special topics regarding agency are regulated under other various Codes. For example; insurance agencies are regulated in Insurance Code and travel agencies are regulated in Travel Agencies and Travel Agency Unions Code. The intermediaries who are agencies of brokerage houses in the purchase and sale of capital markets instruments are regulated under the Communiqué of the Capital Markets Board Regarding The Principles on Intermediary Activities and Intermediary Institutions, Serial: V, No: 46.

Legally Required Form for an Agency Contract

As per the general rule under NTCO, validity of contracts is not subject to any legal form, provided that a specific form is held mandatory under a specific law. As there are no specific laws requiring any such mandatory form (including the relevant provisions of the NTCC governing agency contracts) an agency contract may be entered into even in a verbal form. Notwithstanding the foregoing, in light of the Civil Procedures Law numbered 6100, a written document *i.e.* a document signed by a principal and an agent is required to prove the valid existence of a contract if the disputed amount exceeds TRL 2500 (app. Euro 1100), should there be any disputes regarding the agency relation.

Notwithstanding the foregoing, should a principal contemplate to grant to the agent authority to execute contracts and other legal docu-

ments and to receive payments, to renew or to decrease receivables on principal's behalf, such power of attorney must be given in writing. And also the authority to conclude contracts shall be registered and announced by the agent.

Rights and Obligations of an Agent

As indicated above, the parties are free to contractually agree on the rights and obligation of the agent. Even if there are no contractual arrangements, it is possible to determine the basic rights and obligations of the agencies under the provisions of the laws.

i. Obligations

Under Turkish commercial and contracts law regime, an agent is required to:

- conduct activities relating to the business of the principal within the territory. The principal is free to contractually limit such activities to a narrower extent than as provided in the legislation. Similarly, the principal could impose sale targets on its agents;
- respect the principal's interests e.g. show due care in selecting customers, monitoring the conditions of the market, etc.;
- observe the duties of loyalty and trust, which duties cover (i) the duty to notify the principal about all issues relating to the relationship between the principal and the agent, (ii) the duty to act in accordance with the principal's instructions to an extent such instructions are not against the independence of the agent, (iii) non-compete obligation, (iv) duty of confidentiality;
- take preventive and/or protective measures in favor of the principal when necessary *i.e.* to seek remedies such as notifications for payment or protest, an injunctive relief, evidence consideration etc., as may be required; and
- remit all relevant payments and send the necessary documents to the principal in a timely fashion.

ii. Rights

Under Turkish commercial and contracts law regime, an agent is entitled to:

- request payment of commission fees; an agent will be entitled to commission fees only after the customer duly pays the amount under its sales agreement with the principal;
- unless otherwise agreed under the contract, carry out activities in a territory exclusively assigned;
- claim compensation for extraordinary costs;
- claim portfolio compensation for losing its clientele and suffering financial distress as a result of an unjust termination by the principal or valid termination by itself; and
- if a non-compete obligation is set forth after the termination of the agreement, claim special compensation for non-compete.

Rights and Obligations of a Principal

To avoid repetition, we simply note that the rights of the agent constitute the obligations of the principal, and the obligations of the agent constitute the rights of the principal, due to the synallagmatic nature of agency contracts. To clarify, the principal shall inform the agent regarding the offers that he do not accept, shall provide the documents regarding products, shall inform the agent on the issues necessary for him to fulfill its obligations, especially shall notify if the volume of business will be less than expected and shall pay the necessary fees.

Authorities of an Agent and Unauthorized Representation

An agent is entitled to:

- negotiate (intermediate) and/or conclude contracts on behalf and for the account of the principal; and on this basis, agents can be classified in two classes being (i) agents with the authority to conclude contracts on behalf and for the account of his principal, (ii) agents without the authority to conclude contracts on behalf and for the account of his principal;

- represent the principal in respect of preventive and/or protective measures referred above; which authority covers the right to represent the principal before courts; and
- collect and receive payments in respect of the goods or services from third parties personally contracted by himself.

Pursuant to article 108 of the NTCC, in cases where an agent acts without authority or exceeds the authority granted, the principal may immediately give consent to the relevant transaction negotiated and/or concluded by the agent. If such consent is not given, the agent will be responsible for the transaction on his own behalf and account.

Termination of Agency Contracts

In case of agency contracts with indefinite term is three months, each party, who request to terminate the contract, shall provide an at least three months prior notice period before the effective date of any contemplated termination. Agreements for a definite period of time shall automatically terminate upon lapse of the contractual term, unless the parties agree on an automatic renewal system. In any case, any party may rely on just grounds to immediately terminate the agency agreement.

Other than bankruptcy, death, restriction of the capacity which are referred to rules of the NTCO; incidents that may constitute just grounds for termination are not specifically defined in the NTCC; however, according to the Supreme Court of Appeal's decisions, the following reasons may, *inter alia*, be considered as just grounds for termination of agency contracts:

In the event that one of the parties to the contract,

- discontinues or becomes obliged to cease its activities for any reason for an unreasonable period;
- engages in any activity causing harm to the other party, whether directly or indirectly; and
- makes late payments in spite of written notice.

In addition, the parties to an agency contract may also mutually agree on other just grounds on the condition that such causes are not against to the mandatory provisions of the law.

Needless to say, agency contracts are automatically terminated upon expiration, on the condition that they are not renewed by the mutual agreement of the parties or do not contain any auto-renewal provisions.

Goodwill Indemnity

Before the NTCC, there was no legal provision under Turkish laws regulating the goodwill indemnity (in other words portfolio compensation) and the concept and the grounds for goodwill indemnity had been established by Supreme Court of Cassation's precedents.

In line with established practices of Supreme Court of Cassation, in case of termination of the agency agreement, (regardless of whether the three months-notice is given or not) a "portfolio compensation" may be ordered by the court due to the goodwill created by the agent.

The method adopted to make such calculation is to leave the compensation amount to the court's discretion but limiting it with the average of agent's yearly net profit accrued during the last five years-period.

With the NTCC entered into force, goodwill indemnity for agencies is specifically regulated under article 122. Pursuant to the NTCC, the conditions for goodwill indemnity are that:

- principal has derived significant benefit from the clientele formerly introduced by the agent, after termination of the agency contract;
- (as a result of the termination, agent has lost the right to claim compensation pursuant to potential agreements with clients that it might have entered into, had its agency rights not been terminated by principal;
- payment of the compensation is fair and equitable.

The NTCC also provides that the amount of compensation shall not exceed the yearly average of the agent's annual commissions or other payments received within the last five years. If the contract continued less than five years, then the yearly average of the whole activity period shall be taken into consideration. The NTCC specifically states that if the agent terminates the contract on its own or the pro-

ducer company terminates the contract on just grounds, the agent shall not be entitled to claim the goodwill indemnity. It must be noted that a provision in an agency contract establishing a waiver by the agent from the right to claim goodwill indemnity is not valid. In other words, even though the agency contract explicitly states that the agent will have no rights regarding any goodwill indemnity whatsoever, the court may still rule in favor of the agent asking for goodwill indemnity.

The claims must be raised within one year as of the termination of the agency contract.

Non-Compete Obligation and Indemnity

Pursuant to the NTCC, unless otherwise agreed in writing, the principal shall not appoint more than one agent at the same time within the same territory and same area for the same field of activity. Moreover, an agent shall not act on behalf of competitors who are located at the same place or region or are active in the same commercial area. In other words, the non-compete obligation shall apply to the agency during the term of the contract unless otherwise agreed by the parties.

On the other hand, under the law, the agent is not bound by a non-compete obligation after the term of the agency contract. Another matter which is regulated by the NTCC for the first time is the rules on non-compete agreements after the term of the contract which is set forth by article 123. In order for limiting the activities of an agent after the termination of the agency contract, the parties shall agree in writing and the agreement covering the rules of the mutual understanding shall be signed by the principal and delivered to the agent. This kind of non-compete agreement can only set forth for an additional period of two years after the termination or expiry of the agency contract and it can only be relevant to the territory and customer group provided to the agent and the subjects of the agreements that the agent is entitled to intermediate. The principal shall pay a reasonable compensation to the agent for the non-compete limitation. The principal may waive the non-compete limitation before the termination of the agency contract. In such case, the principal will not be under the obligation to pay compensation after the passing of six months upon its waiver. In the event

that one of the parties terminates the contract with just grounds, within one month as of the termination, such party can notify the other party in writing that it is not bound by the non-compete agreement. The arrangements contrary to the above rules will be invalid to the extent they are against the favor of the agent.

Law numbered 6361 on Financial Leasing, Factoring and Financing Companies*

Att. Nilay Celebi

Introduction

The Financial Leasing Law, dated 10.06.1985 and numbered 3226, and the By-Law Regarding Money Lending Activities, dated 30.09.1983 and numbered 90, with its appendices and amendments are abrogated by the Law on Financial Leasing, Factoring and Financing Companies, dated 21.11.2012 and numbered 6361[1] ("Law No. 6361" or "Law").

The purpose of Law No. 6361 is to regulate the establishment and working principles of financial leasing, factoring and financing companies which operate as financial institutions and to regulate the procedures and principles regarding financial leasing, factoring and financing agreements.

By being defined as "financial institutions" by Law No. 6361, it is important to note that the aforementioned companies form an important part of the financial system; a legal basis for the establishment and operations of the companies is set up and an effective supervision and auditing system is introduced.

One of the most important changes introduced by Law No. 6361 is the establishment of the legal entity entitled the "Association of Financial Leasing, Factoring and Financing Companies" as a professional organization with the status of a public institution, and the obligation imposed on the companies to become a member of this Association. With the establishment and commencement of the operation of the Association, all companies in this sector will act in coordination and operate in compliance with the legal regulations and certain standards.

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* ***Article of December 2012***

1 Published in the Official Gazette dated December 13, 2012 and numbered 28496.

Important Provisions of Law No. 6361

Pursuant to Temporary Article 1 of Law No. 6361, the provisions of the legislation issued pursuant to the abrogated provisions and which do not conflict with Law No. 6361 will be applicable until the entry into force of the legislation to be issued pursuant to the related law. According to the same article, the legislation foreseen under Law No. 6361 shall enter into force within 1 year.

Pursuant to Temporary Article 2 of Law No. 6361 regarding the adaptation period, companies subject to this law must adapt themselves, within 3 years as of the date of publication of the law to provision No. 5(1)(e) regulating the minimum capital, and within 6 months as of the date of publication of the law to provisions No. 8(1) regarding the establishment of a branch and No. 13(2) with respect to the conditions required to be on the board of directors and general managers (chief executive officers). In the event of a force majeure, and if deemed acceptable by the Banking Regulation and Supervision Board ("BRSA" or the "Board"); these periods may be extended provided that the extensions do not exceed 1 year.

The establishment of a company in Turkey falling within the scope of the Law is permitted only with a resolution adopted with the vote of at least 5 members of the Board, provided that the conditions foreseen under the Law are met. A company to be established in Turkey shall fulfill the following;

a) Shall be established as a joint stock company and its number of founders may not be less than five;

b) The share certificates shall be registered and in cash;

c) Shall bear one of the following expressions: "Financial Leasing Company", "Factoring Company" or "Financing Company" in its trade name;

d) The founders shall fulfill the conditions specified under the Law;

e) The members of the board of directors shall have the qualifications set forth under the corporate governance provisions of this Law and have professional experience in order to realize

the planned activities;

f) Shall have a paid-in capital amounting to at least twenty million Turkish Liras in cash and free of any collision,

g) The articles of association shall be in compliance with the provisions of the Law;

h) Shall have a transparent and open shareholding structure which will not prevent the active control of the Banking Regulation and Supervision Authority ("Authority");

i) Shall submit an activity program detailing the business plans with respect to the foreseen scope of activities, projections regarding the financial structure of the establishment, budget plan for the first three years and the company's structural organization.

The companies that obtain an establishment license must also receive permission to operate from the Agency. The permission to operate given by the Board shall be published in the Official Gazette.

The opening of a branch within the country or abroad is subject to the permission of the Agency. Companies cannot engage in organizational structures other than the establishment of branches, and cannot grant franchises.

The Agency shall be informed before amendments are made to the company articles of association. Unless the Agency delivers a negative opinion within 15 business days regarding amendments to the articles of association, these amendments will be included in the agenda of the general assembly meetings of the company and the Agency will be informed of the results. The current version of company articles of association should be published on the company website. The articles of association must be updated within 10 business days following the date of realization of the amendments. Changes in the company address shall be notified to the Agency within 15 business days following the date of such change.

The company board of directors cannot consist of less than 3 members, including the general manager. The general manager, or his representative in his absence, is a natural member of the board of direc-

tors. The general manager of the company must have professional experience in the area of business management or finance of at least 7 years; for the deputy general manager the requirement is at least 5 years. Additionally, they must have completed an undergraduate degree.

The supervision and auditing of the companies pursuant to the Law is conducted by the Agency. The Agency is entitled to request any and all information, even confidential information, which it deems related to the provisions of the Law from the company, the shareholders of the company, the corporations controlled by the company and their branches and from other related real persons and legal entities. In addition, the Authority may examine all of the books, records and documents, including tax related records. The companies are obliged to provide the information requested by the Authority, to keep the books, records and documents available for examination, to provide access to all the data processing system to the occupational personnel of the Authority executing on-site auditing, be in compliance with the purposes of the audit and ensure the data safety. Further, the companies are obliged to submit for examination any records in microfiche, microfilm and other similar form with respect to any books, documents and reports required to be preserved. Companies must submit all systems of storing and recording information along with the relevant codes necessary to access these records or to make these records readable.

Conclusion

Law No. 6361 defining the financial leasing, factoring and financing companies, which constitute an important part of the financial system, together and as financial institutions, is important and essential.

Financial Leasing Agreements*

Att. Leyla Orak

Introduction

Until December 13, 2012, financial leasing, factoring, financing and loan activities were regulated by the Financial Leasing Law No. 3226 ("Abrogated Law"), the By-Law regarding Money Lending Activities No. 90 and the relevant secondary legislation. The Financial Leasing, Factoring and Financing Companies Law No. 6361 ("Law No. 6361") which was promulgated by the Turkish Grand National Assembly on November 21, 2012, entered into force through publication in the Official Gazette dated December 13, 2012 and numbered 28496. Law No. 6361 regulating all companies engaging in the abovementioned activities repeals and replaces the Abrogated Law and the decree No. 90.

Law No. 6361 introduces important changes to the financial leasing agreements. In this month's newsletter article, the financial leasing agreements and the material changes introduced with the new provisions shall be analyzed.

Execution of the Agreement and Property Rights

The Financial leasing agreement is an agreement under which the lessor transfers possession of a good they provide to the lessee in exchange for a leasing price. Pursuant to Law No. 6361 investment, participation and development banks as well as financial leasing companies may be party to a financial leasing agreement as the lessor. Thereby, the limitation under the Abrogated Law that only a financial leasing company could be the lessor is no longer preserved. Further, under the Abrogated Law it was not clear whether the lessor could purchase the good from the lessee first and then lease it under a financial lease agreement. Article 18/1 of Law No. 6361 now explicitly enables the lessor to purchase the leased good from a third person or even from the lessee.

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* ***Article of December 2012***

The leased good may be movable or real-estate. Law No. 6361 enables, for the first time, reproduced copies of computer software to be leased under a financial leasing agreement. Any good which individually constitutes an asset may be leased under this agreement.

Contrary to the Abrogated Law, financial leasing agreements are not required to establish a minimum period in which it may not be terminated.

It is no longer required for the agreement to be executed by a public notary. The financial leasing agreement may be executed in writing. Real estate and movable goods leased under financial leasing agreements shall be annotated or registered to the land registry, to the special registries for movable goods, if any, and be notified to the Association of Financial Leasing, Factoring and Financing Companies[1] ("Association"). Movable goods not registered to a special registry shall be registered to the special registry to be kept by the Association. The registry to be kept by the Association shall be accessible to the public; and therefore persons not party to the financial leasing agreement may not allege that a lease annotation was unbeknownst to them.

Rights and Obligations of the Parties

The lessor and the lessee undertake reciprocal obligations by entering into a financial leasing agreement. The lessor undertakes to transfer the possession of the good, and the lessee undertakes to pay the leasing price. Law No. 6361 also regulates other obligations and certain rights of the parties.

Under this section, the provisions of Law No. 6361 governing the rights and obligations of the parties shall be analyzed.

The Rights and Obligations of the Lessee

The lessee is obliged to pay the leasing price. The financial leasing price and the terms of payment shall be regulated under the agreement. The provision under the Abrogated Law requiring the annual

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[1] Pursuant to the Law numbered 6361, the Association shall be established within six months as of the entry into force of the law.

leasing price for financial leasing from abroad to be at least equivalent to 25,000.- US Dollars is not preserved in Law No. 6361. The Association shall regulate the procedures and principles of financial leasing from abroad.

Pursuant to another important change introduced by Law No. 6361, even if the leased good is not yet produced or its possession is not yet transferred, it may be regulated in the agreement that the lessee shall commence payment of the lease as of the date of the agreement.

As under the Abrogated Law, the lessee shall be the possessor of the leased good. It shall use the good in compliance with the agreement and with diligence and it may benefit from the good. The leased good must be insured and the lessee shall pay the premiums. Unlike the Abrogated Law, Law No. 6361 does not specify the insurer; it shall be regulated under the agreement.

The lessee may be granted a purchase right under the agreement.

The lessee shall be responsible for all loss and damages on the good for the duration of the agreement. The lessor shall not be responsible for any defects on the good.

The Abrogated Law included a provision which stated that the lessee could not transfer possession of the leased good. In 2007 new provisions were introduced enabling the lessee to transfer possession (a) by obtaining the written approval of the lessor for leasing transactions for the purpose of providing housing to consumers and financing investments, (b) solely by notifying the lessor of leasing transactions regarding housing finance and (c) in accordance with the provisions of the leasing agreements for other types of leasing transactions.

Law No. 6361 facilitated the transfer of possession of the leased good and even the change of the lessee. Accordingly, even if there is no contractual provision enabling such transfer, the lessee may transfer its rights and obligations under the agreement or the agreement itself with the written approval of the lessor. There is no obligation to obtain the approval of the lessor for transfers under lease agreements in relation to housing finance; the lessee may transfer possession of the good to a third person by notifying the lessor of the transfer.

The Rights and Obligations of the Lessor

The lessor is under the obligation to transfer the possession of the leased good to the lessee. Unless regulated otherwise under the agreement, the leased good shall be transferred to the lessee at the latest within two years as of the date of the agreement.

If the leased good may not be delivered to the lessee due to the lack of execution of an agreement by the lessor with the producer or the seller of the leased good in due time, the provisions of the Code of Obligations in relation to the rights of the non-violating party, in the event of non-execution of obligations of the other party, shall be applicable.

Law No. 6361 no longer preserves the provision stating that the lessor shall be the insurer of the leased good. Pursuant to the new provisions, the agreement shall specify the party who shall insure the leased good.

The agreement may grant the lessee a purchase right over the leased good. In the event the agreement regulates this opportunity, and provided a notice is served to the lessee, in the event the lessee fails to exercise its purchase right within thirty days starting from the generation of the right or to return the leased good to the lessor, the lessor may unilaterally realize any action necessary for the transfer of ownership of the good to the lessee.

Unless regulated otherwise in the financial leasing agreement, the lessor may transfer the property of the leased good to another lessor (as defined under Law No. 6361). The transfer must be notified to the lessee.

Termination of the Agreement

As was under the Abrogated Law, unless regulated otherwise, the agreement shall be deemed terminated at the end of its term, and in the event of bankruptcy, death or loss of legal capacity of the lessor. The parties may agree to extend the term of the lease agreement three months prior to the lapse of its term. The event of unsuccessful execution proceedings against the lessee is no longer preserved as grounds for termination. On the other hand, Law No. 6361 regulates that the

lessee may terminate the agreement prior to its term in the event the lessee or its enterprise to which the leased good is allocated is in the process of liquidation.

In the event the lessor defaults in the payment of the leasing price and does not make the payment within the thirty-day period (this period may not be less than sixty days if the agreement grants a purchase right), which the lessor will grant to the lessee, the lessor may terminate the agreement. Law No. 6361 further regulates that if the lessee is issued notifications due to non-payment three times, or two times in a row within the same year, the lessor may terminate the agreement.

Law No. 6361 maintains the provision that if due to violation of one party it may not be expected for the other party to carry on with the agreement, the agreement may be terminated. Accordingly, the termination right shall arise only if one of the parties acts in violation of the agreement and if this violation results in a situation in which it may no longer be expected for the other party to be bound by the agreement. The issue as to whether a financial leasing agreement could be terminated due to a fundamental change of circumstances or based on just cause, which was not resolved under the Abrogated Law, is therefore not resolved with the provisions of Law No. 6361 either.

In any event, if the agreement is terminated, the lessee who does not exercise or who does not have a purchase right shall immediately return the leased good to the lessor.

The Abrogated Law regulated that in the event the lessor terminates the agreement, the lessee shall be obliged to return the leased good, pay all undue lease payments and compensate any exceeding damages. The Law No. 6361 did not preserve this provision. Pursuant to the new provisions, in the event the lessor (or the lessee, due to liquidation of the lessee or its enterprise) terminates the agreement, the lessee, who shall return the leased good, may additionally be obliged to make an additional payment. If the total amount of undue lease payments of the lessee and the exceeding loss of the lessor is less than the sale or lease price of the leased good to be sold or financially leased to a third person by the lessor, the lessee shall pay the difference to the lessor. Otherwise, the lessor shall pay the lessee the difference. If the lessee terminates the agreement (other than due to the liquidation of

the lessee or its enterprise), the lessee may request compensation from the lessor of the damages it incurs.

The provision of the Abrogated Law stating that the agreement may not be terminated for a minimum period of four years is not preserved under Law No. 6361.

Conclusion

Law No. 6361 abrogated the Abrogated Law and the by-law No. 90 through its entry into force on December 13, 2012. This law regulates the financial leasing, factoring and financing companies and the agreements which fall under its scope. These regulations introduce certain material changes.

The definition of the lessor which may enter into financial leasing agreements is widened. The agreement may be executed in writing, and the leased good shall be annotated or registered to the land registry, to its own registry or to the special registry kept by the Association. A minimum term of validity of the agreement is not regulated.

The Lessee may transfer the agreement with the written approval of the lessor. The lessor may transfer ownership of the leased good to another lessor by notifying the lessee. If the agreement grants a purchase right, in the event the lessee does not return the leased good at the end of its term, subject to certain conditions, the lessor may unilaterally transfer ownership of the leased good to the lessee.

If the lessee defaults in the payment of the lease price and does not make the payment within the specified period, defaults in the payment three times, or two times in a row in a given year, the lessor may terminate the agreement.

The Constitutional Court Has Not Annulled the Provision Pertaining to the Obligation to Recruit an Attorney at Law for Joint Stock Companies*

Att. Naciye Yilmaz

The Constitutional Court has rejected the application with regard to the annulment of the article 35/3 of the Legal Profession Act Numbered 1136 amended by the Law Numbered 5728 for joint stock companies.

Grounds of Annulment Application

An application had been made by Trabzon 2nd Criminal Court of Peace for the annulment of the relevant article with the case numbered 2010/10 before the Constitutional Court. The grounds for this application were the incompatibility allegations of the act with the essential constitutional principles, such as state of law, equality, freedom of contract, right to privacy and legality of the penalties. Trabzon 2nd Criminal Court of Peace asserted in its challenge that the article 35/3 of the Legal Profession Act was contrary to the above-mentioned fundamental constitutional principles.

Paragraph 3 of Article 35 of the Legal Profession Act

In the article 35/3 of the Legal Profession Act of which the annulment is requested by Trabzon 2nd Criminal Court of Peace, it is initially stipulated that all person with the capacity of filing a lawsuit may file a lawsuit and pursue it on their own without hiring any legal representative - the litigant in person. However, there is an exception to this general rule of litigant in person, for certain joint stock companies, with the provision stating; *"joint stock companies of which the authorized capital is equal to the fivefold or more of the authorized capital mentioned in Article 272 of the Turkish Commercial Code and building societies which have one hundred or more members should recruit an attorney at law"*.

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* ***Article of February 2012***

The relevant article also stipulates a sanction for the persons acting contrary to this provision. Pursuant to the article 35/3, *"the public prosecutor shall determine an administrative fine on a monthly basis […] for the institutions which do not recruit an attorney at law and consequently violates this paragraph"*.

Constitutional Court's decision

The Constitutional Court states the grounds for the rejection of the application with its decision numbered E. 2010/10 K. 2011/10 and dated 30.06.2011 which was published in the Official Gazette dated 18.02.2012 and numbered 28208.

The Constitutional Court firstly explains the social and economic importance of the joint stock companies. According to the Constitutional Court, *"shareholders, employers, creditors and society have different benefits in joint stock companies and these companies with their immense capital and with the possibility provided by the limited liability and legal entity, play an important role in the progress of states."* This role requires a balance between the benefits of the parties and also requires modern business management principles. In this framework, the Constitutional Court emphasizes that the state has a regulatory duty in the process of the national economy and the article 35/3 of the Legal Profession Act should be evaluated in this regard.

The principle of state of law is associated with the above mentioned explanations by the Constitutional Court. The Constitutional Court states that the scope of the obligation to recruit an attorney of law for certain joint stock companies is not ambiguous, but explicit with the justification of the relevant article where it is stipulated that *"the purpose of this provision is to assure that joint stock companies are benefited from legal counseling not only during the lawsuits procedure but also before the litigation arise as a preventive legal measure because most of the litigations and legal problems arise out of omission of legal formality or failure to anticipate legal risks beforehand or during the creation of legal relations between the parties."*

Subsequent to these explanations concerning the principle of state of law, the Constitutional Court evaluates the principle of equality. In

this framework, the Constitutional Court states the purpose of the principle of equality as same rules for same legal positions, matters and prevention of discrimination before the laws. The Constitutional Court emphasizes in its decision that the principal of equality should be understood as "legal equality". Hence, same provisions should be applied for the persons with same status. As for the joint stock companies, even if the elements are same for all joint stock companies, because the joint stock companies with a large amount of authorized capital play distinctive and exceptional role in the social and economic life in the state, these should be evaluated separately from the joint stock companies with a small amount of authorized capital. Hence, the Constitutional Court underlines the differentiation between joint stock companies with a large amount of authorized capital and joint stock companies with a small amount of authorized capital and clarifies that they are not on the same "legal status".

Another matter that is provided as grounds by Trabzon 2nd Criminal Court of Peace is legality of penalties. The Constitutional Court states that the sanction for the non-compliance of the recruitment of attorney at law for the obligors is explicitly regulated under the article 35/3 of the Legal Profession Act and it had been enacted before the contravening act was committed. Hence the relevant provision cannot be construed as being contradictory with the principle of no punishment without law.

The Constitutional Court lastly states on the subject of amendment to the Regulation on the Legal Profession Act, which is amended pursuant to the article 35/3 of the Legal Profession Act. The Constitutional Court indicates that consistency evaluation of the Legal Profession Regulation to the Constitution is not one of the statutory duties of Constitutional Court thus this matter shall not be subject to the control of constitutionality.

Conclusion

According to my opinion, the decision of the Constitutional Court concerning the rejection of the annulment application is a proper decision because the joint stock companies with large amount of authorized capital have important economic and social functions for the

society and national interest. As is explained in detail by the Constitutional Court, I consider that the relevant provision is not in contradiction with the essential constitutional principles.

COMPETITION LAW

Regulation on Fines, an Illusion or a True Harmonization with the EU Law?*

Prof. Dr. H. Ercument Erdem

Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("Regulation on Fines" or "Regulation") has into force through publication in the Official Gazette dated 15.02.2009 and numbered 27142. The Regulation on Fines was prepared based on articles 16 and 27 of the Act on the Protection of Competition numbered 4054 (the "Competition Act). Article 16 of the Competition Act regulates financial fines to undertakings or members of undertakings who engage in anti-competitive activities, which are banned under competition law. Article 27 of the Competition Acts stipulates that, the Competition Board ("Board") is the authorized body to impose such administrative monetary fine.

Impact of the European Union on the Regulation

Turkey is a candidate state to the European Union ("EU"). In order for Turkey to obtain EU membership status in the future, it shall adapt its legislation to the EU acquis. The Regulation on Fines has been prepared within the scope of such accession negotiations. Therefore, the Guideline of the European Commission in 2006 published in the EU Official Gazette dated 01.09.2006 and numbered C 210/2[1] ("2006 Guideline" or "Guideline") was benefited from for the preparation of the Regulation on Fines.

The 2006 Guideline is the second Guideline pertaining to the financial fines imposed on undertakings in EU. The first Guideline

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* ***Article of May 2012***

1 Please see the following link to access the 2006 Guideline http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF (accessed on: 30.05.2012).

with this regard was prepared in 1998[2] ("1998 Guideline") and was applied for a period of eight years. In the light of an eight year-long experience, it outlived its usefulness and inevitably, and the 2006 Guideline was prepared.

The Scope of the Regulation

With Regards to Actions in Violation of Competition

The Regulation on Fines regulates the administrative fines to be imposed in the event the situations described under Articles 4 and 6 of the Competition Act take place.

Article 4 of the Competition Act governs the anti-competitive agreements, concerted practices and decisions limiting competition; whereas, Article 6 governs the abuse of dominant position. Nevertheless, Article 8 (1) of the Regulation on Fines includes the term *"cartel"*. Although the term "cartel" is used by scholars and in Board decisions, it is not explicitly mentioned under the Competition Act. It is seen that the 2006 Guideline does not contain the term *"cartel"* either. The term *"cartel"* is mentioned only twice under the 2006 Guideline within brackets in order to ensure compliance with the Treaty on the Functioning of the European Union (TFEU), which does not contain the term *"cartel"*. Likewise, the 1998 Guideline used the term *"cartel"* only within quotation marks. For these reasons, the Regulation on Fines is formally noncompliant with the 1998 and 2006 Guidelines.

From the Turkish law perspective, the usage of a term not mentioned under the Competition Act in the Regulation on Fines and imposing sanctions upon cartels violates the *"nulla crimen sine lege/ no crime and punishment without law"* principle.

With Regards to the Individuals Infringing Competition

The Regulation on Fines regulates that both the undertakings and association of undertakings, and their directors and employees who

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[2] Please see the following link to access the 1998 Guideline http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y0114%2801%29:EN:NOT (accessed on: 30.05.2012).

retain *"determining impact"* on the action violating competition may be subject to administrative fines. While the *"determining impact"* is not defined thereunder, the Board decisions define the persons having *"determining impact"* as persons engaging in correspondences and interviews within the scope of the action which violates competition. Nonetheless, it would have been appropriate for the criteria of *"determining impact"* to be defined broader under the Regulation on Fines. As a matter of fact, as a consequence of the clear statement principle, the directors and employees shall be informed of which acts would result in fines.

The 2006 Guideline regulates the administrative fines to be imposed on undertakings and association of undertakings only. Each member state shall regulate the fines to be imposed on individuals separately. Therefore, the Regulation on Fines does not contravene with the EU acquis in this respect.

Determination of the Fines Imposed on Undertakings

The method for determining the fines is similar to the practice in the EU. The base fine is initially determined, and adjusted with the mitigating and aggravating factors to decrease or increase the amount of basic fines.

Basic Monetary Fine

- Article 4 of the Regulation on Fines, similarly to Article 16 of the Competition Act, foresees that the base fine may not, in any event exceed *"ten percent of the gross revenue of the undertakings, and associations of undertakings or the members of such associations to be fined, generated at end of the fiscal year preceding the final decision"*. This provision constitutes an incoherent approach to the EU acquis from two aspects:
  - ➢ Neither the Competition Act nor the Regulation on Fines explains whether the total gross revenue of the undertaking or the revenue of the undertaking in the relevant product and geographic market shall be taken into consideration for the calculation of the fine. Nevertheless, the 2006 Guideline specifies that the revenue to be taken into consideration

for the determination of the administrative monetary fine is the revenue generated from the *"relevant good market in which the infringement takes place"*. Therefore, the Regulation on Fines clearly fails to achieve uniformity with the EU acquis.

Nonetheless, the Board may not fill this legal gap in the Regulation on Fines pursuant to the EU acquis. The Board takes the total gross revenue of the undertakings in calculation of the administrative monetary fine. In addition to the noncompliance with the EU acquis, this situation constitutes a violation of the "principle of proportionality" inherent in criminal law. This way, the undertakings are imposed fines based on their gross revenue for violations of competition concerning a very small portion of their revenue. In such an event, the administrative monetary fine will be disproportional to the unjustified revenue acquired from the violation of competition.

Likewise, this provision also contrasts with the principle, regulated under the Constitution governing the equal treatment to those under the same circumstances. An undertaking, which operates in various business will be subject to a fine calculated based on its gross revenue rather than the revenue in the relevant business, while another undertaking, which may be operating in one particular branch of business will be subject to fine based on its revenue from that relevant branch of business where it commits the violation of competition.

It should also be stated that, if this system stipulated under the Regulation of Fines had accomplished a desirable and fair purpose in terms of the intended competition policies, the "total revenue" system under 1998 Guideline would not have been amended to "the total revenue generated from the relevant product market" under the 2006 Guideline.

➢ The turnover to be taken into consideration in calculating the total fine is specified as the revenue *"…generated at the end of the fiscal year preceding the final decision, or if that*

cannot be calculated, by the end of the fiscal year closest to the date of the generated at the end of the fiscal year preceding the final decision, or if that cannot be calculated, by the end of the fiscal year closest to the date of the final …" both under the Competition Act and the Regulation on Fines. Nevertheless, the 2006 Guideline expressly states that the turnover to be taken into consideration is the turnover of the undertaking's last business year during which the infringement took place. Thus, the Regulation on Fines contrasts with the EU acquis with this respect as well.

The consequences of this provision of the Regulation of Fines, which is akin to the 1998 Guideline, are unfair. The turnover of the undertakings after they have committed the competition violation may increase without any relation to such violation. This situation may result in heavy fines imposed on the undertakings.

- The Competition Act regulates that undertakings, which violate the competition may be subject to administrative monetary fines up to 10% of their revenues. However, Article 5 (1) (a) of the Regulation on Fines states that in the event a violation of competition under Articles 4 or 6 of the Competition Act take place, the administrative monetary fines shall be determined *"between two percent and four percent […] of the annual gross revenues […] which shall be determined by the Board"*. In other words, the Regulation on Fines sets a minimum and maximum limit to the administrative monetary fines to be imposed. Such minimum and maximum limit is not regulated under either of the 1998 Guideline or the 2006 Guideline. The 2006 Guideline, in compliance with the Regulation numbered 2003/1[3], determines that the administrative monetary fines shall not exceed 10% of the undertaking's turnover. Thus, the Regulation on Fines apparently contravenes with the EU acquis.

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3 Please see the following link to access the Regulation numbered 1/2003 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT (accessed on: 30.05.2012).

This provision of the Regulation on Fines also clearly contrasts with the Competition Act. The Competition Act foresees a minimum limit of 0% and a maximum limit of 10% for administrative monetary fines; whereas the Regulation on Fines amends this provision of the Competition Act. Nonetheless, secondary legislation may not supersede, but may only elaborate on laws.

- Article 5(2) of the Regulation on Fines foresees the increased amount of fines by half in the event the violation of competition continues for a period of one to five years, and doubling of the amount of fine if the violation of competition exceeds five years. Contrarily, the 2006 Guideline foresees a fine imposed based on the number of years the violation of competition continues and therefore relates the duration of violation with the amount of fine. The system foreseen by the Regulation on Fines is clearly not in compliance with the EU acquis. Moreover, this system does not comply with the relative equality principle either, since the time periods set forth for the increase of fines are too broad. In other words, an undertaking having violated competition for a much longer time which therefore generated an unjustified profit for a longer time, and an undertaking that violated the competition for a much shorter time will be faced with fines increased to the same extent.

  Such an unjust calculation system has not been foreseen even under 1998 Guidelines. Contrarily, the 1998 Guideline regulated that violations lasted shorter than one year was not subject to any fine increase, that the fines could increase by up to 50% for violations lasting for a period of one to five years, and for each year exceeding five years an additional increase of 10% was possible. Nevertheless, even this system introduced by the 1998 Guideline was not deemed sufficient by the EU, which adopted a more "just" system with the 2006 Guideline.

Mitigating and Aggravating Circumstances

The Regulation on Fines does not provide an exclusive list of mitigating and aggravating circumstances. Therefore, the Board may take into consideration different mitigating and aggravating circumstances depending on the specific characteristics of each case.

Situations such as incentives by public authorities or oppression by other undertakings regarding a violation are considered among mitigating circumstances. Also active cooperation is considered as another circumstance for decreasing fines.

Repetition of competition violations, continuation of cartels after the date of notification of an investigation are considered among aggravating circumstances.

This practice of the Regulation of Fines is in line with the 2006 Guideline. Nevertheless, the Regulation of Fines did not have to specifically mention the active cooperation. As a matter of fact, leniency is regulated under a separate regulation and such regulation already specifies the amount of decrease of fines under certain circumstances[4]. Active cooperation is not mentioned among mitigating circumstances under the 2006 Guideline either. Nevertheless, the regulation on active cooperation entered into force several months after the 2006 Guideline[5].

Administrative Monetary Fines to be imposed on Directors and Employees

- Directors and employees may be subject to a fine provided that the undertaking is imposed an administrative monetary fine. Article 8 (1) of the Regulation on Fines regulates that directors and employees, having a determining impact on the competition infringement may be subject to a fine amounting 3% to 5% of the administrative monetary fine imposed on an undertaking. However, Article 16 (4) of the Competition Act foresees that directors and employees may be subject to an administrative monetary fine up to 5%. In other words, contrary to the Competition Act, the Regulation on Fines introduces a mini-

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4 Please see the following link to access the Regulation on Active Cooperation for the purpose of Revealing Cartels http://www.rekabet.gov.tr/Resources/Yonetmelikler/yonetmelik10.pdf (accessed on: 18.01.2013).

5 The EU Commission Notice governing active cooperation was published in the EU Official Gazette dated 08.12.2006 and numbered C 298/17. Please see the following link to access the Notice http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF (accessed on: 30.05.2012).

mum limit.

Nevertheless, as explained in detail above, the regulations may not introduce different provisions than laws. Therefore, the Regulation on Fines violates the Competition Act.

- Mitigating and aggravating circumstances enable the Board to adequately and appropriately determine the administrative monetary fine to be imposed. However, other than active cooperation, the Regulation on Fines does not introduce any other mitigating and aggravating circumstances. These issues should have been specifically regulated.

Conclusion

Preparation of the Regulation on Fines is an important step in Turkey's adoption to the EU accession process. Nevertheless, as explained hereinabove, the Regulation on Fines includes number of non-compliances with the EU acquis from both formal and material aspects:

- The Regulation of Fines includes the term *"cartel"*, although it is not included under the 2006 Guideline or in the Competition Act;
- While the EU acquis foresees that the base fine shall be calculated based on the undertaking's turnover in the relevant business where the infringement of competition occurs. However, the Regulation on Fines foresees that the base fine shall be calculated based on the whole turnover of the undertaking;
- For the calculation of the base fine, the EU acquis takes the turnover of the enterprise for the last year in which it engaged in the competition infringement into consideration, whereas the Regulation on Fines foresees that the turnover of the undertaking of the fiscal year preceding the year when the decision is given shall be taken into consideration;
- While the EU acquis does not impose any other limitation other than a maximum limit of 10%, the Regulation on Fines introduces a minimum and maximum limit of 2% and 4% in addition to the 10% maximum limit foreseen under the Competition Act;

- The EU acquis introduces a system not resulting any unfair treatment between the undertakings by enabling the calculation of the fines in proportion to the duration of the violation, whereas the Regulation on Fines introduces an unfair system whereby undertakings engaging in short or long-term violations are imposed the same proportion of fines.

The provisions introduced by the Regulation on Fines further violate the Constitution with respect to the effects of the turnover and the duration of the infringement on the base monetary fine, violate the Competition Act with respect to upper and lower limits of the administrative monetary fines and also contravene with the general principles of criminal law by not determining the mitigating and aggravating factors on the administrative monetary fine to be imposed on the directors and employees of an undertaking.

New Communiqué on Complaint Procedure Relating to Competition Infringements*

Prof. Dr. H. Ercument Erdem

The Communiqué No. 2012/2 on Complaint Procedure Relating to Competition Infringements ("Communiqué" or "Communiqué No. 2012/2") entered into force through publication in the Official Gazette dated August 23, 2012 and numbered 28390[1].

The Communiqué was issued in order to determine the filing of procedures and principles related to the assessment of the complaints regarding violations of Articles 4, 6 or 7 of the Act on the Protection of Competition No. 4054[2] ("Competition Act") to be lodged before Turkish Competition Authority ("Authority") on the basis of Article 27 of the Competition Act.

Procedure to Lodge a Complaint

The Communiqué No. 2012/2 regulates three aspects of the procedure to lodge a complaint:

Persons Entitled to Lodge a Complaint

Applications, denouncements and complaints before the Authority may be made in the form of application to the Ministry of Customs and Trade. The Communiqué No. 2012/2 does not cover the complaints to be made by public institutions.

As it can be seen, as per the Communiqué No. 2012/2, all persons, including the ones who do not have a legitimate interest are entitled to lodge a complaint. However, Article 9 of the Competition Act express-

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* ***Article of September 2012***

1 Please see the following link to access the Communiqué No. 2012/2 http://www.rekabet.gov.tr/Resources/Tebligler/teblig94.pdf (accessed on: 18.01.2013).

2 Please see the following link to access the Competition Act http://www.rekabet.gov.tr/default.aspx?nsw=j6VYScQKgFG/oIWFwqUaBQ==-SgKWD+pQItw= (accessed on: 18.01.2013).

ly states that *"real persons and legal entities who have a legitimate interest are entitled to file a complaint"*. Within this scope, it should be mentioned that it would be better to include the condition to have a "legitimate interest" in the Communiqué No. 2012/2 in order to ensure full compliance between the Communiqué No. 2012/2 and the Competition Act.

Moreover, neither the difference between denouncement and complaint nor their consequences are stated in the Communiqué No. 2012/2.

Form of the Complaint

Complaint application before the Authority should principally be made in writing and submitted to the Authority either in person or via mail, e-mail, fax, telephone or any other way. It is unclear whether an application made through telephone should be followed by a written submission or not. Applications which are not made in person to the Authority are considered as denouncements as it is the case for verbal applications, and will be put down on a minute.

Scope of the Complaint

- ***With Regards to the Complainants***. Applications made by real persons should include the name and surname, identity number, address and signature of the applicant. As for complaints made by legal entities, they should include the commercial name/ trade name of the legal entity, its address, signature circular and signatures of people entitled to represent and bind the legal entity pursuant to the signature circular.

  In case a complaint application is made by a representative; the original or true copy of the document, which shows the power of the representation, should be annexed to the application and the application should include the addresses of both the representative and the represented real person or legal entity, as well as the signature of the representative.

  The complainant has the right to request that its identity information is to be protected and kept confidential. In such an event, the request shall be respected and the personal data will

not be disclosed. However, it would be appropriate for the Authority to not disclose any information or documents submitted at the stage of application, in so far as they may contain sensitive information on the persons and institutions.

Applications, which do not satisfy the above-stated conditions, would in principle not be taken into account by the Authority. However, the Authority, on its own initiative, may initiate proceedings even though the above-mentioned information is not complete, if the application is considered to be important.

- ***With Regards to the Competition Infringement***. In addition to those specified above, applications should also include clear, detailed and precise information on the competition infringement. In other words, applications should include concrete information and/or documentation regarding the form, place and date of the infringement and on the undertakings or associations of undertakings about whom investigation is requested. Otherwise, the applications will in principle not be taken into account. However, the Authority may request additional information before initiating preliminary investigations. In such case, it would be more appropriate that the Authority sets a time-limit within which the complainant may provide its views.

  In addition, it would be also beneficial for the complainants to submit all documentation in their possession directly or indirectly connected with the facts set out in the application such as agreements, commercial documents, correspondences, etc. as well as the names and addresses of the persons able to testify to the facts set out in the complaint.

  In the light of the foregoing, it would be more efficient and easy for both the complainants and the Authority, to prepare a standard application form including all the required information.

- ***As Regard to the Incorrect Information***. The Authority has the power to initiate legal actions against persons providing incorrect information in their applications.

Evaluation of the Complaint

The Authority will inform the complainants or their representatives about the outcome of their application within thirty days. Concerning incomplete applications, the complainants or their representatives will not be informed.

In addition to the criticisms indicated above, it should also be mentioned that the Communiqué also does not regulate what steps should be taken in cases where the complaints are rejected.

Conclusion

Notwithstanding to the above given critics, the issuance of the Communiqué No. 2012/2 would be beneficial, since the Authority would be able to act more efficiently and rapidly on the basis of the information and the documents provided by the applicants.

Report on Competition Policy 2012 – I*

Att. Begum Taner Hunturk

Competition Authority ("Authority") published the Competition Report ("Report") prepared for the purposes of determining competitive conditions in certain markets, designating the behavioral, structural and legal reasons that hinder the development of competition in these markets and to submit suggestions to the decision making authorities for the elimination of these barriers and restrictions.

Each market is evaluated under three main headings within the Report:

- Competition restrictions related to the structure of the market
- Competition restrictions related to the regulations
- Competition restrictions related to the behaviors of the undertakings in the market

Authority has evaluated the following markets and industries within the Report: electric, natural gas, airway, railroad, road and maritime transportation, banking, broadband internet access, digital platform management, pharmaceuticals and fast moving consumer goods retailing.

The evaluations of the Authority as regards to energy and transportation sectors are given herein below in summary. The other markets and industries shall be dealt within the next months' issue.

Electricity Market

Turkish electricity market which is publicly held until recent years is engaged in a continues process of change and reform in line with the global trends and to follow up the latest transformations thanks to adoption of policies enabling a transition process to improve a competitive structure.

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* ***Article of April 2012***

Authority stated that comprehensive liberalization process in the Turkish electricity market, which is initiated with the Law No. 4628 on Electricity Market, is rapidly developing and privatization is the leading current factor. Moreover, it is noted that the other factors that are significant within the liberalization of electricity market are separation of ownership of transmission and distribution lines, allowing consumers to decide from whom they buy their electricity power and coordination and cooperation between Energy Market Regulatory Authority ("EMRA") and the Authority.

Authority provided the following suggestions in light of their evaluations:

- Creation of a sustainable competitive market to be set as the main target for the electricity privatization process
- Unbundling ownership of transmission and distribution from the competitive market operations
- Taking necessary measures to reduce switching costs
- Giving priority to studies for raising consumers' awareness and competition culture
- Improvement of the increased inter-connection and coordination between EMRA and the Authority

Natural Gas Market

When taken into consideration the consumption ratio of the energy resources, natural gas takes the third place after fuel and coal. Turkey has a very limited amount of production in this field in comparison to its consumption. The natural gas is provided in Turkey by importing through pipelines or by maritime transport of liquefied natural gas. In this scope, Turkey has concluded long term purchase agreements with producer countries, especially with Russia and Iran.

The main legal framework in Turkey enabling the natural gas market to be competitive is drawn by the Law No. 4646 on Natural Gas Market dated 18.04.2001. The same law stipulates that the independent activities of regulation and inspection in natural gas market shall be conducted by EMRA.

When the Authority examined the natural gas market in the scope of competition policy, it emphasized that an evaluation taking into consideration all value strings in the market, initiating from the purchase of natural gas to reaching the end consumers, should be made. At this stage, the Authority stated that it is hard to achieve a consistent and efficient competition policy for the natural gas market.

It is noted that the key elements in a successful liberalization process in the natural gas market are the separation of activities bearing a natural monopoly characteristic from the supply chain and applying the general competition legislation to natural gas commerce.

Authority suggests the following for the establishment of an effective competition in the Turkish natural gas market:

- Effective regulation of the transmission and distribution activities bearing a natural monopoly characteristic
- Implementing a competitive pricing mechanism
- Decreasing the concentration level of a market which has a state monopoly background
- Restructuring of BOTAŞ in a functional way

Airway Transportation Industry

The Turkish Civil Aviation sector has enormously grown since 2003 as a result of steps taken for liberalization and with the launch of scheduled flights by the private sector.

The Authority stated in the Report that although positive developments are taken place in the market, there are still some concerns as regards to development and continuity of healthy and effective competition. It is emphasized that competition is fundamentally limited by legislation. Authority noted that especially regulations on slot allocation and bilateral agreements on international air transportation limit the competition.

In the light of its examinations, the Authority submitted the following suggestions for the establishment of a more competitive airway transportation market:

- The functioning and inspection of the slot allocation to be conducted by an independent civil aviation mechanism with sufficient administrative and technical capacity
- Bilateral agreements to be converted that they would provide rights for multiple aviation companies

Railway Transportation Industry

The infrastructure services can be considered as upper market and the activities of passenger and freight transportation through railroad can be considered as inferior market within the scope of railway industry. The authority, duty and liabilities in relation to domestic railway transportation are conducted by Railway Regulatory General Management ("RRGM"), Infrastructure Investments General Management ("IIGM"), which are within the scope of Transportation, Maritime and Communication Ministry, and Turkish Republic State Railways ("TRSR") which is active in operation.

Pursuant to the current legislation, a monopoly right is granted to TRSR for the domestic railroad operation activities. The mentioned monopoly right constitutes an entry barrier for the railway industry. Moreover, the infrastructure and transportation services are provided by TRSR in a vertically integrated way.

Authority suggested the following for railway industry to reach a competitive structure after the liberalization of the industry:

- Structuring an functionally independent Authority for Regulating Railway Competition
- Taking the necessary precautions for preventing the anticompetitive effects for undertakings that shall enter into the market
- Deregulating the fields determining the base prices for transportation activities
- Adopting the secondary legislation in relation use of infrastructures, which will support the competitive structure of the market.

Maritime Transport Industry

In general the maritime transportation industry contain passenger and freight maritime transportation and port operation services. These services consist of many sub-markets and services fields.

The competent authority for the policy making and their implementation is the Transportation, Maritime and Communication Ministry. The mentioned Ministry is also authorized to grant license and auditing the actors in the market.

Pursuant to the Cabotage Law, the passenger and freight transportation within the Turkish coastline and towing and pilotage services, within and between Turkish ports and all other ports services can be conducted exclusively by Turkish flagged vessels. Pursuant to the same law, the pilotage, port services, maritime working and seaman services can only be conducted by Turkish nationals or companies registered in Turkey.

The Authority evaluated the competition concerns in maritime industry under two main headings: originating from the structure of the market; and weak or insufficient competition. In addition to these, another concern is displayed as high concentration ratios especially in container stowing and ro-ro transportation.

The Authority's suggestions are as follows:

- Adopting policies allowing to promoting the entry of new passenger and cargo vessels, which will increase share of maritime transport in domestic transport
- Adopting policies that would promote the unification of several small sized ports which are placed closed by to each other at the same coastline into a one main port with a bigger scale
- Giving priority to investment which would increase the capacity and the infrastructure for handling/stowing services in the new ports to be established in order to flourish competition between ports in container handling services
- In the Privatization Procedures on ports that are still pending, a requirement to make an investment on container handling infrastructure to be inserted in to the tender specifications

- Adopting policies promoting and easing foreign undertakings that are experienced in port management and/or liner passenger transportation to make investments in Turkey
- Promoting the entry of new undertakings into the ro-ro transportation field in order to increase the number of undertakings active in that market.

Road Transportation Market

Road transportation market consists of passenger and cargo transportation services.

It is stated in the report that the road transportation services market is a market with low barriers to entry. It is also noted that there is surplus in supply and instability in demand-supply balance arising out of shifting demand during different seasons. In holiday seasons, at peak times when the number of passengers increases, the undertakings face with a hard time to satisfy the high demand. On the other hand, there is much higher supply of chairs at off-peak seasons then the actual demand in a significant part of the year. Moreover, it is emphasized that there is major grey- off the books - economy in this market.

In the light of its examinations, the Authority submitted the following suggestions:

- Preventing grey - off the books - economy activities

Adopting necessary regulations to manage demand and capacity balance by adjusting excess capacity to meet demand in the market and promoting the active undertakings to reach a sufficient scale.

Competition Report 2012 – II*

Att. Begum Taner Hunturk

We continue to examine the Competition Report ("Report") prepared by the Competition Authority ("Authority") for the purposes of determining competitive conditions in certain markets, designating the behavioral, structural and legal reasons that hinder the development of competition in these markets and to submit suggestions to the decision making authorities for elimination of these restrictions.

We have previously dealt with the electric, natural gas, airway, railroad, road and maritime transportation sectors within the Report.

The evaluations of the Authority as regards to energy, transportation, broadband internet access, digital platform management, banking, pharmaceuticals and fast moving consumer goods are given herein below in summary.

Broadband Internet Access Market

Turkish broadband internet access market is thoroughly audited and regulated by the Information Technologies and Communication Authority ("ITCA"). On the other hand, Authority stated in its report that the competition level within the relevant market is rather low, alternative technologies are not yet effectively available and the consumers are forced to pay high prices for low quality services.

The competition concerns within the relevant market are listed as follows:

- Concerns arising out of the behaviors Turkish Telekom, who is the main undertaking integrated in a vertical structure
- Concerns arising out of the lacks in the implementation of the required regulations
- Concerns arising out of the current administrative control over the cable TV infrastructure

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* ***Article of June 2012***

In this regard, it is stated that concerns arising out of the behaviors of the Turk Telekom are being faced with limitation attempts by the intervention and decisions of the Authority and the ITCA.

Authority provided the following suggestions in light of their evaluations:

- Promoting the development of alternative technologies for the broadband internet access
  - o Development of the cable TV as an alternative to DSL by improving its infrastructure
  - o Privatizing the infrastructure and operations of the cable TV
  - o Providing the investors a concrete and explicit legal framework for the wide spreading of the fiber optic infrastructure and technology
- Effective application of the regulations in the broadband internet access market
  - o Preparing the necessary regulations for enabling Turk Telekom to share its infrastructure with the alternative undertakings in the copper cable access market, where it is the prevailing actor
  - o Establishment of the coordination and cooperation between ITCA and the Authority

Digital Platform Management Market

Authority examined the competition concerns within the mentioned market as competition concerns arising out of access to contents and competition concerns arising out of equipment.

Access to Contents

The access to premium content consisting of broadcasting rights of football games and Hollywood movies has great significance to operators active in distribution of audio and visual contents such as digital platform operators. In the Report it is stated that the shortfall of contents with such a quality and the exclusivity provisions within the agreements relating to premium content rights increase the costs of premium contents sale.

Moreover, there are restrictive legal regulations in Turkey as regards to sale of broadcasting rights pertaining to football games. Article 13 of the Law on Establishment and Duties of the Turkish Football Federation ("LTFF") grants the competence for broadcasting and distribution of football games to the Board of Directors of the Football Federation. Authority drives our attention to the competition restrictions stipulated in the Specifications of the bid made in 2010 for 4 years by using the above referred competence.

The broadcasting rights of Turkish Super Football League have been an issue considered important by the Competition Board and several decisions have been concluded on this issue. These decisions have been mentioned within the Report and the practice in Turkey has been compared with the international practice. It is stated that it would be convenient if the TFF Board of Directors uses its competence by not excluding the evaluations to be made within the scope of Competition Law. The requirement of a new regulation, which would prevent the establishment of entry in to the market through football broadcasting rights, is emphasized.

Equipment

As it is also mentioned in the Report, the broadcasts provided through the platforms are generally coded and in order for the viewers to watch these, they need certain hardware and software. The hardware decoding the broadcast codes are defined as smart cards. The hardware where these cards are placed and the decoding programs and software are uploaded, are defined as set top boxes and the system where only the customers have access to the system is defined as conditional access system.

The Access Directive, which is the EU Regulation on this issue, has been mentioned and the practices in different countries have been included within the Report. Furthermore, the decisions of the Competition Board have been discussed and it is stated that imposition of the condition to purchase the set top boxes to consumers are damaging other undertakings rights, who are active in this field and this could also finally damage the rights of the consumers.

The evaluation as to general equipment emphasizes that in order to increase the competition in the digital platform management and to prevent current and potential competition concerns, the regulations enabling the consumers to switch or diversify their digital platform service providers should be adopted by the regulative authorities.

Banking Market

The Banking Regulation and Supervision Authority are responsible from the regulation of the banking sector within the scope of Banking Law numbered 5411. In addition, Central Bank of the Turkish Republic has the regulative role on the classification of deposits, statutory reserves and on the limits of the credit card interest. The publicly held banks are subject to the regulations of the Capital Markets Authority. Moreover, the Saving Deposits Insurance Fund has the competence to regulate the field of deposit insurance. As seen, there are several regulative authorities in the relevant market.

Notwithstanding the above, banking market can be deemed as a market which is open to competition.

Authority examined the competition concerns within the relevant market under two headings as the structural concerns and legal and behavioral concerns. In the light of these evaluations, the Authority submitted the following suggestions:

- Abolishing the exception provided in Article 19 of the Law No. 5411 which is preventing the application of Article 7, 10 and 11 of the Competition Law to mergers and acquisitions of banks, where their total market share does not exceed %20
- Adopting regulations, which eases switch between banks by customers and which decreases the costs of such switch
- Providing the sectorial authorities to take effective role in protection of customers in practices such as transaction price or costs applied in agreements of deposit, credit and other banking services and that they cooperate with the Authority
- Decreasing the information asymmetry between banks and customers, imposing banks to disclose certain information to customers enabling them to compare the banks

Pharmaceuticals Industry

The pharmaceuticals industry is subject to detailed legal regulations due to its unique nature. The most eye catching feature of the industry from the frame of competition concerns is the developed distribution network. The distribution network in the mentioned industry consists of pharmaceutical warehouses, which distribute the medicines it has purchased from pharmaceutical companies in the upper market to the sub-markets and the pharmacies in their sub-markets. Pursuant to the determinations of the Authority, the competition concerns within the pharmaceuticals distribution network concentrates on the retail level. Due to structural and behavioral competition concerns in the retail distribution networks, a price competition between pharmacies which could be reflected to the consumers cannot be established and thereby the consumer choices and their access to medicine are being limited.

Authority submitted the following suggestions in order for overcoming the competition concerns:

- Considering the importance of the establishment of the competition between pharmacies
- Re- regulating the legislation, in which the practices preventing the patients from freely choosing the pharmacies they take services from and restrict competition, are depending on, in an explicit way, so that they would not cause any base for competition restrictions.
- Development of system providing the pharmacies to increase the level of competition within the current pay back system and thereby encourage them to offer to the consumers the equivalent medicine that are cheaper and reflect the advantages provided from the choice of medicine to the end consumers.
- Evaluation of the suggestions for application of criteria for opening new pharmacies depending on geographical and population factors, which would eventually create an entry barrier to the market in the retail level, in a wide platform by applying an impact analysis.

Fast Moving Goods Retail Market

The fast moving goods ("FMG") retail market has been in a rapid transformation since the beginning of 2000s. The organized retail is increasing in FMG retailing. On the other hand, the numbers and the market shares of the conventional retailing are decreasing. It can be acknowledged that, together with the increase of their market share, the mergers and acquisitions between organized FMG retailers and rates of concentration are also increasing. The Authority by taking into consideration the structural transformation and increase of concentration determined that the organized retailers are getting stronger in their horizontal and vertical relationships and taking an advantageous position against the supplier undertakings and increased their role in determining the commercial conditions in the supply network through buyer power.

It is stated in the Report that the Authority, by investigations they hold in relation to the FGM retailing, aims to closely follow up the market, display a proactive approach to competition concerns and search for ways to resolve problems which may arise out of the buyer power by tools which would not hinder the functioning of the market. In this frame, Authority has dealt with the retail market on the basis of rule of reason analysis and initiated discussions on three methods which could be a model for Turkey:

- Decreasing the turnover thresholds in the notification of concentration only being limited to FMG retailing market
- Introducing Code of Practice and system of Ombudsman
- Sending the supplier-retailer agreements periodically to the Authority

Conclusion

As it can be acknowledged when preparing the Report, Authority has deliberately chosen markets where they cannot resolve the competition concerns on their own by their sole intervention, but where there is a need for regulations in the scope of competition policy of the other administrative authorities and thereby tried to create awareness on these subjects.

Rebates Systems applied by the Undertaking in Dominant Position in Competition Law*

Att. Naciye Yılmaz

Dominant Position and Abuse of Dominant Position

The Act on the Protection of Competition ("Act") defines dominant position as *"the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers"*.

The Act prohibits *"preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market"* by the Article 6(a) and "making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts" by the Article 6(b) for the undertakings in dominant position. In this framework, as the rebates, provided to some buyers, may constitute discrimination between the buyers, this kind of practices are evaluated as abuse of the dominant position and prohibited. The most significant characteristic of the rebates systems is that rebates are subject to conditions, thus some buyers in the relevant market benefit from the rebates while some buyers do not[1]. Moreover, rebates may have exclusionary effects for the current competing undertakings in the market and may restrict new entries to the market for the potential competing undertakings[2]. Therefore, rebates systems have two different anti-competitive effects: exclusion and discrimination[3].

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* ***Article of May 2012***

1 **Kocabaş, Bekir**, *İndirim Sistemleri ve Rekabet: Tek Taraflı Davranışlar Açısından Bir Değerlendirme,* Rekabet Kurumu Uzmanlık Tezleri Serisi No:90, Ankara, 2009, p. 5.

2 **Öz, Gamze**, *Avrupa Topluluğu ve Türk Rekabet Hukukunda Hâkim Durumun Kötüye Kullanılması,* Rekabet Kurumu Lisansüstü Tez Serisi No:4, Ankara, 2000, p. 175.

3 **Sanlı, Kerem Cem**, *Rekabetin Korunması Hakkındaki Kanun'da Öngörülen Yasaklayıcı Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Karalarının Geçersizliği,* Rekabet Kurumu Lisansüstü Tez Serisi No:3, Ankara, 2000, p. 302.

Rebates Systems

Rebates systems are defined as changes in pricing applications for the buyers implied by the undertakings operating at different levels of the production or distribution chain[4].

Rebates systems are classified in several ways in practice and by scholars. In this article, we will base on the effects of the rebates with regard to the abuse of dominant position.

Rebates Systems Which Are Considered as Abusive

First one of these types of rebates is fidelity rebates, (or loyalty discounts) which conduct the buyers to supply their entire needs from one undertaking. The undertaking in dominant position provides fidelity rebates on condition that the buyer supplies the entire or an important part of its needs from the relevant undertaking[5].

Second type of rebates, which are considered as abusive are the target rebates. Target rebates imply targets related to the future forecasted needs of buyers or targets which are independent from the buyers' needs[6].

In this context, the undertaking in dominant position assures its supply of products. On the other hand, it guarantees buyers' fidelity and complicates and restricts the activities of competing undertakings while preventing potential new entrants to the market hereby.

Rebates Systems Which Are Considered as Legal

In principle, quantity discounts are not considered as abusive in Competition law, because the quantity discounts are not provided for purchase in a specific period. Quantity rebates are only related to the purchase from the supplier, are applied to entire buyers and provided objectively regarding the amount of the purchase. Hence, two buyers, who purchase the same amount of products, acquire equal rebates.

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4 **Kocabaş**, ibid, p. 5.

5 **Görgülü, Ümit**, *Hâkim Durumun Kötüye Kullanılması Kapsamında Fiyat Ayrımcılığı Uygulamaları,* Rekabet Kurumu Uzmanlık Tezleri Serisi No: 32, Ankara, 2003, p. 17.

6 **Kocabaş**, ibid, p. 9.

However, quantity rebates should not be considered as per se legal; their effects in the market should also be examined.

Functional rebates are also considered as legal and do not constitute price discrimination because this kind of rebates is provided by the suppliers for the reason that the buyer effectuates a function in the relevant market.

In this framework, it should be noted that while rebates systems are predefined and are provided to the entire buyers, we may not mention any price discrimination[7].

Conclusion

Rebates systems applied by the undertakings in dominant position cause the buyers to make more efforts for achieving relevant targets and thus limit their freedom of choice, prevention, distortion or restriction of competition in the relevant market, and cause discrimination between the buyers. Therefore, rebates which promote the fidelity of the buyers and which are provided ambiguously are prohibited under Turkish Competition Law. However, as is mentioned before, we may not refer to the price discrimination if the rebates are explicitly definite and objectively applied.

Consequently, undertakings in dominant position should pay attention while applying rebates systems that discrimination and exclusion effects are sufficient for the prohibition in Competition law. However, in case that different pricing have economic and rational justifications (rule of reason), related rebates shall not be considered as abuse of dominant position. Briefly, while applying rebates due to the necessities of the commercial relation and market conditions, undertakings in dominant position should take into consideration that these rebates must not have discriminatory and exclusionary effects and apply rebates systems objectively.

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[7] **Gül, İbrahim**, *Teşebbüsün Alıcılarına Ayrımcılık Yaparak Hâkim Durumunu Kötüye Kullanması*, Rekabet Kurumu Lisansüstü Tez Serisi No: 2, Ankara, 2000, p. 83.

"Non-Compete Agreements" within Mergers and Acquisitions*

Prof. Dr. H. Ercument Erdem

Non-compete agreements are frequently used in merger or acquisition transactions. These agreements are mostly necessary to ensure the attainment of the desired results from the merger or acquisition transaction. Hence, in acquisitions, in order to ensure that the value of the right or asset acquired is fully transferred to the buyer, the seller might have to be placed under an obligation not to compete with the buyer for a certain period. This requirement may come up particularly in relation to building up a clientele and sufficiently exploiting the know-how acquired.

Definition of the Non-Compete Competition

Non-compete agreements are ancillary restraints. Ancillary restraints are restraints which are directly related to the concentration and which are necessary to the implementation of the transaction and to fully achieving the objectives envisaged by the merger or acquisition transaction.

Ancillary restraints are actually agreements which aim to prevent or restrict competition as per Article 4 of the Act on the Protection of Competition No. 4054 ("Competition Act") and are thus illegal. Nevertheless, non-compete agreements within mergers and acquisitions in compliance with the European Community Regulations are assumed as required ancillary restraints for the fulfillment of the results of said transaction and are thus allowed under certain conditions.

Legal Framework

There is no regulation under the Competition Act regarding ancillary restraints. Nonetheless, the Communiqué Concerning Mergers and Acquisitions Calling for the Authorization of the Competition

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* *Article of December 2012*

Board No. 2010/4[1] ("Communiqué No. 2010/4") briefly refers to ancillary restraints. Accordingly, authorizations granted by the Competition Board ("Board") to mergers and acquisitions include ancillary restraints as well.

Following the entry into force of the Communiqué No. 2010/4, the Guideline for Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline") was published on the official website of the Competition Authority[2]. The Guide provides information regarding the characteristics and components of ancillary restraints.

Types of Non-Compete Agreements

Non-compete agreements may be foreseen as a prior or accessory agreement, or as a supplementary obligation.

Prior Non-Compete Agreements. These contracts are "agreements" as expressed under the Competition Act, which aim to restrict competition by accepting certain conditions regarding the price, sale, production, distribution and similar areas.

Since the purpose of the prior non-compete agreement is to directly or indirectly prevent, distort or restrict the competition within a product or service market, these kinds of agreements are deemed illegal and prohibited under the Competition Act.

Accessory Non-Compete Agreements. These types of agreements have a tight connection with the main agreement that gives rise to their formation and assist in the performance of this agreement. In other words, these types of agreements are a part of the main agreement and shall have meaning only within the scope of the main agreement.

Unlike prior non-compete agreements, the main point and aim of accessory non-compete agreements is not the direct or indirect prevention, distortion or restriction of competition within a product or service

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1 Communiqué No 2010/4 was published in the Official Gazette dated October 7, 2012 and numbered 27722 and entered into force on January 01, 2011. To find this Communiqué see: http://www.rekabet.gov.tr/Resources/Tebligler/teblig88.pdf (accessed on: 18.01.2013).

2 The Guideline was published on June 27, 2011. To find this Guideline see http://www.rekabet.gov.tr/Resources/Kilavuzlar/kilavuz14.pdf (accessed on: 18.01.2013).

market, even though restriction or prevention of competition is a goal of the agreement. In these agreements, competition is restricted to allow the performance of the main contract and mostly for necessity. Therefore, accessory non-compete agreements cannot be considered as directly against competition.

Supplementary Obligation. Any obligation similar to or complementary with non-compete obligations such as those preventing the seller from employing the workers of the undertaking to be acquired and from disclosing or using the trade secrets of the undertaking to be acquired shall be assessed in a manner similar to non-compete obligations. As such, where confidentiality is related to the know-how, an obligation to prevent the disclosure and utilization of the relevant information as long as it is deemed to be confidential, *i.e.* retains its know-how characteristics, may be assessed as an essential element of the transaction.

Components of the Non-Compete Agreement

Ancillary restraints, having all of the components below shall not be considered illegal:

Directly Related and Necessary. The Guideline stipulates that ancillary restraints shall be directly related to the merger and acquisition transaction and necessary for the implementation of the operation envisaged from the merger and acquisition transaction, in order to accept such an ancillary restraint.

For an ancillary restraint to be directly related to the acquisition transaction, it is not sufficient for it to be implemented within the same scope or time period with the merger or acquisition transaction. It has to be closely related economically to the main transaction and it has to be necessary to facilitate a smooth transition to the new structure to be formed following the merger or acquisition transaction.

The criterion of necessity demonstrates that the non-existence of the related restraint shall cause the non-implementation of the merger and acquisitions transaction or the implementation within uncertain conditions with higher costs and a low likelihood of success. The Guideline does not express the "necessity criterion" as explained above, but provides a poor translation of the EU Commission Notice

on restrictions directly related and necessary to concentrations No. 2005/C - 56/3[3] ("Notice").

While determining whether a non-compete agreement is necessary, the Board thoroughly evaluates for an extended period of time whether the relevant restraint is directly related to the merger and acquisition transaction and necessary for the implementation of the operation[4].

Objective. The objectivity of a competition restraint means that this prohibition must be objectively necessary pursuant to the concrete conditions of acquisition or merger in the concrete case. The purpose in this situation is not to prohibit the transferor from competing or restrict his commercial and entrepreneurial freedom. This restraint must be objectively necessary with regards to the specific conditions of the concrete case. In other words, for a restriction to be objective, a transferor other than transferor concerned must envisage a competition restriction like this one within the circumstances of the concrete case.

The Guideline does not explain the objectivity principle as described above, rather it purports that the "direct relation" and "necessity" criteria must be assessed objectively in accordance with the specifics of the case. However, this issue is clearly stated in the Notice.

Reasonable. The Guideline states that in order for a non-compete contract to be recognized as reasonable, it's scope with respect to subject, geographic area and person shall not exceed the reasonable level that is required for the implementation of the merger and acquisition transaction. In other words, the competition restriction should only cover the competition concerns that the purchaser may have as a consequence of the merger operation and should not go beyond these concerns.

- ***In terms of Subject.*** As a rule, non-compete obligations must be limited to those goods and services comprising the area of oper-

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3 The Notice was published in the Official Journal of the European Union dated March 05, 2005 and numbered C56/24. The provision regarding the objectivity is on the 11th paragraph of the Announcement. To find the Announcement see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF (accessed on: 03.01.2013).

ation of the economic unit to be acquired before the transaction. Goods and services that have mostly completed development phase but not yet entered marketing phase may be included within this framework.

- ***In terms of Geographic Area.*** Non-compete obligations must be limited geographically to the area of operation of the seller before the transaction. However, in exceptional circumstances, such as when the seller has made investments to enter into new regions, restraints concerning these regions may also be accepted as necessary and reasonable.
- ***In terms of Person.*** Restraints concerning the seller itself and those economic units and agencies which constitute an economic unit with the seller may be accepted as reasonable while any non-compete obligations beyond them, especially those concerning the dealers of the seller or users, shall not be accepted as necessary and related restraints.

For an extended period the Board, on one hand, audits whether the scope of the ancillary restraint is reasonable or not, and on the other hand it especially investigates the persons to whom the restraint is related, subjects of the restricted activities and geographic area where the restriction is applied[5].

Reasonable Period. The Guideline provides that non-compete agreements that do not exceed three years in duration are generally accepted as reasonable. Nevertheless, it may be possible to accept under the framework of ancillary restraints a non-compete obligation with a duration longer than three years where a customer tie-in lasts longer or it is required by the nature of the know-how transferred, provided that the scale required by the concrete case is not exceeded.

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4 For detailed information see: The Board decision dated 16.04.2002 and numbered 02-24/242-97, dated 03.04.2003 and numbered 03-22/247-108, dated 04.06.2012 and numbered 12-33/936-292, dated 08.07.2012 and numbered 12-38/1079-338 and dated 20.09.2012 and numbered 1339-445.

5 For detailed information see: The Board decisions dated 20.02.2003 and numbered 03-11/118-55; dated 31.12.2003 and numbered 84/1021-409 and dated 04.11.2010 and numbered 10-69/1454-554.

While examining the Board decisions, it can be observed that the Board analyzes each case separately as required and accepts non-compete agreements concluded for more than three years[6].

The Guideline sets forth that in joint ventures, long-term or indefinite non-compete obligations preventing the parent undertakings from competing with the joint venture may be accepted as ancillary restraints.

Evaluation of the Non-Compete Agreement

In the event the merger and acquisition transaction exceeds the thresholds set forth in the Communiqué No. 2010/4[7], the Board examines the transaction and authorizes the transaction if it complies with the competition rules. In such cases, the authorization granted by the Board also covers ancillary restraints. Therefore, a separate application is not necessary in order to apply to the Board with regards to ancillary restraints.

In the event that the merger and acquisition transaction does not exceed the thresholds set forth in the Communiqué No. 2010/4, the parties to the transaction should determine whether the restraints introduced by the merger or acquisition exceed this framework. Within the scope of the Guideline, the parties determine whether the non-compete agreement is an ancillary restraint or not; in other words they determine whether such restraint is illegal.

Upon request by the parties, in its decision concerning the merger or acquisition, the Board shall assess any restraints with a novel aspect that have not been addressed in the Guidelines or in its previous decisions.

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6 For detailed information see. The Board decisions dated 03.03.1999 and numbered 99-12/94-36, dated 12.02.2002 and numbered 02-08/58-27, dated 24.11.2005 and numbered 05-79/1088-314, dated 14.08.2008 and numbered 08-50/741-297, dated 15.04.2009 and numbered 09-15/343-85.

7 Thresholds regulated in the Communiqué numbered 2010/4 are revised by the Communiqué numbered 2012/3 that was published in the Official Gazette dated 29.12.2012 and numbered 28512.

Conclusion

Non-compete agreements play a key role in merger and acquisition transactions. When a non-compete obligation is not regulated in such transactions, the investment made becomes meaningless and no contribution is made to the economy. In other words, the purpose of competition law cannot be realized.

Within this scope, it was appropriate to set forth ancillary restraints initially in the Communiqué No. 2010/4 and then lay them out in the Guideline, in compliance with European Union law.

Furthermore, the section of the Guideline on ancillary restraints is but a brief summary and references to the Board decisions are very few. In fact, pursuant to the Guideline, the transacting parties are essentially entitled to evaluate whether non-compete agreements may be considered as ancillary restraints or not. In this way, the Guideline does not actually guide the transacting parties and does not facilitate their work. In addition, some parts of the Guideline are directly taken from the Notice of the European Union and translated badly. For this reason, I am of the opinion that the Guideline needs to be revised once again.

The Turkish Competition Board Authorizes a Joint Control Acquisition in the Sector of Manufacturing and Sale of Components and Systems for Automotive and Motor Vehicles (Mahle/Behr)*

Prof. Dr. H. Ercument Erdem

The Competition Board ("Board") authorized the acquisition of joint control over Behr GmbH & Co ("Behr") by the main shareholders of Mahle GmbH ("Mahle") and Behr, under Act for the Protection of Competition numbered 4054 ("Competition Act") and the Communiqué No: 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board ("Merger Communiqué").

Multiphase Transfer of Control

Mahle envisages taking control of Behr in the year 2013. The mentioned acquisition of control will be implemented in several phases. The first phase consists of Mahle acquiring a 19.9 % interest of Behr's share capital by way of capital increase and participation of Mahle within Behr as a limited liability partner. This first phase was completed on 18.10.2010.

In the second phase, which was completed on 17 January 2011, the total participation in the share capital of Mahle in Behr was increased to % 36.85.

The third phase, which is voluntary, provides Mahle with an acquisition option, which accredits Mahle to additional shares that would enable owning the majority shares in the amount of 50.1% in Behr. It is stated in the Notification Form that this option may be used after the date of 01.01.2013.

A mid–phase is planned before proceeding with the abovementioned third phase that provides Mahle to preserve 36.85% of its share

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* ***Article of March 2012***

percentage and to acquire additional rights, which enable joint control over Behr.

Parties to the Transaction

Mahle is active world-wide in the development, manufacturing and sale of components and systems for automotive and motor vehicles. Mahle ranks among the top systems suppliers worldwide for piston systems, cylinder components, as well as valve train, air management, and liquid management systems.

Mahle is active in Turkey through its subsidiaries Mahle Farpias Filtre Sistemleri A.Ş., Mahle Mopisan Konya A.Ş. and Mahle Mopisan Izmir A.Ş.

Behr manufactures and supplies original equipment for passenger and commercial vehicles, in particular components and complete systems of motor cooling and air-conditioning in automotive industry. Behr is currently owned and controlled by the Behr family, who is the main shareholder. Mahle has a minority shareholding in Behr.

Behr has been operating its business activities in Turkey through Kale Behr Otomotiv Sanayi ve Tic. A.Ş.

Relevant Market

Affected Market. Taking into consideration the activities of transaction parties, the Board determined that there are two different affected markets: The horizontal affected market and the vertical affected market. The Board defined the horizontal affected market as "the oil heat exchangers market developed, produced or sold for high way vehicles". The Board evaluated the supply relations between the transaction parties as a vertical relation and concluded that vertical affected market is "the oil filters, heat exchangers, thermostats, and cabin air filters market". Indeed, thermostats and oil-water heat exchangers produced by Behr are inputs of oil filter modules produced by Mahle.

Relevant Geographical Market. The Board determined the relevant geographical market as "Turkey" by taking into account the homogenous nature of the sales conditions of the products in affected markets.

Evaluations within the Scope of Merger Communiqué.

The Board stated that pursuant to Article 5/1 (b) of the Merger Communiqué, "the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons, who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means" shall be considered a merger or acquisition transaction within the scope Article 7 of the Competition Act.

The subject matter of the notification is the acquisition of rights envisaged within the mid-phase, which provide Mahle to have joint control over Behr. In this stage, the joint control shall be established without any transfer of shares but through amendments to the agreements and by the employment of executives of Mahle for two key positions in Behr.

First Two Phases. The Board initially evaluated the first two phases before making any further evaluations as regards to the mid-phase in subject of the notification and asked for explanation on why the first two phases were not notified. In response, it is alleged that these phases do not shift the control and thereby they are not subject to notification.

However, in the first stage Mahle had acquired the right to appoint two members to the supervisory board of Behr. Behr, is managed by one or more executive directors nominated by the supervisory board. These executive directors only for the approval of the Supervisory Board in a few very important decisions, which are not deemed as decisions regarding the ordinary course of the business and which are specifically determined as important.

Under these conditions the Board decided that the first two phases must be evaluated to find out if any change of control occurs at that stage.

The Supervisory Board consists of six (6) members and takes decisions with simple majority. There are three exceptions, which require qualified majority as affirmative votes of five members; which are (i) commencing activities in new fields, ceasing current commercial activities, making essential changes in the production and sales program,

(ii) comprehensive cooperation between Mahle and Behr and (iii) making amendments to the list of activities requiring the Supervisory Board's approval.

The Board stated that control over an undertaking may be established as absolute control by a single control group or as joint control by several groups. The absolute control can be defined as "the ability of a single control group to solely determine the strategic commercial decisions or create deadlocks by their unilateral veto rights, without prejudice to the rights granted to the minority shareholders for protecting their investment".

On the other hand, the Board noted that the joint control arises when more than one group of shareholders have equal impact on the strategic commercial decisions and such decisions can only be concluded by consensus and /or any of the parties may create deadlocks on their own discretion. The Board also emphasized that the joint control may be established through (i) equality in voting rights and in appointments to decision making positions, (ii) the use of privileged shares having veto rights, (iii) having decisive impact on strategic decisions by the parties sharing the control through different means.

When evaluating the item (i) herein above, the Board drew attention to the point that in cases where the relation between the parties are stipulated through agreements, the equal representation of each party in the management bodies of the undertaking should be included in the provisions of the agreement and there should not be any decisive voting practice.

Notwithstanding, in cases where the joint control is established through privileged shares having veto rights, these veto rights should go beyond protecting the rights of minority shareholders[1]. Moreover, CB did not evaluate the following decisions as strategic commercial decisions but rather evaluated them as elements required for the protection of shareholders' investment: (i) amendments in the subject matter of the undertaking, (ii) capital increases or decreases, (iii) sales of assets, and (iv) transfer or liquidation of the undertaking.

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[1] Board's decision dated 25.11.2009 and numbered 09-57/1392-361.

The Board examined the first two phases of the transaction from the above explained view and concluded that Mahle's right to appoint two Supervisory Board members and its indirect veto right on commencing activities in new fields, ceasing current commercial activities, making essential changes in the sales program cannot be considered as strategic decisions. Thereby, the Board stated that no change of control occurred in the first two phases.

The Mid-phase. The transaction parties agreed to amend the duties, which are subject to the approval of the Supervisory Board. Thus, in addition to previous veto rights, Mahle shall have a provisional veto right on the appointment of executive directors. This provisional veto right shall cease when Mahle's share percentage in Behr exceeds 50%, or, in any event, latest by 31 January 2013. The Board concluded that this new provisional veto right provides Mahle a joint control over the day to day management of the undertaking.

In addition, this mid-phase also covers the appointment of two employees previously employed by Mahle as the Behr's CFO and Human Resources Manager.

The CFO's responsibilities shall cover budget planning, financial and liquid management Moreover, the CFO shall be responsible for the approval of most expenditures. The decision making body in relation to legal department and purchasing department shall also be the CFO.

Participation Agreement provides that the main management matters, including the determination of the investment, finance, turnover, expenditure and employment plans shall be decided by the unanimity of the all Executive Directors.

Another issue that would provide joint control to Mahle shall be the appointment of the Human Resources Manager, who will be responsible for the development of Behr's global employment policies.

In the light of the above determinations, as a result of mid-phase following the first two phases Mahle and Behr shall have joint control and this would change the absolute control of Behr.

Compulsory Notification/Turnover. The global turnovers of the both transaction parties exceed five hundred million TL, and their turnovers in

Turkey also exceed five million TL. Thereby, this transaction is subject to the authorization of the Board in order to be legally valid.

Creation or Strengthening of a Dominant Position

Article 7/I of the Competition Act prohibits acquisitions creating or strengthening dominant positions and which, as a result, significantly restrict the effective competition in the relevant market[2].

The only horizontally overlapping market is the oil heat exchangers developed, produced or sold for high way application. Moreover, there is no vertical overlap in the Turkish geographical market.

Thus, taking into consideration the number of undertakings active in the relevant market and their market shares, the Board concluded that the transaction in subject does not create or strengthen a dominant position.

Conclusion

The Board unanimously decided to authorize the acquisition of joint control over Behr GmbH & Co ("Behr") by the main shareholders of Mahle GmbH ("Mahle") and Behr, which would not impede effective competition by strengthening of a dominant position.

This decision is significant from several aspects. First of all, this decision thoroughly discusses the concept of "joint control" and its application by also referring to EU Legislation. Moreover, the Board deals with the notions of "absolute control" and "joint control" in a comparative way and distinguishes between the two concepts.

Furthermore, the detailed examinations on the structure of the rights granted to Mahle in the scope of the mid–phase displays a good

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2 Article 7/I of Competition Act No. 4054 is as follows:

"The merger by one or more undertakings or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, 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, is illegal and prohibited." To review the Act, see the following link:

http://www.rekabet.gov.tr/default.aspx?nsw=j6VYScQKgFG/oIWFwqUaBQ==-SgKWD+pQItw= (accessed on: 18.01.2013).

and concrete example of "change of control by other means" stipulated under Article 5/1(b) of the Merger Communiqué.

If we are to criticize the decision, we should state that the provisional nature of the veto right on appointment of executive directors granted to Mahle in the Mid-phase is not argued in the existence of the requirement of a "permanent change of control" under Article 5/1 of the Merger Communiqué. It is stated that this provisional veto right shall end either upon the acquisition of majority shares or in any event, latest by 31.01.2013. Thus, the Boards should have discussed whether such a provisional right constitutes a permanent change of control under the Merger Communiqué or not.

Unconditional Authorization to the Acquisition of Control over the Hard Disk Drive Business of Samsung by Seagate*

Prof. Dr. H. Ercument Erdem

The Competition Board ("Board") has unconditionally authorized, the acquisition of the control over the Hard Disk Drive ("HDD") of Samsung Electronics Co. Ltd. ("Samsung") by Seagate Electronics PLC ("Seagate"; "Samsung" and "Seagate" hereinafter referred to as the "Parties") in its decision dated 29.12.2011 and numbered 11-64/1656-586[1], by concluding that, even though this operation will result in the creation or strengthening of a dominant position, it will not result in the significant lessening of the competition in the relevant market.

Parties to the Operation

Seagate, the transferee, is a public company active worldwide in the design, production and marketing of mobile, processing, desktop and consumers' electronics as well as computer running equipments composed principally of HDD and hybrid HDD. Seagate also produces registry media for thin-film and disk read and write heads in order to use them within the HDD.

Samsung, the transferor, on the other hand is active worldwide in the design, production and marketing of HDD for computers systems, sub-systems or consumers' electronic equipment; and the sale of these products to Special Product Producer and Special Design Producer companies.

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* ***Article of July 2012***

1 Please see the following link to access the Board's decision:
http://www.rekabet.gov.tr/Resources/GerekceliKurulKararlari/karar4587.pdf (accessed on: 18.01.2013).

Subject of the Transaction

Within the scope of the asset sale agreement signed between the Parties on 19.04.2011, Samsung will transfer the control over the HDD business to Seagate and will acquire, at the end of the operation, part of Seagate's current shares.

The assets subject to acquisition consist of some factories, equipments and other tangible and intangible assets exclusively used by Samsung and owned or leased by Samsung and used in the research, development and sale of HDDs.

The transaction will neither create any modification in the shareholding structure of Seagate, nor in the ownership, control and administration structure of Samsung.

Legal Framework of the Transaction

Article 5 of the Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board[2] ("Communiqué No. 2010/4") enumerates the cases considered as a merger or an acquisition. As per this article, *"the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means"* constitutes a merger or an acquisition transaction.

Pursuant to the Communiqué No. 2010/4, transactions considered as a merger or acquisition are subject to the authorization of the Board if (1) the total turnovers of the transaction parties in Turkey exceed one hundred million TRY, and turnovers of at least two of the transaction parties in Turkey, each exceed thirty million TRY or (2) the worldwide turnover of one of the transaction parties exceeds five hundred million TRY, and at least one of the remaining transaction parties has a turnover in Turkey, exceeding five million TRY.

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2 Please see the following link to access the Communiqué No. 2010/4: http://www.rekabet.gov.tr/Resources/Tebligler/teblig88.pdf (accessed on: 18.01.2013).

In the present case, Samsung transfers the control over HDD business to Seagate with an agreement. Therefore, the transaction between the Parties is considered as a merger or an acquisition transaction pursuant to the Communiqué No. 2010/4. Moreover, this transaction is also subject to the authorization of the Board since the thresholds stated above are exceeded.

Investigation of the Transaction by the Board

Merger or acquisition transactions: which (1) create or strengthen a dominant position (2) result in significant lessening of the competition in the relevant product market are illegal and prohibited under the Turkish competition law.

For that reason, in order to determine whether the transaction between the Parties is prohibited under Turkish competition law, the Board conducts the following steps of investigation:

(i) The Board determines the relevant product market effected by the transaction;

(ii) The Board examines whether the said transaction will create a dominant position or strengthen a dominant position in the relevant market (first test);

(iii) The Board determines whether the transaction will significantly lessen the competition in the relevant market as a result of creating or strengthening a dominant position in that market (second test).

Thus, the Board has separately applied, within this case, both tests foreseen under competition law; although it normally does not strictly apply the tests. Indeed, Board decisions generally do not include concrete facts related to these tests. Moreover, in some decisions, the creation or strengthening of a dominant position is considered, without any justification, as the "significant lessening of competition". For instance, the Board, in its decision dated 08.07.2010 and numbered 10-49/900-314 related to the acquisition by Mey İçki Sanayi ve Ticaret A.Ş. ("Mey İçki") of Burgaz Alcoholic Beverages Commercial and Economic Union, which the Saving Deposit Insurance Fund offered for sale, decided that Mey İçki was in dominant position in the markets

for raki and gin and that Mey İçki will significantly lessen the competition in the market by strengthening its dominant position through this acquisition.

Determination of the Relevant Market

Relevant Product Market

A relevant product market means a market which includes all those products and/or services, which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and their intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products and/or services by the consumer is taken into account.

Within this scope, the Board has first determined that HDDs are used in different areas such as "desktop applications", mobile applications" and "products produced within the scope of consumers' electronics". Nevertheless, since the HDDs as a whole constitute the object of the acquisition, the Board does not take into consideration these differences in the usage, and regards the HDDs as a whole, specifying the relevant product market as "all HDD products".

Relevant Geographic Market

A relevant geographic market means an area in which the undertakings are active in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous and which can be easily disassociated from neighboring areas especially because competitions conditions are sensibly different from there.

Within this scope, even though the Board considered that the relevant geographical market shall be considered globally for reasons such as the structures of prices and demands, the Board has determined the relevant geographical market as "Turkey" since it has determined that the Turkish market's structure is different from other markets.

Test of Dominant Position

The Board has expressed that a market share superior to 50% may reveal, save for certain exceptional cases, the existence of dominant

position and examines the market shares of the Parties between the years 2007 and 2010 in the HDD general market and in the markets for mobile applications, desktop and corporate solutions. The Board, as a result of the examination that it has conducted, decided that Seagate will acquire an important market power within Turkey.

As it can be seen, the Board dos not clearly determine whether Seagate will be in a dominant position or will strengthen its dominant position after the acquisition. The Board has probably not made a clear determination because the consequences of both assumptions are the same. As a matter of fact, regardless of whether Seagate reaches a dominant position or strengthens its dominant position after the transaction, the second test will apply. However, even if the consequences are the same, it would have been better to make a clear determination to ensure the clarity and definiteness in law.

Test of Significant Lessening of Competition

In order to determine whether the merger transaction will cause a significant lessening of competition in the relevant market or not, the Board takes into account various criteria.

Positive Effects to be Created in the Relevant Product Market by the Transaction

As a result of interviews realized with undertakings, the Board concluded that, except national computer producers, most of the undertakings will not be negatively influenced by this transaction. Indeed, even after the transaction, both Western Digital and Toshiba will continue to be important actors in the relevant product market. Moreover, the facts that the final products of HDD constitute a low percentage of its costs and that price differences between HDD producers are extremely low, will reduce negative effects of the transaction on competition.

Negative Effects to be Created in the Relevant Product Market by the Transaction

As a result of interviews realized with undertakings, the Board has determined that the said transaction may reduce the negotiating power in relation to the price and supply of computer producers which use

HDD products as intermediate products, particularly local computer producers.

Effects of the Transaction on Potential Competition

The Board has determined that, in the following years, there may be some alternative products to HDDs. As a matter of fact, the Board has identified the Solid State Drive ("SSD") as a new technology that can powerfully enter into the market by reason of its superior characteristics such as its rapidity, resistance and battery life in comparison to HDDs.

In addition to the SSD technology, the Board has also identified the "cloud computing" technology, which corresponds to the storage of data in the server of data processing companies in lieu of physical servers of users as an alternative to the HDDs in the following years.

Finally, the Board has determined that in the following years, the effects of HDDs in the market will diminish and that SSDs will be an important alternative to HDDs.

Effects of Foreign Market in the Internal Market

The Board, by taking into account that the parties to the said transaction realize their production abroad and sell the products in Turkey through distributors or intermediates, that the transaction is realized in a global scale and that unconditional authorization was granted by eleven competition authorities including USA, EU, South Korea and Japan, determined that a more competitive market structure will be established in Turkey subject to the modifications of the market conditions in the world even if the Turkish market is actually different from other markets.

Conclusion

The Board, as a result of the examination realized, unconditionally authorized the said transaction by determining that, even though the operation will have certain negative effects on competition, these effects do not reach an extent which will "significantly lessen competition".

The said decision is an extremely important decision for Turkey. The Board reaches a conclusion after applying the two tests stated in the Communiqué No. 2010/4 separately, and clearly establishes the criteria to be considered in determining whether the competition will be significantly lessened after the merger or acquisition transaction (the second test).

No Fines for Tying Arrangements on Cartridges*

Prof. Dr. H. Ercument Erdem

The Competition Board ("Board"), in its decision dated 17.11.2011 and numbered 11-57/1470-527[1], decided that integrated circuit implementation in cartridges branded Xerox does not create an abuse of dominant position as stated in Article 6 of the Act No. 4054 on the Protection of Competition ("Competition Act") since this system does not prevent consumers to buy cartridges from third party cartridge producers than Xerox.

Competition Infringement Allegation

During the preliminary investigation, it was alleged that the integrated circuit implementation in the Xerox branded cartridges prevents interoperability of third party cartridges for printers of this brand.

Integrated Circuit Implementation

The Board, as a result of the examination it conducted, has reached the following information concerning Xerox branded cartridges from Xerox Buro Araclari Ticaret ve Servis A.S. ("Xerox"):

- There are implemented circuits in more than 50 toner cartridges of Xerox for Xerox branded printer models, still being sold in the market
- The integrated circuit in Xerox branded printers may be used for different purposes such as (i) to determine whether the said cartridge pertains to the relevant printer, (ii) the follow-up of the cartridge life and to inform the consumer accordingly, (iii) to report the cartridge level in printers which can be remotely controlled.

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* ***Article of February 2012***

1 To review the decision, see the following link:

http://www.rekabet.gov.tr/Resources/GerekceliKurulKararlari/karar4468.pdf (accessed on: 18.01.2013).

- Integrated circuits are also implemented in various competitors' cartridges[2] active in the market.
- The cartridge with integrated circuit may technically be reused. As a matter of fact, a discharged cartridge may be refilled by means of resetting or replacing the integrated circuit.
- Different options exist in case a cartridge runs out: (i) an original cartridge may be purchased in lieu of the discharged cartridge, (ii) a cartridge indicated as compatible with various printer models may be purchased, (iii) the discharged cartridge may be refilled by means of resetting or replacing the integrated circuit.
- The use of an original cartridge assures a high quality printing performance. However, the use of optional ways such as refilling of a discharged cartridge may pose risks of poor quality printing or even result with a breakdown of the printer notwithstanding these ways are financially more advantageous.

Abuse of a Dominant Position

The Board, by taking into account that the abusive behavior related to the claim is a unilateral behavior, stated that it may only constitute an abuse of a dominant position. Indeed, Article 4 of the Competition Act, regulating agreements and concerted practices between undertakings or decisions and practices of associations of undertakings, requires the presence of at least two undertakings.

The Board, in order to evaluate whether this claim constitutes an abuse of dominant position pursuant to Article 6 of the Competition Act or not, first determined the element of relevant market and then examined whether Xerox is in a dominant position.

Determination of the Relevant Market

Relevant Product Market. The Board stated that markets including products such as printers are "primary" or "initial" markets

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[2] Some undertakings which have integrated circuit implementation are as follows: HP, Samsung, OKI, Epson, Lexmark, Philips, Sagem, Utax, Sharp, Develop and Olivetti.

because they require, in due course, the use of supplementary products or services; And the markets, including products and services such as replacement parts, consumable materials, repair or maintenance and repair services used with the principal product and necessitated after the lapse of a certain period as of the purchase of the principal product, are "secondary" or "consecutive" markets. The Board pointed out that, in case of existence of secondary markets, the market may be defined in three different ways:

- The system market including both the primary and secondary products;
- The complete secondary market including replacement parts, consumable material or service for all brands in the primary market;
- The brand-specific secondary market including replacement parts, consumable material, technical service, maintenance and repair services related to any brand.

Nevertheless, the Board, despite having made all these determinations, did not specifically delineate the relevant market and assumed that the market was, in the strict sense, the market of consumable material (or ink/toner cartridges) used for Xerox branded printers.

Relevant Geographical Market. The Board did not make any determination concerning the relevant geographical market in its decision.

A Dominant Position Evaluation

The Board, despite not having specifically determined the relevant market, particularly examined Xerox's position in the secondary market with a view to determine whether Xerox is in a dominant position or not.

Secondary (Ink/Toner Cartridges) Market. The Board, in examining Xerox's position in the secondary market, took in account the XXV. Report on Competition Policy[3] ("Competition Report") of the

[3] To review the Commission Repot, see the following link: http://ec.europa.eu/competition/publications/annual_report/1995/fr.pdf.

European Commission ("Commission") and made the dominant position evaluation in accordance with the following criteria; the price and life of the product in the primary market, the transparency of the prices in the secondary market, the balance between the products' price and the principal product's price in this market and the level of the costs in the process of obtaining all this information[4].

The Board, as a result of the examination it has conducted, determined that the low price difference between the Xerox branded printer and cartridge and the total cost of the toner cartridge proportionally outweighs the cost of the printer. Furthermore, the Board also stated that the cartridges' prices are accessible and that the passage costs between printers are not high. In the light of the foregoing, the Board determined that it is possible to switch between different printers.

In conclusion, the Board set forth that the above-stated determinations depict that Xerox cannot increase its prices in the secondary market independently from the primary market and concluded that Xerox is not in a dominant position in the relevant market.

Primary (Printer) Market. The Board, in order to determine whether Xerox is in dominant position or not, examined the breakdown of the market shares held by competitor parties operating in the primary market and determined that 3-4 undertakings have higher market shares than Xerox in the relevant market[5].

Decision

The Board examined both the printer market corresponding to the primary market and the ink/toner cartridges market (used in Xerox branded printers) corresponding to the secondary market.

As a result of the examination, the Board determined that, despite the integrated circuit implementation, cartridges may also be obtained

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4 See § 85 – 86 of the Commission Report. These criteria are also stated in the decision dated 15.08.2008 and numbered 08-33/417-143 of the Board on printers branded Xerox. To consult the decision, see the following link: http://www.rekabet.gov.tr/Resources/GerekceliKurul Kararlari/karar2433.pdf (accessed on: 18.01.2013).

5 The Board has already determined that Xerox was in dominant position in the primary (printer) market in its decision dated 15.08.2008 and numbered 08-33/417-143. For detailed information, see fn. 4.

through refilling of the cartridge and / or the use of a compatible cartridge, procured from other sources than Xerox, and stated that there are other competitor undertakings, which act in the same way.

In conclusion, the Board decided that Xerox is not in a dominant position in the consumable material (or ink/toner cartridges) for Xerox branded printers market. For that reason, the Board decided not to initiate an investigation against Xerox.

Evaluation

We understand from the Board's decision that the Board has in reality examined whether Xerox is in a dominant position in the secondary market or not. As a matter of fact, the Board had already determined in its decision dated 15.08.2008 and numbered 08-33/417-143 that Xerox is not in a dominant position in the primary (printer) market. In other words, in this decision, the Board has in reality examined if Xerox is in a dominant position in the secondary market even if it is not in a dominant position in the primary market. The below evaluations may be made concerning the said decision:

- All the information reached by the Board during the preliminary investigation is related to the secondary market;
- The Board did not specifically determine the relevant market. However, in order to determine whether an undertaking is in a dominant position, the relevant market shall be specifically determined. As a matter of fact, in accordance with the relevant market, the assessment whether an undertaking is in a dominant position or not may change;
- The Board, in evaluating the dominant position of Xerox, first examined its position in the secondary market and referred to the criteria stated in the Commission Report. For the examination of the primary market, the Board did not make any determination with regards to the dominant position, however, merely stated that there are 3-4 undertakings which have more market power than Xerox.

The Board has provided, by this decision, a new dimension to the notion of "dominant position" set forth in the Competition Act. As a

matter of fact, it is commonly agreed that an undertaking is in dominant position in the primary market because it may control the economical parameters in that market. However, this decision introduces a completely new perspective and reveals that an undertaking, despite not being in dominant position in the primary market, may be in dominant position in the secondary market.

This possibility was also examined in 1995 within the Pelikan / Kyocera case[6] in the European Union. Even though the Commission decided with this case that Kyocera was not in dominant position in the primary market, it stated that an undertaking not in dominant position in the primary market may be in dominant position in the secondary market and determined the criteria to be taken into account within the examination.

As it can be seen from the decision, in order for the competition to be fully protected in the relevant market, the dominant position evaluation shall be made in two steps. The dominant position shall first be examined in the primary market, then in the secondary market. The sole evaluation of the dominant position in the primary market may result in a deficient investigation and result in consequences disrupting the competition.

Finally, it shall be indicated that explanations stated in the said decision are extremely poor and do not permit a good understanding of the subject matter. Nevertheless, important decisions such as this decision should have been drafted in more detail by the Board.

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6 See § 85 – 86 of the Commission Report. The Commission also analyzed this subject respectively in Info-Lab/Ricoh, Hugin Kassaregister AB and Hugin Case Register Ltd, Hilti AG and Tetra Pak International AG cases. For detailed information, see. **Van Beal, Ivo / Van Bael & Bellis**, Competition Law of the European Community, The Hague 2005, p. 149, fn. 526, http://books.google.com.tr/books?id=Xzo8eA_MenEC&printsec=frontcover&dq=Van+Bael+%26+Bellis&hl=tr&sa=X&ei=b0tLT4HfDIry8QPa78XbCw&redir_esc=y#v=onepage&q=Pelikan&f=false.

The Competition Board Decided That There Is No Abuse Dominant Position in the Ice-Cream-Market*

Prof. Dr. H. Ercument Erdem

The Competition Board ("Board"), in its decision dated 28.08.2012 and numbered 12-42/1257-409[1], decided that Unilever Sanayi ve Ticaret Türk A.Ş. ("Unilever") does not abuse its dominant position by refusing to sell ice cream branded "Algida" at certain points of sale and thus, deemed it unnecessary to open an investigation.

Undertaking Subject to Preliminary Inquiry

Unilever is a company active in the fast moving Turkish consumer goods market since 1953 and operates in the industrial ice cream market since 1990 under the brand name "Algida". The sub-brands of Algida are "Cornetto", "Magnum", "Max" and "Carte d'Or".

Behavior Subject to Preliminary Inquiry

The applicant alleged that Unilever abuses its dominant position by refusing to sell him the ice cream branded Algida despite cash payment.

Legal Framework of the Preliminary Inquiry

Article 6 of the Act No. 4054 on the Protection of Competition ("Competition Act") prohibits the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with other or through concerted practice.

The Competition Act also enumerates a non-exhaustive list of behaviors which constitute an abuse of dominant position. Even

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* ***Article of November 2012***

1 To consult the Board decision, see the following link:

http://www.rekabet.gov.tr/Resources/GerekceliKurulKararlari/karar4985.pdf (accessed on: 18.01.2013).

though the refusal to sell products is not stated in that list, it is accepted as a behavior which may lead to an abuse of dominant position both by the Commission of the European Communities[2] ("Commission") and the Board[3] since this behavior is liable to eliminate a trading party as a competitor.

Applicability of Provisions Related to Abuse of Dominant Position

The precondition for the applicability of Article 6 of the Competition Act is the existence of a dominant position in the relevant market. However, this precondition is not enough to be subject to competition rules. Indeed, holding a dominant position is not prohibited under Competition Act. For the prohibition to be applicable, an undertaking shall not only have a dominant position on the market but shall also be abusing its dominant position.

Refusal to sell constitutes an abuse of dominant position, providing the below conditions are cumulatively fulfilled. The Commission defines these conditions as follows:

Existence of Essential Facilities/Products. The product should be in itself indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence. This condition would be fulfilled if there are no plausible alternatives to the facility and if the impossibility of duplicating the facility can be determined objectively.

Elimination of Competition in the Secondary Market. The undertaking in a dominant position has the possibility to reserve another market, the downstream or ancillary market, completely, or to a large extent, to itself or to one of its subsidiaries due to its dominant position in the input market.

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2 See joint cases C-468/06 to C-478/06 of the Commission on the following link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0468:EN:HTML (accessed on: 29.11.2012).

3 See Board decision dated 16.05.2012 and numbered 12-26/767-220 on the following link: http://www.rekabet.gov.tr/Resources/GerekceliKurulKararlari/karar4985.pdf (accessed on: 18.01.2013).

It is not necessary that the undertaking in a dominant position also be active in the secondary market in order for this condition to be fulfilled. For instance, the undertaking in a dominant position may facilitate its entry into the secondary market by refusing to sell.

Absence of an Objective Justification. A case-by-case analysis is required for this condition. For instance, a refusal to sell harmful products that necessitate proper precautions and technical expertise when being handled may be considered an objective justification.

Board Analysis and Findings

The Board first determined the relevant market, then considered whether Unilever is in a dominant position in this market and finally analyzed if refusal to sell could be considered in that case as an abuse of dominant position.

Relevant Market

Relevant Product Market. A relevant product market means a market that includes all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products by the consumer is taken into account.

The Board stated that there are two different ice cream markets: the industrial ice cream market and the "scooping" ice-cream market. The most important difference between the two markets is that industrial ice cream is sold everywhere and scooping ice cream is only sold around the place where it is produced.

Considering that ice cream branded Algida is industrial ice cream, the Board determined the relevant product market to be the industrial ice cream market.

Relevant Geographic Market. A relevant geographic market means a market which comprises the area in which the firms concerned are involved in the supply of products or services, the conditions of competition are sufficiently homogeneous and can be disassociated from neighboring markets because competition conditions are perceivably different.

Given that Algida branded ice cream is sold all around Turkey, the Board determined the relevant geographic market to be all of Turkey.

Dominant Position Analysis

The dominant position analysis of the Board was based on one of its previous decisions from 2008 where it concluded that Unilever enjoys a dominant position, given its share of more than 40 % of the industrial ice cream market through its ice cream branded Algida[4].

The Board concluded that no important development has occurred since its 2008 decision and that Unilever is still in a dominant position in the industrial ice cream market.

Abuse of Dominant Position Analysis

The Board pointed out that refusal to sell products may be considered an abuse of dominant position within the scope of Article 6 of the Competition Act provided the three cumulative conditions explained above are fulfilled.

In light of the foregoing, the Board examined the first condition, the existence of an essential facility, and reached the conclusion that the ice cream branded Algida does not constitute an essential facility since there are several national and local industrial ice cream producers active in the relevant market creating an alternative for customers.

The Board, considering that the three conditions stated above should be cumulatively fulfilled, decided that Unilever's refusal to sell ice cream branded Algida to certain points of sale did not constitute an abuse of dominant position.

Evaluation of the Board Decision

This Board decision is a relatively important decision since it determines the conditions under which the refusal to sell by an undertaking in dominant position constitutes an abuse of dominant position under Article 6 of the Competition Act.

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4 Board decision dated 15.05.2008 and numbered 08-33/421-147, http://www.rekabet.gov.tr/Resources/GerekceliKurulKararlari/karar2469.pdf (accessed on 18.01.2013).

However, the only reference made by the Board to the above-stated cumulative conditions in the decision without explaining their content may be criticized. Considering that Board decisions should enlighten business practice, their decisions should be more detailed in order to better guide the behavior of undertakings.

In addition to the above, the non-examination by the Board of the existence of the two other conditions because the first condition is not realized is another point to be criticized. Such an analysis would provide for more reliable information on the market conditions and would acknowledge the other players on the market about the Board's perspective.

A New Brochure Helping Undertakings to Stay Out of Competition Troubles*

Att. Zeynep Tuncer

The European Commission ("Commission") has published on November 23, 2011, a new Brochure on Compliance Matters ("Brochure") in order to help undertakings[1] to better respect European Union ("EU") competition rules[2].

This Brochure summarizes the key competition rules that undertakings should respect, including the dangers involved in ignoring the law and sets out practical steps that can be taken to ensure compliance with these rules.

Undertakings' Responsibility in Complying with Competition Rules

EU competition rules applying to undertakings are a fact of daily business life that has to be reckoned with, because ignorance of the law will not shield undertakings from the consequences of breaking it. However, while it is clear that undertakings are under an obligation to comply with the rules, they are largely free to decide how to go about it.

Costs of Non-Compliance for Undertakings

In case of non-compliance with EU competition rules, both undertakings and administrators may be confronted to important administrative fines.

Undertakings may also be obliged to indemnify third parties' damages which have occurred because of an infringement of competition.

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* ***Article of January 2012***

1 The term "undertaking" is the legal jargon of the term "company". All companies are subject to competition rules, with no differentiation according to their size.

2 To consult the Brochure, see the following link:

http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf (accessed on 01.01.2012).

How Ensure a Compliance with EU Competition Rules

In order to ensure effective compliance with EU competition rules and prevent costs of non-compliance, undertakings should think ahead, develop an approach tailor-made for their particular situation and set it out in writing, rather than react to problems only when they occur.

The below-stated steps may be taken into account for undertakings with a view to ensure effective compliance with EU competition rules:

A Clear Strategy

Identifying the Overall Risk and Individual Exposure. A successful undertaking's compliance strategy would be based on a comprehensive analysis of the areas in which it is most likely to run a risk of infringing EU competition rules. These areas will depend on factors such as:

- The sector of activity, for instance a history of previous infringements in the sector indicates a need for particular attention;
- (frequency / level of) the undertaking's interaction with competitors; for instance in the course of industry meetings or meetings or within trade associations, but also in day-to-day commercial dealings;
- The characteristics of the market: position of the undertaking and its competitors, barriers to entry, etc. If a company holds a dominant position in a market, the preventive measures to be taken will differ from those where th3e risk factor is more in the nature of "cartelization".

Making the Strategy Explicit. In the interest of genuine compliance, it is also important to disseminate the undertaking's compliance strategy throughout its entire organizational structure. For the sake of internal clarity, the strategy would preferably be laid down in writing, plainly worded and in all the working languages of the undertaking, so that it is understood by everyone. It could for example take the form of a manual.

A practical set of "DON'Ts" and "RED FLAGs" can be useful tool:

- A list of "DON'Ts" could include clearly illegal conduct such as price-fixing agreements, the exchange of future pricing intentions, allocation of production quotas and the fixing of market shares;
- RED FLAGs" are warning signs which serve to identify situations in which infringements of competition rules can be suspected. They would encourage managers and employees to exercise particular caution in seeking to avoid any infringement on the part of their own undertaking.

Apart from choosing the right strategy and making it accessible to all staff, unequivocal senior management support is vital. The message that compliance with the law is a fundamental policy of an undertaking needs to be clearly endorsed. This is an essential element of creating a culture of respect for the law within the undertaking.

Formal Acts of Acknowledgement by Staff and Consideration of Compliance Efforts in Staff Evaluation

Backup measures taken by undertakings as regards adherence of their staff to the adopted compliance strategy might include:

- Asking staff for written acknowledgement of receipt of relevant information on compliance with EU competition law, for instance when providing them with a manual or after dedicated training sessions. This form of explicit recognition helps to make individual staff members more aware that compliance concerns each and every one of them;
- Putting in place positive incentives for employees to consider this objective with utmost seriousness. Compliance duties could for example be part of job descriptions;
- Penalties for breach of the internal compliance rules. Such penalties would however have to be consistent with national employment law and double-checked with legal advisers first.

A further essential feature of a successful compliance strategy is the inclusion of clear reporting mechanisms. Staff must not only be aware of potential conflicts with EU competition law, but also need to

know who to contact and in what form when concrete situations of conflict arise.

Constant Update, Contact Points for Advice and Training

Obviously it is not enough just to put down a strategy on paper. Where a manual is made available to staff, it should be reviewed regularly. There should also be a clearly identified contact point where advice can be sought by staff in case of doubts about the compatibility of certain types of behavior or agreements with EU competition law.

Training on applicable EU competition rules also plays an important role. Many undertakings already offer their staff, in particular newcomers, an ambitious training program.

Monitoring / Auditoring

Monitoring and auditing can serve as effective tools to prevent and detect anti-competitive behavior inside the undertaking. Monitoring, for instance by verifying the undertaking's own behavior in the competitive process in bidding markets, would mean a more preventive approach.

Auditing would tend to discover anti-competitive behavior only after it had already occurred.

What to do if the Strategy Has Failed to Ensure Full Compliance?

An effective compliance strategy will be expected to simply prevent any infringement from happening. Yet it may prove insufficient to ensure compliance, and there may nevertheless be instances of wrongdoing.

Stopping the Infringement at the Earliest Possible Stage. In such case, the existence of a compliance strategy – on condition that it incorporates appropriate reporting mechanisms – will allow mishaps to be nipped in the bud.

It will enable the undertaking to take appropriate measures without delay, so that any potential infringement is swiftly brought to an end. This will contribute to limiting damage to competition and minimizing the undertaking's exposure.

Cooperation under the Leniency Program and the Settlement Procedure. The detection mechanisms provided by an effective compliance strategy can also help to get the best out of the Commission's leniency program. Aimed at enabling the detection of secret agreements between competitors, it offers a unique opportunity for undertakings willing to cooperate with the Commission, to receive immunity from fines or to get a fine reduced.

Finally, if undertakings are prepared to acknowledge their participation in a cartel, the Commission may invite them to participate in a swifter conclusion of the procedure. The undertakings' cooperation in this "settlement" procedure is rewarded with a 10% reduction of the fine in addition to any reduction for leniency.

Conclusion

The publication of such a Brochure is extremely helpful for undertakings. Indeed, this Brochure will ensure that undertakings are aware, on the one hand, of the risks of non-compliance with EU competition rules and on the other hand, of the steps that they can take in order to ensure compliance.

The preparation of such a Brochure would also be appropriate in Turkey. As a matter of fact, a lot of undertakings are still not aware of the competition rules considering that competition law is a new field which is applied for only 15 years.

ARBITRATION LAW

National Arbitration in the Civil Procedure Code – I*

Prof. Dr. H. Ercument Erdem

Provisions of the Civil Procedure Code numbered 6100 ("CPC") regarding arbitration shall be applicable to disputes which do not involve any foreign element and for which the place of arbitration has been designated as Turkey. These provisions are significant for adapting the provisions governing national arbitration to the currently applied arbitration concept and to the International Arbitration Act numbered 4686 ("IAA"). With the adaptation of the CPC to be in line with the IAA, they became compatible with the UNCITRAL Model Law. Thus, the controversies between different arbitration rules have been overcome.

Due to the extensive scope of the provisions of the CPC governing arbitration, we will analyze them under separate chapters and other provisions shall be assessed in our articles to be published in the following newsletters.

In General

Provisions of national and international arbitration rules under the Turkish law are primarily governed with two separate codes. Provisions governing national arbitration were included within the Civil Procedure Code numbered 1086 ("Former CPC") prior to the promulgation of the CPC. Nevertheless, there were material differences between the arbitration provisions of the Former CPC and the provisions applicable to international arbitration. Therefore, the unification and harmonization process of national and international arbitration rules were of material importance.

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* ***Article of March 2012***

The provisions of the CPC governing arbitration have been regulated in line with the IAA. Therefore, both legislations have become compatible with the UNCITRAL Model Law.

Article 407 of the CPC regulates the scope of application of the provisions of the CPC governing arbitration. The provisions of the CPC governing arbitration shall be applicable to disputes which do not involve a foreign element, as defined under the IAA, and for which the place of arbitration is designated as Turkey. Furthermore, arbitration is only valid for disputes in which the underlying matter is subject to the free will of the parties. Pursuant to article 408 of the CPC, arbitration is not convenient for disputes arising from rights in rem over immovable goods or other transactions of which the parties cannot dispose on their own will. To this end; disputes related to divorce, inheritance, bankruptcy and labor act do not overlap with the scope of arbitration.

Article 410 of the CPC regulates that the competent court having jurisdiction over the works assigned for courts in an arbitration proceeding is the regional court of justice located at the place of arbitration. Pursuant to Temporary Article 3/3 of the CPC, the provisions of the Former CPC which do not contradict with the CPC will be applicable until the regional courts start to function. The IAA has designated such courts as the civil court of first instance. There is no justification for this difference in the provisions. Therefore, it is supported by the doctrine that it would have been more appropriate to appoint civil courts of first instance as the courts having jurisdiction, as it has been regulated under the IAA.

The Arbitration Agreement

Article 412 of the CPC regulates the definition and form of the arbitration agreement. The arbitration agreement is defined as an agreement, whereby the parties agree to refer to resolution by a unique arbitrator or an arbitral tribunal all or part of the disputes that have arisen or that may arise between them in respect to a contract or any other legal relationship. The arbitration agreement may be executed as a separate agreement or an arbitration clause. In practice, it is seen that the arbitration agreements are mostly embodied as an arbitration clause within an agreement governing the relations between the two parties.

In order for an arbitration agreement to be valid, it shall be in a written form. The written form requirement is not a condition of proof but a condition of validity. Pursuant to article 412/3 of the CPC, the inclusion of the arbitration agreement in a written executed document or in an exchange of a communications such as letters, telegrams, telex, fax or transferred into an electronic environment, or the lack of objections of a respondent in his petition to the petition of claim of a claimant claiming the existence of a written arbitration agreement is sufficient. An arbitration agreement will also be deemed validly executed in the event of a reference to a document containing an arbitration clause, so as to make it part of the main agreement. The claim about the existence of the arbitration agreement gives flexibility to the condition of written form.

The arbitration agreement must be executed for specific disputes. Indeed, it must be agreed to refer disputes arising from a specific legal relationship to arbitration. For instance, arbitration agreements which foresee referring all disputes which may arise between two parties to arbitration shall not be valid.

The principle of validity of the arbitration agreement being independent from the validity of the main agreement is accepted by the CPC as well. Pursuant to the "separability doctrine", the validity of the arbitration agreement is independent from the validity of the main agreement in which they are embedded. Therefore, even if the main agreement is deemed invalid for any reason, the arbitration agreement shall continue to be valid and binding. This principle is supported by Article 412/4 of the CPC. Pursuant to the relevant article, objections to the arbitration agreement stating that the main agreement is not valid or that the arbitration agreement is regarding a dispute which has not yet arisen are inadmissible.

Pursuant to Article 413/1 of the CPC, in the event of initiating a lawsuit before courts regardless of the existence of a valid arbitration agreement, the respondent shall put forward the fact that the dispute shall be resolved through arbitration as an initial objection. Pursuant to Article 116/1/b of the CPC the objection regarding a dispute which shall be resolved through arbitration is among the initial objections. In this context, the objection on arbitration shall not be heard if it has

been put forward after the submission of the reply brief or after the lapse of the period for submitting the reply brief. Following an initial objection on arbitration, the court shall accept the objection and deny the lawsuit for procedural issues, unless the arbitration agreement is invalid, ineffective or impossible to execute. In the event the initial objection on arbitration is not put forward in the allocated time, the dispute shall be resolved before the courts and the parties may not object to the dispute being referred to the court. The fact that the objection on arbitration is an initial objection and that it would not be taken into consideration in a later stage may be criticized.

Pursuant to Article 422/1 of the CPC, the arbitrators may rule on their own competences, including ruling on objections to the existence and validity of the agreement. The ability of the arbitrators to rule on their own competences is referred to with the notion "*competence-competence*" by the scholars. Pursuant to Article 422/2 of the CPC, the objections to the competence of the arbitrators shall be put forward at the latest with the reply brief. The parties appointing the arbitrators or participating in the appointment of the arbitrators does not deprive them of the right to object to the competence of the arbitrators. Nevertheless, the objection related to the arbitrators exceeding their competences must immediately be put forward.

Provisional Legal Conservatory Measures in Arbitration

Article 414 of the CPC governs the ordering of interim measures and recording of evidence decisions. Pursuant to Article 414/1 of the CPC, unless agreed otherwise, arbitrators may decide to order an interim measure or the recording of evidence during the course of the arbitration proceedings upon request of a party. The interim measure decision may be declared conditional by the arbitrators upon the provision of adequate collateral. Nonetheless, it is supported by the doctrine that provisional seizure decision is not an interim measure which may be ordered by the arbitration tribunal given its nature, and it may only be requested from the courts.

Article 414/3 of the CPC regulates the events where application to the courts is possible for an interim measure or recording of evidence decision. Pursuant to this article, in the event the arbitrators or another person to be appointed by the parties may not act in a timely and effi-

ciently manner, one of the parties may apply to the courts for obtaining an interim measure or recording of evidence decision. If these circumstances are not present, the application to the courts may only be done based on an authorization to be granted by the arbitrators or a written agreement of the parties regarding this matter. This provision may also be criticized, since the anticipated procedure may consume a lot of time in practice and may not serve its purpose, especially in case the delay is inconvenient.

Procedure of Appointment of the Arbitrators

Article 415 of the CPC regulates the number of arbitrators. The parties may freely agree on the number of the arbitrators, provided that the number of arbitrators must be an odd number. Pursuant to the second paragraph of the relevant article, in the event the parties do not indicate a precise the number for arbitrators, three arbitrators shall be appointed.

The procedure for appointing the arbitrators is governed by Article 416 of the CPC. Accordingly, only real persons may be appointed as arbitrators. In the event that a sole arbitrator shall be nominated, but the parties cannot agree on the choice of arbitrator, the arbitrator shall be appointed by court. If three arbitrators shall be appointed, each party shall appoint one arbitrator and these arbitrators shall appoint the third arbitrator. The third arbitrator shall act as the chairman. In the event one of the parties do not appoint their arbitrator within one month after the receipt of the request of the other party for such appointment to be made, or in the event the two party-appointed arbitrators do not nominate the third arbitrator within one month following their appointment, the court shall appoint the arbitrator upon request of one of the parties. As it may be seen, if the arbitrators are not appointed by the parties, the provisions adapt a solution to resolve any deadlocks through appointment of such arbitrators by court.

Article 416/1/d introduces a provision regarding the qualifications of the arbitrators. Accordingly, in the event there is more than one arbitrator, at least one of the arbitrators must be a lawyer with five years or more experience in its field of expertise. Thereby, it is ensured that the arbitrators are chosen among qualified persons.

Pursuant to Article 416/2 of the CPC, any disputes with respect to the appointment of arbitrators shall be resolved by the courts. This decision may not be appealed. Article 421 of the CPC on the other hand regulates that in the event the term of one of the arbitrators expires, the new arbitrator shall be appointed by following the same procedure. The time consumed for the appointment of the sole or multiple arbitrators shall not be taken into consideration in calculation of the duration of arbitration.

Conclusion

Provisions of the CPC governing arbitration have been prepared by taking into consideration the UNCITRAL Model Law and the IAA. Therefore, the provisions of the IAA and the CPC have been aligned. This is a positive development with regard to the harmonization and unification of the national and international arbitration rules.

Given the material similarities between the IAA and the CPC, it would be appropriate to regulate the national and international arbitration by summoning the provisions in one code. Thereby, any confusion with respect to the scope of application of the relevant laws may be overcome.

National Arbitration in the Civil Procedure Code – II*

Prof. Dr. H. Ercument Erdem

Some provisions of the Civil Procedure Code numbered 6100 ("CPC") regarding arbitration have been analyzed in our previous article. In this article, we shall continue to analyze the relevant provisions and Article 417 and following articles of the CPC.

Withdrawal or Challenge of Arbitrators

Arbitrators, just like judges, play an important role on judicial activity. Therefore, impartiality and independence of arbitrators are of importance in arbitral proceedings. Pursuant to Article 417/1 of the CPC, the arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. In the event such circumstance occurs later, the arbitrator shall without delay disclose any such circumstances to the parties.

Pursuant to Article 417/2 of the CPC, the challenge of arbitrators is possible only in the event an arbitrator does not have the qualifications agreed upon by the parties, in the presence of a reason for challenge agreed in the arbitration procedures by the parties or if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Article 418 regulates in detail the procedure of challenge of arbitrators. The parties may freely agree on the procedure of challenge of arbitrators. A party that intends to challenge an arbitrator shall send notice of its challenge within two weeks following the appointment of the challenged arbitrator, or within two weeks after the circumstances giving rise to challenge became known to the party, and shall inform the other party of its challenge in writing. In the event that the arbitrator does not withdraw or the other party does not agree to the challenge, the arbitral tribunal shall decide on the challenge.

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* ***Article of May 2012***

The liability of arbitrators is regulated under Article 419 of the CPC. Unless agreed otherwise by the parties, in the event that the arbitrator who accepted the office in the arbitral proceeding fails to fulfill the task in the absence of a valid reason, he shall compensate the damages of the parties. It is seen that the relevant provision limits the liability of arbitrators.

Filing of the Case and Proceedings

Provisions concerning filing of the case and proceedings are laid down under Article 423 and following articles of the CPC. Article 423 regulates the two essential principles that govern the arbitral proceedings. These principles are equal rights and authorities of parties and legal right to hearing. The parties may, in principle, freely agree on the procedural rules to be applied to arbitral proceedings, however, contrary regulations to these principles may not be adopted and the arbitrators shall comply with these principles as well.

The parties may freely determine the procedural rules to be applied by the arbitrators, without prejudice to the compulsory provisions under the arbitration section of the CPC. In the event that the parties do not determine the said rules, the arbitration shall be conducted by the arbitrators by taking into consideration the arbitration related provisions of the CPC.

Pursuant to Article 425 of the CPC, the place of arbitration shall be freely determined by the parties or by an arbitration institution agreed by the parties. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The arbitral tribunal may meet at any location other than the place of arbitration and may conduct procedural actions, under condition to previously notify the parties.

Article 426 of the CPC sets forth different provisions regarding the date of filing of the case in arbitration, for different scenarios. Pursuant to this article, the arbitration case shall be considered to be initiated with the application to the tribunal for the appointment of arbitrators, or to the person, institution or organization who shall appoint the arbitrators, or in the event that the arbitrators shall be appointed by both

parties pursuant to the agreement, the arbitration case shall be considered to be initiated with the appointment and notification of an arbitrator by the claimant to the other party. Additionally, in the event that the names and surnames of the arbitrators are specified in the arbitration agreement, the arbitration case shall be considered to be initiated as soon as the request for arbitration is received by the other party. Pursuant to the second paragraph of this article, in case one of the parties has obtained a decision on provisional injunction or provisional seizure, the arbitration proceedings shall be initiated within two weeks, otherwise the decision on provisional injunction or provisional seizure shall be lifted automatically. As the said decisions are provisional, the proceedings shall be initiated within this short period of time.

The fact that arbitration is a rapid dispute resolution process finds its reflections on Article 427 of the CPC. Unless agreed otherwise by the parties, the arbitrators shall decide on the merits of the case, in cases where a sole arbitrator is in charge, within one year as from the appointment of the arbitrator; and in cases where several arbitrators are in charge, within one year as from the date of drafting of the first minutes of meeting by the arbitrators. This time period may be extended with the agreement of parties, and if the parties fail to agree, with the decision of the courts.

Statement of claim and statement of defense shall be submitted within the time period agreed by the parties or determined by the arbitrator. Unless agreed otherwise by the parties, the claims or defenses may be amended or supplemented. The arbitrators may refuse this amendment or supplementation in case it may be considered inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties in an unfair manner or any other circumstances. Therefore, the efforts aiming to extend arbitral proceedings may be prevented. Pursuant to Article 429 of the CPC, arbitrators may decide that the proceedings would be held based on file or by holding hearings.

In the event that the claimant does not submit its statement of claim in due time without providing a valid reason, in case the statement of claim is not in due form and the deficiencies are not fulfilled in the cure period granted, arbitration proceedings shall be ended pur-

suant to Article 430/1-a of the CPC. In case that the respondent fails to submit the statement of defense, this would not be considered as acknowledgement or acceptance of case and the proceedings shall proceed.

Pursuant to Article 431, arbitrators may decide to appoint experts to report on the issues determined by the tribunal, and that the parties shall make necessary explanations and produce relevant documents to the experts, and to hold viewings. Experts may participate to the hearing after submitting their reports upon request of one of the parties or in case the arbitrators deem it necessary. At this hearing, any party may interrogate the experts and present expert witnesses in order to testify on the points at issue. Pursuant to Article 432 of the CPC, any of the parties may request the assistance of the courts for the collection of evidence with the approval of arbitrators.

Closing of the Proceedings and Arbitral Award

Article 435 of the CPC regulates the closing of the arbitration proceedings. The proceedings shall be closed upon the final arbitral award or in case one of the circumstances listed in the relevant article occur. Pursuant to Article 433 of the CPC, unless agreed otherwise by the parties, the arbitrators may decide with the majority of votes. The chairman may decide solely on the procedural matters if the parties or the other arbitrators authorize the chairman.

The arbitral tribunal shall decide as *amiable compositeur or ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal on the relevant matter.

In case of settlement of the parties in the course of arbitration proceedings, the proceedings shall be closed pursuant to Article 434 of the CPC. In case the parties' request is in compliance with morals or public order, or in a subject that may is arbitrable, the settlement shall be determined as an arbitral award.

Article 436 of the CPC governs the elements that are required to be included in the arbitral award. Legal grounds on which the award is based and the justification, the rights and obligations attributed to parties under a sequence number specified clearly and conclusively and arbitration costs and the possibility to initiate an action for annulment

are among the important elements that shall be included in the arbitral award.

Pursuant to Article 437, unless a different time period is determined, the parties may, within two weeks after the receipt of the arbitral award, request the correction of any error in computation, any clerical or typographical error, or any error of a similar nature, or the interpretation of a certain issue of part of the arbitral award.

Arbitration Costs

The arbitration costs include the costs listed under Article 441 of the CPC. Pursuant to Article 442/1 of the CPC, the arbitrators may request an advance payment from the parties for the costs of arbitration if necessary. Unless agreed otherwise, the advance payment shall be equally borne by the parties. Unless the parties agree otherwise, the costs shall be borne by the unsuccessful party. In the event each party is partially successful, the costs shall be allocated to parties in accordance with the success of the parties. Costs of arbitration shall be specified in the award that closes the arbitral proceedings or that determines the settlement of the parties.

Right to Appeal Against the Arbitral Award

The only right to appeal against an arbitral award is the action for annulment and it is regulated under Article 439 of the CPC. The action for annulment shall be initiated in the court located at the place of arbitration and shall be primarily and urgently tried by the court. The grounds for an annulment are limited to the grounds listed under the second paragraph of the relevant article. In line with the nature of arbitration as a way of dispute resolution, whether the arbitrators duly applied legal provisions or not shall not be discussed in the action for annulment. The action for annulment shall be initiated within one month and unless the relevant court decides otherwise, shall be tried based on file.

The decisions rendered, following an action for annulment may be subject to appeal. The appeal shall be limited to the grounds for annulment listed in the relevant article, and shall be primarily and urgently decided by the court. The appeal shall not suspend the execution of the award.

Pursuant to Article 443 of the CPC, provisions on the new trial which is an extraordinary legal remedy shall be applied, as long as they are suitable for the arbitration.

Conclusion

The provisions of the CPC governing arbitration aim at independent, impartial and accelerated proceedings, by taking current arbitration practices into consideration. The fact that the grounds for annulment of arbitral awards are limited increases confidence to arbitral awards.

Even though the provisions of the CPC are greatly influenced by the International Arbitration Act numbered 4686 ("IAA"), CPC does not regulate the terms of reference, unlike the IAA, which may be criticized. The terms of reference are of great importance since it confirms the arbitration agreement between the parties on one hand, and on the other hand, it reflects the agreement of the parties as per the issues regarding the procedure to be followed in arbitration proceedings.

As indicated in our previous article, given the material similarities between the IAA and the CPC, it would be appropriate to regulate the national and international arbitration by summoning the provisions in one code, in order to overcome discrepancies with respect to the scope of application of the relevant laws.

Terms of Reference Pursuant to the International Chamber of Commerce (ICC) Rules of Arbitration*

Att. Alper Uzun

Terms of Reference

Terms of Reference is a document provided for the usage within international arbitration law by the International Chamber of Commerce with its main purpose being the fast and efficient progress of arbitral proceedings; the content of which is drawn and executed with participation and by mutual consent of the parties and arbitrators.

The document sets forth the scope and limits of the duties and competences of the arbitrators. The document includes information on the parties and arbitrators, a summary of pleas and defense of the parties, the claims, the dispute in question, and the procedural provisions which shall be applicable. Therefore, the drawing up of the document sets forth a framework to the flow of the proceedings, and as it reflects the consent of the parties, the recognition and enforcement of the arbitral awards at the end of the proceedings is assured.

The Advantages, Functions and Legal Nature of the Terms of Reference

The parties and the arbitrators, by drawing up the terms of reference, ensure that the dispute is explicitly put forward and defined. The parties negotiate and arrive to a consensus with respect to numerous material rules applicable to the procedure of the arbitration, such as the language and place of arbitration, terms, and means of notification. Therefore, some possible frustrating issues related to procedural matters which may arise at a later stage can be averted at the inception of the arbitration proceedings and any interruption in the proceedings may thus be prevented.

The Provisional Time Table separately prepared together with the Terms of Reference states in detail which items shall be fulfilled at

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* ***Article of April 2012***

which dates. Therefore, the more efficient usage of the arbitration period by the parties and the arbitrators is ensured.

By signing the document, the parties acknowledge explicitly and in writing that all proceedings executed so far, the procedure followed for the notification of the petitions, choice of place of arbitration, means of notification, advance on costs and numerous other matters have been carried out in compliance with law. Therefore, any application by one of the parties for the annulment based on matters set forth therein or raising similar claims at the enforcement stage is prevented at the inception of the proceedings. The arbitrators discussing and ruling of an issue falling out of scope of their competences is also prevented by the terms of reference. All these matters decrease the possibility of the arbitral decision being annulled and facilitate obtaining the enforcement decision from the courts of the country where the decision shall be enforced.

The Terms of Reference does not replace the arbitration clause or agreement, nevertheless it constitutes a new arbitration agreement interparty by the signing of the document by both parties. In case of controversies between the Terms of Reference and the arbitration clause, the parties shall be deemed to have declared their most recent intention and desire to put into effect by signing the Terms of Reference without any reservations, and this Terms of Reference shall prevail.

Another function of the Terms of Reference is to determine any legal gaps. The Terms of Reference provides the possibility to agree upon provisions for matters where the procedural rules to be applicable to the procedure of arbitration are silent where the International Chamber of Commerce's Rules of Arbitration are applied.

The Terms of Reference, which has an important function in the current International Arbitration Law, has been frequently referred to by the ad hoc arbitration proceedings by the sole arbitrator or the arbitrators for its numerous advantages, even being introduced by the practices of the International Chamber of Commerce. The International Arbitration Act numbered 4686 requires the arbitrators to prepare terms of reference unless the parties agree otherwise. Pursuant to Article 18 of the International Chamber of Commerce's Rules of Arbitration, a Terms of Reference must include the following content:

Information on the parties and arbitrations, information on notification, the dispute in question by summarizing the plea and defense, listing the matters to be resolved, place of arbitration, procedural rules, whether the arbitrators are authorized to act as *amicable compositeur*.

Material Consequences of the Terms of Reference

The preparation of the Terms of Reference bears numerous legal and other consequences. The Terms of Reference enters into force as of its execution by the parties and the arbitrator (or the arbitral tribunal) and bears all its impacts and consequences. Nevertheless, pursuant to the International Chamber of Commerce's Rules of Arbitration, signing of the Terms of Reference by both parties is not mandatorily required in order to proceed with the arbitration proceedings. Therefore, the prolongation of the procedures by a party refusing to sign the Terms of Reference is prevented. The International Chamber of Commerce's Rules of Arbitration regulates that in the event one of the parties refusing to participate in the preparation or signing of the Terms of Reference, the document shall be referred to the arbitral tribunal for approval. In the event a both parties choose not to sign a Terms of Reference, the document will not subsist.

The possibility to file an annulment lawsuit for the reasons stipulated under article 15A/1 of the International Arbitration Code numbered 4686 shall materially be removed after the signing of the Terms of Reference. By preparing the Terms of Reference, the parties shall be deemed to have declared that they agree their current dispute to be resolved through arbitration, thus they may not claim the invalidity of the arbitration clause at a later stage. Given that the parties shall have acknowledged the choice of arbitrators, they shall not be able to initiate annulment proceedings claiming the undue choice of arbitrators, or the failure to pronounce a decision within the period of arbitration; requesting the annulment of the arbitral award by claiming that the arbitrators have ruled on a matter falling out of scope of the arbitration agreement or not ruling or all matters set forth in the claims of the parties or by claiming that the procedures have been violated.

Another consequence of the signing of the Terms of Reference by the arbitrator and the parties is to state that the arbitral award material-

ly bears all enforcement qualifications. Pursuant to article 5/1 of the New York Convention, claiming the invalidity of the arbitration clause, that the appointment of arbitrators is in violation of the procedural law, that a matter falling out of scope of the arbitration agreement has been resolved, that all matters raised in the claims have not been addressed in the award, or that the procedure has been violated shall constitute a violation of the good faith principle in the event the parties have signed the Terms of Reference without any reservations.

The parties may not proceed with the annulment of the award for the reasons specified under the Terms of Reference and signed by the parties, and may not claim any such reasons at the stage of enforcement of the award.

Conclusion

The Terms of Reference, which has emerged as a result of increased necessity appearing in the arbitration proceedings, has become a very paramount document bearing material legal consequences with respect to its function in International Arbitration Law. The Terms of Reference aims to accelerate the proceedings, ensure legal security and efficiency by avoiding any potential procedural issues through determining matters such as revealing the respective claims and defense of the parties, the means of notification, and language of arbitration for the sake of solving the dispute in question. Furthermore, the parties once more expressly declare their agreement on the dispute to be resolved under arbitration law, thus preventing any future objections and challenges to this matter and obtaining an arbitral award, which may be recognized and has enforceability.

Partial Enforcement of Foreign Arbitral Awards*

Att. Ezgi Babur

As is known, in order to give a res judicata effect (binding effect of already judged matter) to a foreign arbitral award within the territory of Turkey, the courts must authorize its enforcement. During enforcement proceedings, the court will examine whether or not there exist an obstacle for the enforcement of the foreign arbitral award and accordingly the enforcement shall be granted or rejected. In some cases, the grounds for the refusal of enforcement may only affect a part of the arbitral award. At this point, the question of the possibility of partial enforcement of the subjects ruled in the arbitral award is of importance.

In General

The grounds of dismissal in the enforcement of foreign arbitral awards are regulated under Article 62 of the International Private and Civil Procedure Law numbered 5718 ("IPCPL") and in the New York Convention dated 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

Article V/1-(c) of the New York Convention shall be applied with regard to the requests of partial enforcement in the enforcement proceedings realized in accordance with the New York Convention. Pursuant to the said Article, in case the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

Article 62/(g) of the IPCPL provides that in cases where the arbitral award pertains to a subject which is not included in the arbitral agreement or clause or where the arbitral award passes beyond the lim-

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* ***Article of July 2012***

its of the arbitral clause, the court of enforcement shall dismiss that part of the request of enforcement of the foreign arbitral award.

Based on the above-mentioned Article, the Turkish Court of Cassation ruled that the partial enforcement of the foreign arbitral award is possible in a case where there are three separate agreements between the parties of an arbitration procedure and two of them have an arbitration clause:

> *"In that case, the question of possibility of partial enforcement of arbitral awards arises. As a rule, there is no legal obstacle to partial enforcement of arbitral awards. Hence, in the decision of our chamber dated 3.6.2002 and numbered 9357/4209, it is decided that in case the arbitral award is made based on a matter not included in the arbitration agreement or clause or goes beyond the scope of the arbitration agreement or clause, the court may reject the enforcement (concerning this part of the award) and therefore, the partial enforcement is possible."* (Decision of the 19th civil Chamber of the Court of Cassation dated 18.12.2003 and numbered 2003/7270 E., 2003/1288 K.)

The decision referred to above has been adopted by the Court of Cassation pursuant to the International Private and Civil Procedure Law numbered 2675, which was in force prior to IPCPL. However, the content of the Article 45/(h)[1], which has been referred to corresponds to the content of Article 62(g) of the IPCPL. Consequently, the decision above may be taken into consideration in the application of the IPCPL as well. In addition to the said decision, there are other decisions where the Court of Cassation ruled that the partial enforcement was admissible[2].

In addition to foreign arbitral awards, there are precedents decisions of the court of Cassation with regard to partial recognition of foreign court judgments. For instance, the Court of Cassation gives decisions on the partial recognition of judgments, which entrust the

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1 While reference is made to Article 45/4 by mistake, the content of the article referred to indicates that the correct reference should have been made to Article 45/(h).

2 Decision of the 19th Civil Chamber of the Court of Cassation dated 3.6.2002 and numbered 2001/9357 E. and 2002/4209 K. may be given as example in the relevant matter.

custody of minor children to both parents, where it rules on the enforcement of the part of foreign court judgment pertaining to divorce of spouses and rejects the part pertaining to entrusting the custody of minor children to both parents[3].

Partial Enforcement and Prohibition of Révision au Fond

The enforcement judge shall take into consideration the prohibition of *révision au fond* (prohibition of examination of merits of the case) while giving partial enforcement decisions. It should be emphasized that the partial enforcement shall not involve the examination of merits of the case. In the event that the examination of merits is required in order to grant a partial enforcement, the request of partial enforcement shall be rejected.

Accordingly, the part of the arbitral award subject to request of enforcement shall be separable from the arbitral award. For instance, there is no obstacle for the partial enforcement of pecuniary debts[4].

Conclusion

In case there are grounds for refusal of enforcement concerning some parts of the arbitral award, the request of partial enforcement shall be accepted. In this way, a favorable solution for the parties, which choose to resolve their disputes by means of arbitration, in accordance with their contribution of time and their expenses would be obtained. The precedent decisions of the Court of Cassation indicate that the partial enforcement is possible. However, the principle of prohibition of *révision au fond*, which is one of the basic principles with regard to enforcement proceedings, shall be respected. In this regard, the separability of the part of the arbitral award giving rise to a ground of refusal is of great importance.

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3 Please see the Decision of the 2nd Civil Court of the Court of Cassation dated 27.12.2004 and numbered 2004/13947 E. and 2004/15854 K.; the Decision of the 2nd Civil Court of the Court of Cassation dated 12.6.2006 and numbered 2006/2773 E. and 2006/9267 K.

4 **EKŞİ, Nuray**, Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi. Source: http://www.ankarabarosu.org.tr/siteler/ankarabarosu/tekmakale/2009-1/5.pdf (accessed on 28.01.2013).

Resolution of Rent Disputes through Arbitration*

Att. Ezgi Babur

Resolution of disputes arising from rental agreements ("lease disputes") is of great importance, since the arbitral awards with regard to non-arbitrable matters may be subject to annulment or may give rise to a ground of refusal of enforcement. If particular subject matter of a dispute is not capable of settlement by arbitration -a non-arbitrable matter-, the arbitral awards may be challenged for annulment or refusal of its enforcement. Consequently, the issue, whether the disputes arising from rental agreements are arbitrable matters, will be further analyzed.

In General

As is known, arbitration, which is an alternative means of dispute resolution, may only come into question with regard to arbitrable matters. The term of arbitrability may be defined as whether a certain dispute may be resolved by arbitration or not[1]. The basic principle concerning arbitrability is laid down under Article 408 of the Civil Procedure Code numbered 6100 ("CPC"). Pursuant to this article, disputes arising out of rights in rem over immovable properties or disputes, which are not subject to the will of the parties, are not arbitrable. Besides the CPC, provisions with regard to arbitrability may be found in the International Arbitration Act numbered 4686 ("IAA"). Pursuant to Article 1/4 of the IAA, the relevant act shall not be applied to disputes arising out of rights in rem over immovable or disputes which are not subject to the will of the parties. With the said provisions, it is clarified that arbitration may not be referred to as a dispute resolution process with regard to matters outside of the scope of the free will of the parties.

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* ***Article of May 2012***

1 **AKINCI, Ziya**, Milletlerarası Tahkim, 2nd Edition, Ankara 2007, p. 284 ("AKINCI").

The Relevance of Rental Disputes to the Rights in Rem over Immovable

Provisions of the CPC and IAA regulate that "the disputes arising out of rights in rem over immovable" are non-arbitrable. Considering the said phrase, certain authors in the doctrine opine that the disputes arising out of rental agreements do not arise from the rights in rem, and therefore, the rental agreement disputes may be resolved through arbitration[2].

It may be stated as a fact that rental agreement disputes are not related to the rights in rem over immovable. However, it should be considered that, even though rental agreement disputes are not related to the rights in rem over immovable, they may still be classified as disputes which are not subject to the will of the parties. Moreover, the Turkish Court of Cassation opines that the actions pertaining to fixation of rental or eviction of the immovable are non-arbitrable. This issue shall be further analyzed below.

Actions Pertaining to Fixation of Rental or Eviction of the Immovable

It is supported that certain disputes arising out of rental agreements are not arbitrable, since the matter concerns the public order and the will of the parties on the relevant matter are limited by the legislator.

The Turkish Court of Cassation opines that the disputes with regard to fixation of rental arising out of the Law on the Rental of Immovable numbered 6570 ("Law No. 6570") are non-arbitrable:

> *"In the event that the parties may freely conclude agreements in order to resolve the dispute and if the said agreement is valid without a court decision, it is possible to conclude an arbitration agreement (or arbitration clause) on that matter. … Pursuant to the established precedents of the Court of Cassation, disputes with regard to fixation of rental are non-arbitrable. As the issue of fixation of rental is related to public*

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2 **AKINCI**, p. 203; **HUYSAL, Burak**, Milletlerarası Ticari Tahkimde Tahkime Elverişlilik, İstanbul 2010, p. 135-136 ("HUYSAL").

order, the parties may only fix the rental within certain limits with their free will. Therefore, the authority of the parties on the relevant matter is limited. Moreover, the lessee is not obliged to pay the rental claimed by the lessor." (Court of Cassation, 3rd Civil Chamber, decision dated 2.12.2004 and numbered 2004/13018 E., 2004/13409 K.)

As the fixation of rental is related to the social policy of states, the parties may not dispose on the relevant matter with their free will. Consequently, it may be supported that the actions pertaining to fixation of rental are non-arbitrable.

The Turkish Court of Cassation renders decisions supporting the non-arbitrability of the disputes pertaining to eviction of the immovable[3]. The Turkish Court of Cassation opines that, taking into consideration the provision on the jurisdiction of civil courts of peace and as the relevant matter is related to public order, the said disputes may not be resolved by arbitrators.

Commercial Rental Agreements

Law No. 6570 includes provisions in favor of the lessee, as the lessee is the less- favored party in rental agreements. As is known, the said Law does not make a distinction between residential and commercial rentals, nor rental agreements concluded by and between commercial and private parties. However, it is not possible to say that one of the parties is less favored in rental agreements concluded by and between merchants.

In some of the European countries such as Germany and Switzerland, only the rental agreements pertaining to residential rentals are outside of the scope of international commercial arbitration[4]. It may be said that this distinction is accurate since the merchants may not really need more favorable or additional statutory protection as much as ordinary individuals need, as they are highly sophisticated

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3 Court of Cassation, 6th Civil Chamber, decision dated 10.07.1970 and numbered 3170 E., 3032 K.

4 **HUYSAL**, p. 134

parties when concluding any contract and usually negotiate to get the best deal for their interests.

Additionally, merchants are under obligation to act as prudent businessman. Pursuant to Article 20/2 of the Turkish Commercial Code numbered 6762, merchants are under obligation to act as prudent businessmen with regard to their commercial activities[5]. It shall not be possible that merchants who are expected to act as prudent businessmen claim that they were not aware of the outcomes of the arbitration clause that may be found in rental agreements.

Conclusion

The disputes arising out of rental agreements vary as per their qualification and parties of the relevant dispute. Consequently, while assessing the arbitrability of the said disputes, the case at hand shall be evaluated in its entirety. The Turkish Court of Cassation opines that the disputes pertaining to fixation of rental or eviction of the immovable are non-arbitrable. However, we are of the opinion that especially for the commercial rental agreements concluded by and between merchants, arbitrability shall have a wider interpretation, as one of the parties is not less favored nor requires additional protection.

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5 This principle is affirmed by Article 18/2 of the Turkish Commercial Code numbered 6102 that shall enter into force on 01.07.2012.

LAW OF CIVIL PROCEDURE

Implementing Regulation of the Notification Code*

Att. Sedef Ustuner

Introduction

Implementing Regulation of the Act of Notification ("Regulation") which was prepared in accordance with Article 60 of the Act of Notification entered into force through publication in the Official Gazette dated January 25, 2012.

Scope of the Regulation

Pursuant to Article 2 of the Regulation, it shall cover all notifications made by judicial authorities, governmental bodies, special budgeted administrations, social security institutions and special provincial administration, municipalities, legal entities of villages, bar associations and notary publics.

Issuance of the Notification

Pursuant to Article 4 of the Regulation all the notification by the authorities stipulated under Article 2 shall be made through PTT or civil servants. In cases there is a special provision in the relevant legislation or consequential damage may be borne by the delay, then the civil servants or police officers may make the notification.

Pursuant to Article 10 of the Regulation, in case of request and as a matter of necessity, it is possible to make notifications by airmails or other expedited methods or vehicles used in mail or by prepaid telegram.

Article 12 of the Regulation stipulates that the notifications may be made also by electronic means.

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* ***Article of February 2012***

Principles of Notification

In accordance with Article 16, as a principle the notification would be made to the last known address of the person in subject of the notification. In order to determine the last known address, the declaration of the requesting party, notices of the addressee and other relevant persons or current documents shall be taken into account.

However, if it is not convenient to make the notification to the last known address or if the notification could not be made to that address, than the domicile address of the addressee registered in the address registry system would be deemed as the last known address and notification shall be made to that address. In such case, it would be annotated on the notification envelop that notification is made to the address on the envelope, which is the domicile address registered in the address registry system. In this case, another address of the addressee is not required to be investigated.

In Article 17, it is regulated that it is possible to make the notification to another address of the addressee provided that the addressee approves so. It is also regulated that if the addressee applies personally to the competent notification authority, PTT or the civil process server, then the notification may also be made in such cases.

According to article 18, if the work is followed by an appointed attorney, then the notification shall be made to the attorney at his office within the official working days and hours. If there is more than one authorized attorney, then it is sufficient to make the notification to one of these attorneys. If the notification shall be made to more than one attorney, then the first notification made to one of these attorneys shall be deemed as the first notification date.

In Article 19, it is regulated that if there is a legal representative, then the notification shall be made to that representative. However, if it is required by law explicitly that the notification shall be made directly to the person himself, then the notification may not be made to the legal representative.

In Article 20 and the following articles, the notification to be made to the legal entities and commercial enterprises is stipulated. Accordingly, the notification to the legal entity shall be made to the

legal representative or if there is more than one representative, the notification shall be made to only one of these representatives. The notification to the commercial enterprises owned by a real person or a legal entity shall be made to the legal representative of the commercial enterprise who made the transaction relevant to the notification.

If the authorized representative of the legal entity is not available at the business address within the normal working hours by whatever reason or they cannot be served at the time of the notification, the notification made to the personnel or employee of the legal entity who is being employed permanently at the business place shall be deemed to be valid. However, this personnel or employee should have been charged with such duty at the business place of the legal entity. If there is no such person available, this fact shall be stated on the notice paper and the notification shall be made to another officer of employee at the business place.

Article 25 regulates that if the relevant person is not available at the address at the time of delivery, then the notification shall be made to the person who is domiciled at the address or to the housemaid.

In Article 26, it is stated that the notification may be made to the particular place-business address- of the relevant person who continuously create or profess at that particular place. If the person is not available at that place, the notification may be made to the personnel or employee who is working continuously at that place.

If the relevant person who will be served is at a place where he may not be easily reached such as a hospital, hotel, factory, official or private institution, the chief officer or the person who administrates that place shall procure the notification. If the relevant person is not reached promptly, then the notification shall be made to the chief officer or the person who administrates that place.

Article 29 regulates that if the person referred above states that the person who will be served has temporarily left the address, and then the civil process server shall write this issue on the notice paper and shall submit it to the person who declared such a statement and receive his signature. If such person refuses to take the notice paper, the civil process server writes this issue on the notice paper and delivers it to the autonomous, police chief or officer of that place against his signature

and attaches the notice on the door of the addressee. In such a case, the notification shall be deemed to be made after 15 days following the attachment of the notice on the door or submit of the notice paper to the relevant people.

According to Article 30, if both the addressee and the people who may be served in place of the addressee are not present at the address, then civil process server shall investigate the reason of such absence from the neighbor, housekeeper, apartment building manager, autonomous, police chief or officer of that place, and shall write their statement on the notice paper and receive their signature, if they refrain from signing the notice paper, then the civil process server shall also write this issue on the notice paper and sign the notice paper. If the addressee is dead or moved from that address constantly and his new address is not determined, then the notice paper shall be returned to the authority who issued the notice paper. If a new address is found out by the civil process server and the address is within the boundaries of the allocation region of the civil process server, then the process server shall make the notification to such address. If the new address is not within the allocation region of the process server, then the civil process server shall return the notice paper to the center, which the address is connected to.

According to Article 31, the civil process server shall serve the notice paper to autonomous, police chief or officer against signature if one of the following condition occurs (i) the addressee or the person who may be served in place of the addressee is not found at the address, (ii) the addressee or the person who may be served in place of the addressee refrain from receiving the notice paper, (iii) despite the fact that the addressee did not live at that address or left the address constantly, the notice paper has been sent to the address of the addressee which is registered at the address registry system. Process server attaches the notice on the addressee's door and informs the neighbor, housekeeper, apartment building manager. The notice is deemed to be made on the date which the notice is attached on the door.

Article 34 regulates the case where the person who will be served in place of the addressee shall not be apparently below 18 and shall have capacity to legal liability. Also, the notification shall not be made

to person with mental illness, weakness of mind or another illness or obstacle.

Notice by Publication

Article 48 stipulates the notice by publication. Pursuant to this article, the address of the addressee is attempted to be determined by the notification authority if the notice may not be made or addressee's address may not be determined by the process server or his address may not be determined from the address registry system. The authority shall first investigate from the official or private organizations; if he receives a negative result he shall investigate through police inquiry. If the investigation does not give any result, the address is deemed to be unknown and the addressee shall be served by publication.

The notice by publication shall be made through Press Announcements Institution electronically and on the gazette issued at the place of the authority, which will make the notification in order to procure the addressee to be informed. The document and a copy of notice paper shall be displayed for a period of 1 month at the place of the authority which will be seen easily by all people. The authority may decide to make a second publication if it deems necessary. The notification shall be deemed to be made 7 days later following the last publication date.

Inadequacy of Notice, Publication at Night and Holidays

It is regulated in Article 53 and the following articles. Accordingly, the notification shall be deemed to be made if the addressee has been informed despite the fact that the notice is invalid. The date which the addressee declared that he has been informed is deemed to be the notification date.

Notification may be made at night. It may also be made on national holidays and judiciary holidays.

Conclusion

As it is clearly outlined above, the Regulation which sets forth the procedure and principles of the implementation of Act of Notification has brought simplicity and acceleration to notification transactions.

Liquidation of the Movable Properties*

Att. Alper Uzun

In General

Our legal system provides, under article 939/1 of the Turkish Civil Code that pledges over movable properties may be established by transfer of actual possession of the movables. Pledges over certain goods whose transfer lacks any benefit to the creditor may be established without transfer. Pursuant to article 940/2 of the Turkish Civil Code, the movable properties that are required by law to be registered to their relevant registries may be pledged, without transfer of possession of such property, by means of annotation of pledge to the relevant registry, for the purposes of guaranteeing the receivables of real persons or legal entities.

Procedure of Liquidation of Pledged Property

Enforcement proceeding by means of liquidation of a pledge may be made through enforcement proceedings based on a court decision or enforcement proceedings without a court decision (for the purposes of this article, a court decision shall hereinafter be referred to as a "judgment").

If the enforcement proceeding relies on a judgment or on a document specified under article 38 of Enforcement and Bankruptcy Code ("EBC") among documents which serves as a judgment for the purposes of that article (*i.e.* compromises made before a court, acceptances and notarial deed issued *ex officio* including acknowledgement of a pecuniary debt, surety ship of appeal with the sureties of execution office), the liquidation of pledge shall be made through enforcement proceedings based on a judgment.

Enforcement proceedings based on a judgment and enforcement proceedings without a judgment by means of liquidation of a pledge materially resemble the general seizure proceedings. However, in the

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* ***Article of September 2012***

existence of a pledge, the creditor is satisfied through the liquidation of the current pledges instead of seizure phase.

In the event a pledge has been established, the most important issue to pay attention to is the "obligation of primary application to the pledge". Pursuant to article 45 of the EBC *"Even if the debtor of a receivable guaranteed by a pledge, is a person who is subject to bankruptcy, the creditor may only proceed by liquidation of the pledged movable. However, if the amount of the pledged movable does not suffice for the payment of the debt, the creditor may proceed to bankruptcy or seizure for his remaining receivable"*. Therefore, general seizure proceedings cannot be initiated prior to applying to liquidation of a pledge.

In the event of enforcement proceeding by means of liquidation of the pledge, the pledged property shall be specified in the request of proceeding. If the pledged property belongs to a third person, the proceeding will be executed against both the debtor and the third person (the owner). After the initiation of an enforcement proceeding, an execution order will be sent to the debtor. If the debtor does not pay his debt within 7 days or doesn't submit a decision on the stay of execution proceedings with respect to such execution order, the pledged property will be sold.

Stay of execution may be required only if the relevant debt has prescribed, is paid or if an extension for the payment of such debt is granted. The debtor may prove the payment of the debt or the extension granted for the payment of debt only through the documents prepared by official authorities.

For the enforcement proceedings without a judgment by means of liquidation of pledged movables, a payment order will be issued instead of an execution order. Unlike enforcement proceedings based on a judgment, the debtor may either pay his debts within 15 days or may object to the enforcement proceedings within 7 days. In the event of an objection to the enforcement proceedings, such objection should be removed or cancelled on order to finalize the execution proceedings. The judgment of a court shall be necessary under both circumstances. Once the objection is removed as a result of such court proceedings, the liquidation of the pledge shall continue.

As seen, the difference between the enforcement proceedings based on a judgment and the enforcement proceedings without a judgment concerns the finalization of the execution proceedings. The remaining procedures are similar for both of the enforcement proceedings.

The bailiff may procure the valuation of the property immediately after receiving the execution request, without waiting the finalization of the enforcement proceedings. Nevertheless, although the bailiff may *ex officio* initiate the preparations for sale, the sale may not be realized without a request for sale.

The Sales Process

The creditor is required to request the sale within 6 months as from the notification of the payment or execution order to the debtor. In the event that a request of sale is not made within such 6 month period, the enforcement proceedings by means of liquidation of pledged movables shall be discontinued. The time period which elapses until the finalization of the decision to remove or cancel an objection shall not be taken into account for the calculation of such 6 month period foreseen for the request of sale. The creditor shall pay the expenses of sale in advance within this period of time as well.

After the request of sale is made, sale of the movable properties by auction takes place. However, sale by means of bargaining procedure may be accepted for some exceptional cases (Article 119 of the EBC).

If there are more than one creditor, after the sale of the pledged property, distribution of the consideration shall be proceeded with. If turnover of the pledged property is not sufficient for the payment of the receivables for which such pledges were established, the bailiff shall prepare a chart of rank and share, and carry out with the distribution accordingly with such chart.

Document Certifying the Insufficiency of the Pledge

The sale of a pledged property may not fully compensate the receivable. In such an event, the creditor shall be provided with a "document certifying the insufficiency of the debt" certifying that the pledged property is insufficient to cover the receivable. If, after the

request to sell the property and during the execution proceedings, it is apparent that the pledged property shall not be sufficient to cover the receivables, a provisory document certifying the insufficiency of the pledge shall be provided for the uncovered amount.

With the provisory document certifying the insufficiency of the pledge, the creditor may procure the sale of properties of the debtor other than the pledged property through seizure. However, a final document certifying the insufficiency of the pledge is necessary to be provided, instead of a provisory document, in order for such properties to be sold. Unless the creditor provides sufficient evidence that the consideration gained through the sale of the pledged property is not sufficient to cover his receivable, the creditor shall not be provided with a final document certifying the insufficiency of the pledge, and thus the seizure and sale of other properties of the debtor may not be requested. Only when it is finally determined that the receivable is not covered will the creditor be provided with a final document certifying the insufficiency of the pledge.

The final document certifying the insufficiency of the pledge bears certain advantages. With the possession of this document, the creditor may prove to have fulfilled the obligation of primary application to the pledged property, and the creditor therefore may proceed with the general seizure or bankruptcy proceedings. Additionally, in the event the creditor proceeds with a general seizure proceedings within one year, he can directly request seizure without the issuance of a payment or execution order. However, if the general seizure proceedings are initiated after the lapse of the one year period, a payment order or an execution order should be issued.

In addition to such advantages, the final document certifying the insufficiency of the pledge also bears the characteristics of an acknowledgement of a debt in the sense of Art. 69 of the EBC. Therefore, after the lapse of the one year period, if the enforcement proceeding without a judgment is initiated and the debtor objects to the payment order issued, the removal of such objection may be requested by the provision of this final document certifying the insufficiency of the pledge.

It is necessary to state that the final document certifying the insufficiency of the pledge does not constitute a “certificate of insolvency”.

The final document certifying the insufficiency of the pledge only states that the debt was not covered with the pledged, whereas the certificate of insolvency states that the entire property of the debtor is not sufficient to cover the debt. For this reason, the final document certifying the insufficiency of the pledge does not bear the advantages of the certificate of insolvency.

Conclusion

The procedure of the liquidation of the pledged movables materially coincides with the general seizure proceedings. However, certain differences arising due to the presence of a pledge, for instance the obligation of primary application to the pledged property, are important. The absence of a seizure phase in the procedure for the liquidation of the pledged movables stands out as the most material difference. Nevertheless, the process of sale of the pledged property and the distribution of the considerations are widely similar with the general seizure proceedings.

Provisions Governing Legal Proceedings and Penalties with Respect to Disputes arising from the Law No. 4077 on Consumer Protection*

Att. Pelin Baydar

Articles 23-26 of Law no. 4077 on Consumer Protection ("Law no. 4077") regulate the legal proceedings and penalties with respect to any disputes arising from the Law no. 4077. Any disputes arising in connection with the application of Law no. 4077 shall be heard before the consumer courts.

In General

The lawsuits filed by consumers, consumer organizations and the Ministry of Industry and Commerce ("Ministry") before consumer courts shall be exempt from any duties and charges. The expert fees in the lawsuits filed by consumer organizations shall be funded by the Ministry from a fund allocated in the budget. In the event the lawsuit is been awarded against the defendant, the expert fees shall be collected from the defendant pursuant to the provisions of the Act Pertaining to the Procedure for the Collection of Public Receivables, No. 6183 and recorded as budget income.

Consumer lawsuits may also be initiated before the court at the district where the consumer is domiciled.

The Ministry or consumer organizations may initiate lawsuits before consumer courts, relating to issues which are not considered as problems of individual consumers but concern, in general, the protection of consumers, in order to eliminate the situation violating this Law.

Consumer courts may issue precautionary injunctions, when necessary, in order to remove the violation. The precautionary injunctions deemed appropriate by consumer courts shall be publicly disclosed by the Press Announcements Institution in a national newspaper and if any, in a local newspaper at the district where the lawsuit has been

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* ***Article of February 2012***

filed, promptly, provided that the cost of such announcement shall be collected from the party against whom the judgment has been awarded, shallot then be recorded as budget income.

Consumer court judgments ordering the elimination of the violation of the Law no. 4077 shall be announced promptly in the same manner, at the expense of the defendant.

Suspension of Production, Sales and Product Recalls

ARTICLE 24 - İn the event that a series of goods offered for sale are defective, the Ministry, consumers or consumer organizations may initiate a lawsuit for the suspension of production and the defective good, and recall of the goods held for sale. In the event the court decides the defective goods to be collected concluding the lawsuit; based on the qualifications of the defective good and the defect, it shall be decided whether or not such goods shall be returned to the seller. However, until all costs incurred for the collection of the goods are paid by the person against whom a judgment is given, the goods shall not be returned to him.

Any lawsuits of recourse to be filed by third persons who acquired the goods, subject to the lawsuit, for sale purposes, shall be heard before courts who heard the initial lawsuit.

The right of the consumers who purchased defective goods to individually initiate lawsuit due to the moral or material damages they suffered is reserved.

Pursuant to article 24 of Law no. 4077, in the event that a series of goods offered for sale are defective, the Ministry, consumers or consumer organizations may initiate a lawsuit for the suspension of production and of the defective good, and recall of the goods held for sale from the actors in the market.

In the event it is revealed with a court judgment that a series of goods offered for sale is defective, the sale of such product shall be temporarily suspended. A warning shall be issued to the manufacturer-producer and/or importer firm to remedy the defect of the good at latest within three months as of the date of notification of the court's

judgment. The producer-manufacturer and/or importer firm shall recall or procure the recalling of the product if it is impossible to remedy the defect of the good. The recalled goods shall be partially or fully destroyed or caused to be destroyed depending on the risks they involve.

In the event that a series of goods offered for sale has a defect that involves risks endangering the consumer's safety, the provisions of the Act No. 4703 on the Preparation and Application of Technical Legislation Relating to Products are reserved.

The right of the consumers who purchased defective goods to initiate lawsuit due to the moral or material damages they suffered is reserved.

Goods That Appear Different Than They Are

According to article 24/A of Law no. 4077, the production, marketing, importation and exportation of goods, which, though not alimentary, appear differently as edible goods to consumers because of their form, scent, appearance, packaging, labeling, volume or size and cause the consumers to mistake them as alimentary goods and endanger their health and safety, shall be prohibited.

If such goods have been launched into the market, the provisions of the Act on the Preparation and Application of Technical Legislation Relating to Products, No. 4703 shall apply.

The right of the consumers, who purchased goods which appear different than they are, to initiate lawsuit due to moral or material damages is reserved.

Authority, Objections and Statute of Limitations in Penalties

ARTICLE 25 - (Amended: 5728 - 23.1.2008 / m.476) Those violating the procedures and principles to be determined by the Ministry pursuant to the seventh paragraph of article 6 shall be subject to an administrative monetary fine of TRL 144 (*) per each agreement revealed to be noncompliant.

Those violating each obligation foreseen under the sixth paragraph of article 4, article 5, sixth paragraph of article 6, article 6/A the principles and procedures determined by the

Ministry pursuant to articles 6/B and 6/C, fifth paragraph of article 7, article 9, article 9/A, article 10, article 10/A, article 10/B, second and fourth paragraphs of article 11/A, and articles 12, 13, 14 and 15 shall be subject to an administrative monetary fine of 291 (*).

Those violating the obligations foreseen under the fourth and sixth paragraphs of article 7 and articles 8 and 27 shall be subject to an administrative monetary fine of TRL 731 (*).

Those violating the obligations foreseen under the procedures and principles determined and announced by the Ministry pursuant to the second paragraph of article 20 shall be subject to an administrative monetary fine of TRL 1,463 (*). In the event the violation is realized through radios and televisions broadcasting throughout the country, the fine shall be multiplied by ten.

Manufacturer-producer acting in violation of article 18 shall be subject to an administrative monetary fine of TRL 2,928 (*), seller-supplier shall be subject to an administrative monetary fine of TRL 584 (*).

Those violating the obligations foreseen under the first paragraph of article 19 shall be subject to an administrative monetary fine of 7,325 (*).

Those acting in violation of article 11 shall be subject to an administrative monetary fine of 14,651 (*).In the event the violation is realized through periodicals broadcasting throughout the country, the fine shall be multiplied by twenty. The Ministry shall also request the broadcasting corporation to cease of campaign and any advertisement and announcement regarding the campaign. In the event the violation continues despite this request, an administrative monetary fine of TRL 293,055 (*) shall be imposed per day from the date of rise of the obligation of the broadcasting corporation to cease the campaign and any advertisement and announcement regarding the campaign. The Ministry shall apply to the Consumer Court with the request to cease of campaign and any advertisement and announcement regarding the campaign.

Those acting in violation of article 16 shall be subject to a decision of preventive cease, cease, correction or an administrative monetary fine of TRL 8,788 (*) by the Advertisement Board depending on the characteristics of the violation. In the event the violation of article 16 is realized through written, oral, visual or any other media broadcasted throughout the country, the administrative monetary fine shall be multiplied by ten.

Those acting in violation of the seventh and eighth paragraphs of article 7 shall be subject to an administrative monetary fine proportional to the invoice price of the good or service which constitutes the subject matter of the campaign. In the event the organizer of the campaign reimburses the consumer once the consumer leaves the campaign, this fine shall not apply.

Those acting in violation of the second paragraph of article 7 shall be granted a cure period of one week to organize a campaign in compliance with article 7. In the event it is revealed that the violation continues after the lapse of this period, those acting in violation of this article and those violating the obligations stipulated under articles 24 and 24/A shall be subject to an administrative monetary fine of 117,220 (*).

The administrative monetary fines stipulated above shall be doubled in the event the relevant act is repeated within a year.

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(*) the monetary amounts in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of Article 25 are updated and included in the wording of the article, pursuant to article 1 of the Communiqué published in the Official Gazette dated 31.12.2012 and numbered 28514, to be applicable as of 1.1.2013.

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Article 25 regulates the penalty provisions. The fines specified in the referred article shall apply by being duplicated, if the act is repeated within a year.

Pursuant to article 26 of Law no. 4077, the administrative sanctions shall be pronounced by the Ministry and the administrative monetary fines shall be executed by the highest administrative officer.

Decisions regarding such sanctions shall be notified to the occupational organization which the relevant party is a member of within seven days.

A lawsuit may be initiated against the sanctions before administrative courts within fifteen days following the notification of the relevant action. Initiation of an annulment lawsuit shall not cease the enforcement of the decision.

In Conclusion

Articles 23-26 of Law no. 4077 regulate the legal proceedings and penalties with respect to any disputes in connection with this Law no. 4077. Any disputes arising in connection with the application of the Law no. 4077 shall be heard before consumer courts.

Decision of Joint Jurisprudence Declaring That the Lack of Justification Shall Not Constitute Grounds for Denial of Enforcement of Foreign Judgments*

Att. Leyla Orak

Introduction

There is a difference of jurisprudence between the 2. and 13. Civil Chambers of the Court of Cassation whether enforcement of (final) judgments which do not include any justification constitutes incompliance with the *ordre public*. The Court of Cassation Grand Chamber of Unification of Jurisprudence conclusively decided on whether the lack of justification constitutes an obstacle to enforcement, to resolve this jurisprudential difference. The decision of the board with Case numbered 2010/1, Decision numbered 2012/1 dated 10 February 2012 ("Decision") was published in the Official Gazette dated 20 September 2012 numbered 28417. This Decision and its justification shall be assessed in this article.

Enforcement of Foreign Court Judgments

As elaborated on in detail in the newsletter article entitled "Recognition and Enforcement of Arbitral Awards and Foreign Judgments" which was published in the Newsletter issue of March 2012, the enforcement of foreign court judgments are subject to the provisions of International Private and Procedure Law No. 5718 ("IPPL"). In order for a foreign court judgment to be enforced (a) there should be contractual, statutory or actual reciprocity with the relevant foreign country with regards to enforcement, (b) the matter resolved upon by the judgment shall not fall within the exclusive jurisdiction of Turkish courts (such as claims related to the rights in rem over an immovable property), (c) the person against whom the enforcement is sought should have not been improperly summoned, or not represented in court or, a default judgment should not have been rendered

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* ***Article of September 2012***

against him which was contrary to the laws of that country, and (d) it shouldn't explicitly violate Turkish ordre public (art. 54 of IPPL).

Jurisprudential Difference

Court of Cassation 2. Civil Chamber has amended its jurisprudence[1] declaring foreign judgments not including any justification being in violation of the Turkish public order. In its decision in the year 2006[2], it declared that the court shall disregard the accuracy of a judgment, the applied provisions and the legal or procedural determinations thereunder whilst considering enforcement, and therefore that the lack of justification shall not constitute a violation of public order. The decision also underlines that explicit violation of public order is limited to events such as violation of fundamental rights and freedoms regulated under the Constitution, fundamental legal principles accepted by international law, right to fair trial and right to defense.

Court of Cassation 13. Civil Chamber, on the other hand, states in its decisions[3] that the lack of justification in foreign court judgments shall constitute violation of the Constitution and of the public order. Therefore, it accepts that lack of justification of foreign court judgments constitutes obstacles in recognition and enforcement of such awards. The Court of Cassation Assembly of Civil Chambers has not adopted a decision governing the enforcement of judgments not including any justification.

The jurisprudential difference between the Civil Chambers of the Court of Cassation arises from whether the lack of justification of foreign court judgments constitutes an explicit violation of the public order or not.

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1 Decision dated 30.06.1999 with Case numbered 1999/5858 and Decision numbered 1999/7609.

2 Decision dated 08.06.2006 with Case numbered 2006/2612 and Decision numbered 2006/9147.

3 Decision dated 05.12.2001 with Case numbered 2001/9007 and Decision numbered 2001/11406 and decision dated 02.10.2003 with Case numbered 2003/6226 and Decision numbered 2001/11095.

Justification and the Public Order

The explicit violation of Turkish public order is regulated as an obstacle to the enforcement of foreign court awards under the IPPL. The State, in principle, waives its sovereign right to rule on conflicts over which its own courts have jurisdiction and adopt the decision of a foreign court while enforcing a decision. Consequently, the sovereign right of the state is exercised by the bodies of another state. Therefore, violation of the public order is a materially important obstacle to the enforcement of foreign court awards.

The concept of public order is dependent on the time and place, and its content and limits may not be precisely delimited. The Court of Cassation has assessed, in the justification of the Decision, the relevant provisions of Turkish law and how such provisions shall be taken into consideration with regards to enforcement, in order to determine whether the lack of justification constitutes a violation of public order or not.

Justification under Turkish Law

Article 141 of the Constitution of 1982 regulates that court judgments shall include justification. Article 297 of the Civil Procedural Code numbered 6100 (as well as article 388 of the abrogated Civil Procedural Code numbered 1086) stipulates that the judgment shall include (in its justification) the matters on which the parties have or have not agreed, the proof for contested matters, discussion and assessment of proof, the deducted conclusion and the legal cause. Court judgments shall include a justification as per Turkish law.

The justification of judgments derives from public order. The justification shall justify the judgment and is binding. The justification states how the claims and defense of the parties are assessed. It is apparent that under the Turkish law the justification is directly in relation to the fundamental right to defense.

Public Order and Prohibition of Révision au Fond

The investigation made for the enforcement regarding whether the public order has been explicitly violated or not comprehends an assessment of whether the legal consequences of enforcement of the foreign

judgment in Turkey are in violation of the public order or not. Nevertheless, while assessing the noncompliance with public order, the prohibition to review the merits of the case must be taken into consideration. The court handling the enforcement request may not disregard this prohibition by using its discretion. Assessment for enforcement is limited to identification of the existence of requisite conditions for enforcement. The due application of law and procedural provisions to the merits of the foreign judgment may not be inspected (art 54 of IPPL).

The formal and material content of justification under the Turkish law is regulated by the Civil Procedure Code. The justification is subject to the *lex fori* principle, as it is a matter of procedural law. Foreign states may provide for different provisions under their procedural law rules with respect to the justification. Therefore, the lack of justification in a judgment and the violation of the fundamental right to defense should be assessed as two separate and independent matters; and the mere lack of justification in foreign judgments should not be assessed as a violation of public order *per se*.

Turkish legal rules concerning verdicts under Turkish law should not be applicable by analogy to a foreign court judgment regarded as a "verdict" as per the procedural rules of a foreign state. Drawing conclusions from the existence or lack of justification in the foreign judgments shall constitute assessment of compliance of the foreign verdict with the civil and procedural Turkish law. This constitutes violation of the prohibition of *révision au fond*. Any procedure to the contrary shall constitute a renewal of the litigation procedure by Turkish courts.

The criteria to be taken into account for enforcement are whether the verdict of the foreign decision explicitly violates the Turkish public order or not. Bearing the prohibition of *révision au fond* in mind, in order for the procedural law applied to a judgment to constitute an obstacle to its enforcement, it shall *per se* violate the principles of due and fair trial, prevent any defense and constitute a violation of the Turkish public order.

The justification of the Decision specifically states that, instead of the differences with the Turkish law or incompliances with mandatory legal Turkish provisions of foreign judgments; what shall be taken into

consideration is whether the fundamental values of Turkish law, the general public moral and main legal policy, fundamental rights and freedoms, concept of justice are violated by such foreign judgment or not.

Decision of the Court of Cassation Grand Chamber of Unification of Jurisprudence

The Court of Cassation Grand Chamber of Unification of Jurisprudence has resolved with a majority exceeding two thirds of the votes that *"the mere lack of justification of foreign judgments shall not prevent the enforcement of final foreign court judgments"*. The Decision states that the justification is a concept of procedural law and thus the declaration of foreign court judgments not including any justification in violation of the public order is regarded as a violation of the prohibition of *révision au fond*. Whilst assessing compliance with public order, violation of fundamental principles and the concept of justice as well as fundamental rights and freedoms shall be taken into consideration instead of violation of any mandatory provision under Turkish law.

Nonetheless, the chair and members of the Court of Appeal 13th Civil Chamber have given negative votes to the Decision and submitted their dissenting opinion. The dissenting opinion states that violation of the public order may only be assessed with the justification of a judgment. The members having given negative votes affirm that the verdict section of a judgment is a mere statement of conclusions with respect to the claims and that compliance with the public order may only be assessed once the verdict and the justification are regarded as a whole.

Conclusion

The Civil Chambers of the Court of Cassation had adopted different jurisprudence with respect to whether the lack of justification of foreign court judgments constitutes an explicit violation of the public order or not. Therefore, the Court of Cassation Grand Chamber of Unification of Jurisprudence resolved this difference by its Decision adopted on 10 February 2012.

Justification is a matter of procedural law. Although Turkish law relates the existence of justification with public order, foreign states may have adopted different rules of procedure. The foreign court judgments are subject to their own procedural laws. Declaring foreign judgments as explicitly in violation of Turkish public order based on the mere lack of justification constitutes a violation of the prohibition of *révision au fond* regulated under the IPPL. Whether the foreign verdict explicitly violates the Turkish public order or not shall be taken into regard when compliance with public order is assessed for the sake of enforcing such decision.

The Civil Chambers of the Court of Cassation has therefore, with the majority of the votes, declared that foreign judgments may not be deprived of enforcement or be declared explicitly in violation of Turkish public order merely for the lack of justification.

ENERGY LAW

The New Draft Law for Electricity Market*

Prof. Dr. H. Ercument Erdem

The new draft Electricity Market Law ("Draft Law") has been published on the web-site of Energy Market Regulatory Authority ("EMRA"). If Draft Law is promulgated and enters into force, the Electricity Market Law numbered 4628 ("EML")[1] will be abrogated. When compared with the EML, the Draft Law envisages some important changes and herein this article, these changes will be reviewed.

Activities and Licenses

The electricity market activities which can be conducted under a license are listed under Article 4 of the Draft Law as generation, transmission, distribution, wholesale, retail sale, market operation, and export and import activities. Differing from the EML, while the activities of retail sale service and trade are not mentioned, market operation activities are introduced as an activity type.

Under the Draft Law, the licenses and the rules to be applied to them are regulated based on the above indicated classification of the activities. In other words, the Draft Law is structured upon the types of activities rather than the types of licenses. Coordinated with the changes in the activities, there are some significant changes with respect to the licenses and the license holders.

Preliminary License for Generation Activities:

As per Article 6 of the Draft Law, a preliminary license is required for commencement of generation activities. It is regulated that for the

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* ***Article of March 2012***

1 Official Gazette 3 March 2002, Nr. 24335 Reiterated.

legal entities who apply to engage in electricity generation activities, a preliminary license will be issued for a certain term in order for those entities to obtain the necessary documents like permits, approvals and licenses and to acquire the property and the usufruct rights of the lands to be utilized for the establishment of the generation facility. The term of the preliminary license cannot be more than twenty four months including the force majeure events. EMRA is entitled to extend this term as per the source type and the installed capacity.

It is stipulated in the Draft Law that the legal entities who could not obtain the above mentioned documents, certify the acquisition of the property or usufruct rights of the lands or fulfill other legal requirements shall not be granted a generation license. In addition, until the grant of the generation license, in case of any direct or indirect change in the shareholding structure with the exception of inheritance, realization of any actions of transaction which will lead to transfer of shares or non-fulfillment of other legal requirements, the preliminary license will automatically be null. Moreover, the expiry of the license term and the bankruptcy of the legal entity, which holds the preliminary license are also listed as the circumstances, which lead to automatic nullity of the preliminary license. In case of nullity of the preliminary license, the license holder entity or other legal entities holding at least 10% (or in case of public companies 5%) of the preliminary license holder entity cannot apply for another preliminary license for the same location within one year as of the date of revocation.

As per the above, indicated situations with respect to the automatic nullity of the preliminary license, there is no clarity in the Draft Law regarding the time of such nullity. On the other hand, as explained below, while the requirement to obtain approval of EMRA for the share transfers of the license holder legal entities is no longer preserved, ruling that any share transfer will lead automatic nullity of a preliminary license is a contradictory proposition.

Distribution License Holders and Other Market Activities:

In accordance with the current EML, companies who hold distribution licenses can establish generation facilities by obtaining generation license and can enter into affiliation with the legal entities who

conduct generation activities provided that they amend their agreements in accordance with the new regulations in a way to fulfill the conditions of free competition. However, Draft Law sets forth an important restriction in that regard. As per Article 9 of the Draft Law, distribution companies cannot conduct activities other than distribution activities and become a shareholder to other legal entities who engage in market activities either directly or indirectly. On the other hand, while generation companies are restricted to be a controlling shareholder of a distribution company under the EML, the Draft Law provides that the legal entities who engage market activities can be direct or indirect shareholder of a distribution company without indicating any control restriction. Without a doubt, such a shareholding structure providing a vertical integrity should be assessed in light of competition law.

The Draft Law regulates that the distribution companies who also engage in retail sale activities may only realize such activities by incorporating a new company with the same shareholding structure and obtaining a supply license for new company regarding the said distribution area.

Supply License:

The wholesale and retail sale activities, which necessitate different types of licenses as "wholesale license" and "retail sale license" under the EML, are regulated under one license type, namely the "supply license" under the Draft Law. As per Article 10 of the Draft Law, supply companies can conduct wholesale and/or retail sale activities without any limitation of area. In addition, it is indicated that supply companies may also import from and export to the countries with which the interconnection condition is satisfied.

Market Operation Activity:

The market operation activity which is included in the electricity market activities by the Draft Law is defined as the operation of the organized wholesale electricity markets and financial reconciliation activities in such markets.

As it is known, electricity market operation activities are currently conducted by Market Financial Reconciliation Center ("MFRC") organized under Turkish Electricity Transmission Joint Stock Company ("TEIAS") as per EML. The Draft Law foresees that a new company is to be incorporated entitled the Energy Market Operation Joint Stock Company ("EPIAS") and the market operation activities and the financial reconciliation activities of the organized wholesale electricity market will be ceded to this company, and MFRC will be transferred to this company with all its permanent staff and equipment.

The Conversion of the Auto Producer License to the Generation License:

The "auto producer" and "auto producer group" licenses are not explicitly regulated under the Draft Law. Instead, temporary Article 7 of the Draft Law sets forth that generation license will be automatically issued for the auto producer license holders without charging any license fee until 31 December 2012 and the application which were made for the auto producer license are to be considered and evaluated under the terms of generation license applications

License Holder Companies

The Draft Law introduces some changes on the rules regarding the management and shareholding structures of the license holder companies.

Share Transfers in License Holder Companies:

As it is known, according to Article 8 of the EML, in case of the occurrence of a share transfer of the license holder companies resulting in change in the shareholding more than ten percent or more (five percent or more for public companies), merger or consolidation of those companies, change of control in those companies, sale, transfer or any type of change in the legal entity structure, it is necessary to obtain the approval of EMRA, prior to the relevant transaction.

However, Draft Law eliminates such requirement of obtaining the prior approval and it just sets forth a notification requirement under paragraph 3 of Article 5. Accordingly, license holder companies shall notify EMRA, the share transfer in their shareholding of ten percent or more (five percent or more for public companies), change of control and the transactions, which lead to change in the property of the generation facilities. However, EMRA shall not have the authority to approve or not to approve those transactions.

On the other hand, distribution companies are still under the obligation to obtain the permission of EMRA, as per paragraph 4 of Article 5 of the Draft Law, with respect to the share transfer in their shareholding ten percent or more (five percent or more for public companies) and change of control.

Provisions on Total Market Share:

EML sets forth restrictive provisions such as the total market share or the total sale amount for the companies who engage in activities in the market. These restrictions are 10% of the previous year's total sales of energy of Turkey for the wholesale companies, and 20% of previous year's calculated total installed capacity of Turkey.

Draft Law also regulates similar restrictions. Accordingly;

- the total installed capacity of the generation companies a real person or a legal entity engaged in the private sector control may not exceed 20% of the previous year's calculated total installed capacity of Turkey in the previous year,
- the total amount of electricity energy generated by supply companies a real person or a legal entity engaged in the private sector control may not exceed 20% of the of the previous year's total consumption of energy in Turkey, and
- the total amount of electricity energy distributed to areas accessed by distributor companies a real person or a legal entity engaged in the private sector control may not exceed 30% of the previous year's total distributed energy in all areas of distribution.

Changes Regarding the Distribution Companies:

Independent Member for the Board of Directors: Under Article 5 of the Draft Law, it is indicated that the license holders whose tariffs are subject to regulation, in other words the distribution companies, shall have one independent member in their board of directors. The assignment of the rights of those companies and the appointment principles and functions of those independent members will be regulated under a regulation.

Applicable Sanctions to Distribution Companies: Under paragraph 4 of Article 29 of the Draft Law, it is stipulated that the distribution licenses cannot be cancelled. Accordingly, in the event that the distribution companies do not conduct their activities in compliance with the legislation or impede their services or lower the quality grade on an unsatisfactory scale, become insolvent or be in a position to become insolvent, the following sanctions can be applied to those companies by EMRA:

- dismissal some or all of the board members and appointment of new ones,
- compensating the financial consideration of the unfulfilled services and investments firstly from the incomes obtained from other activities of such company, if not sufficient, from the dividend earnings of the shareholders and lastly from the assets of the shareholders of the registered shares, and
- confiscation and transfer of the shares of such company to the Treasury.

On the basis of the foregoing, EMRA will be deemed as the addressee (defendant) of the claims which will be filed against the board members appointed by EMRA to the board of directors of distribution companies due to their duties and in case of a decision for compensation, such compensation will be borne by EMRA, with a right to recourse.

Provisions Regarding Privatization

Implementation of Privatization

The provisions of EML are repeated under Article 31 of the Draft Law. In that respect, the transactions and procedures of privatization with respect to the Turkish Electricity Distribution Joint Stock Company ("TEDAS"), Electricity Generation Joint Stock Company ("EUAS") and the businesses, affiliates, subsidiaries, enterprises, operational units and assets shall be conducted by the Presidency of the Privatization Administration in accordance with the Law on Implementation of Privatization numbered 4046 and dated 24.11.1994[2] in light of the suggestions and opinions of the Ministry of Energy and Natural Resources.

Exceptional Provision regarding Environmental Requirements:

As per Article 9 of the Draft Law, EUAS or its subsidiaries, affiliates, business or assets or the publicly owned companies which are privatized according to the privatization legislation are granted a grace period until the end of 2018 in order to comply with the environmental laws and to obtain the required permits. Accordingly, it is indicated that because of non-compliance to environmental laws within this period or beforehand, their activities cannot be ceased and no sanction can be applied. This exceptional provision is very important for the generation companies which are or will be subject to privatization.

Temporary Articles on Extension of Some Deadlines

Some deadlines set forth in accordance with the EML are extended with the Draft Law. Some of them are as follows:

- Price equalization mechanism which is stated to be applied until the end of the year 2012 is extended until the end of the year 2015.
- The corporate tax and VAT exemptions which were applied until the end of the year 2010 to the mergers, spin-offs and

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2 Official Gazette 27 November 1994, Nr: 22124.

transfers of the companies subject to privatization is extended until the end of the year 2017.

- 50% discount in the system utilization fees and the exemptions from stamp tax and duties during the investment periods of the generation facilities are extended until the end of the year 2015.

Conclusion

In light of the above explanations, it is understood that the Draft Law is structured based on the market activities. To that end, it is possible to say it is neatly drafted when compared with the EML. On the other hand, although it is specified to the electricity market, there also are some provisions regarding natural gas and petroleum markets. Technically, it would be more appropriate to regulate those issues under their specific laws and regulations.

We believe that the conversion of the EMRA approval requirements to notification requirement in case of share transfers and change of control is a positive development. However, with regard to the preliminary licenses that are set forth to be granted before the grant of generation licenses, the provision which regulates nullity in case of share transfers shall be mitigated.

Unbundling within the Electricity Market and the EMRA Resolution on Legal Unbundling*

Att. Revan Sunol

Introduction

"Procedures and Principles concerning the Legal Unbundling of Distribution Systems and Retail Sales" was published within the Official Gazette dated September 27, 2012 and numbered 28424 within the scope of The Energy Market Regulatory Authority ("EMRA") Resolution dated September 12, 2012 and numbered 4019 ("Resolution"). Within the Resolution, the principles and procedures concerning the operation by undertakings holding a distribution license of distribution systems and retail sales under separate legal entities have been set forth.

The Notion of Unbundling

Unbundling within energy markets refers to the unbundling of vertically integrated structures. The unbundling of generation, transmission, distribution and retail sales has an important role within the electricity market with regard to the implementation of competition. The inclination towards the unbundling of the transmission and distribution operations, which are referred to as network operations and which carry natural monopoly characteristics, from generation and retail sales activities, is based on the concern that the dominant undertaking may limit in various ways the access of other undertakings that it is competing with in generation and retail sales areas. The mechanism referred to as vertical unbundling aims to provide the access of all players to distribution and transmission systems without discrimination and the prevention of cross subsidization between undertakings conducting generation, transmission, distribution and retail sales activities.

Unbundling within the electricity market may be realized as unbundling of accounts, legal unbundling and ownership unbundling.

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* ***Article of September 2012***

Unbundling of accounts provides for the independent accounting for separate operations. Legal unbundling on the other hand, provides for the organization of different activities under different legal entities. However, this does not prevent such different activities from being owned by the investment group. Ownership unbundling, to the contrary of legal unbundling, requires the unbundled assets and activities to not be owned by the same investment group[1].

Unbundling in the European Union

Competition within the electricity market in the European Union is regulated with the Directive 2009/72/EC of the European Parliament published within the Official Journal dated August 14, 2009 concerning rules for the internal market in electricity ("Directive 2009/72/EC")[2]. Directive 2009/72/EC repealed Directive 2003/54/EC ("Directive 2003/54/EC") that was published in the Official Journal dated July 15, 2003. According to Directive 2003/54/EC, in the case of vertically integrated undertakings, transmission and distribution systems operators within such undertakings were required to be organized under different legal entities with independent decision making mechanisms. The said Directive emphasized the importance of the independent functioning of distribution and transmission systems especially with regard to other players within the market engaged in generation and retail sales and stated that for this reason, transmission and distribution system operators must have independent management structures. In this context, parent companies were prohibited from giving instructions with respect to the day to day operations of the subsidiary. In addition to these, the unbundling and transparency of accounts were also accepted. However, it did not require ownership unbundling. Directive 2009/72/EC which is in force today on the other hand, accepts the method of ownership unbundling; setting forth that legal unbundling provided within the Directive 2003/54/EC did not imple-

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1 **İzak Atiyas**, Elektrik Sektörünün Yeniden Yapılanması Sürecinde Dağıtım Faaliyetlerinde Dikey Ayrıştırma, http://myweb.sabanciuniv.edu/izak/files/2008/10/izak-atiyas-rekabet-dergisi-elektrik-dikey-ayristirma.pdf.

2 Directive 2009/72/EC of the European Parliament and of the Council of July 2009 concerning rules for the internal market in electricity and repealing Directive 2003/54/EC; Official Journal 14/08/2009 P. 0055-0093.

ment effective unbundling with regard to transmission systems. According to the said Directive, the only way in which effective transparency and prevention of discrimination within the market can be implemented is the removal of the incentive for vertically integrated undertakings to discriminate, by the ownership unbundling of network operations and generation. Accordingly, the unbundling of distribution and transmission system operators has been required for vertically integrated undertakings.

Unbundling in Turkish Law

Unbundling in Turkish Law has been provided with various provisions of the Electricity Market Law numbered 4628 ("Law") and the Regulation on Electricity Market License ("Regulation") published in the Official Gazette dated August 4, 2002 and numbered 24836. Pursuant to the Regulation, license holding legal entities which conduct multiple operations within the market and/or which conduct the same operation in multiple facilities or areas are under the obligation of keeping separate accounts and books for each operation that is subject to license and for each facility or area as well as for operations that complete or that are required by a market operation and operations that relate to side products.

The Law on the other hand sets forth multiple provisions relating to unbundling. First of all, in line with the Regulation, legal entities holding multiple licenses and/or which conduct the same operation within multiple facilities must keep separate accounts and books for each operation subject to license and for each facility. It is possible for generation companies to participate in distribution companies; however, they are prohibited from establishing control over the distribution company.

Private distribution companies may establish generation facilities besides conducting distribution and retail sales activities under the condition that they obtain a license. However, in this case the accounts must be unbundled. In addition to this, the distribution company may purchase electricity from the generation company or companies that it is affiliated with for a purchase price that does not surpass the average wholesale price for the country.

Another fundamental unbundling rule brought by the Law provides that distribution companies shall realize generation and wholesale operations under separate legal entities as of January 1, 2013.

Within this context, according to the Resolution of EMRA, the legal unbundling for the conduct of distribution and retail sales operations realized by legal entities holding a distribution license under separate legal entities shall be realized in accordance with the provisions of the Turkish Commercial Code numbered 6102 ("TCC") relating to partial spin-off procedure. In accordance with the provisions of TCC relating to incorporation, a joint stock company shall be incorporated before commencing the partial spin-off procedure. The articles of association of the joint stock company that is to be incorporated in this context must include the clauses of purpose and subject, type of share certificates, transfer of share certificates, merger and amendment of the articles of association as set out within the provisions of the Regulation.

Under the TCC, in the case that a part of the assets is to be transferred by way of partial spin-off, a spin-off plan shall be prepared in writing by the relative company's board of directors.

Pursuant to article 165 of the TCC, in cases where there is a period exceeding six months between the date of the spin-off and the date of execution of the spin-off agreement or where there is a material change in the assets of the companies participating in the spin-off after the last financial statement, an interim financial statement shall be issued.

A copy of the spin-off agreement approved by the distribution company shall be submitted before EMRA within five business days following the conclusion of the agreement.

The shares of the acquiring, that is to say the newly incorporated company, shall be acquired by the shareholders to the company subjected to the spin-off procedure. The acquiring company and the company subject to the spin-off must have the same control structure until the finalization of the legal unbundling. However, pursuant to article 6, paragraph 3 of the Resolution, within generation and retail sales companies which have the same control structure as the distribution company; even if persons conducting duties as member of board of direc-

tors, general manager and assistant general manager are acting under different titles, managers and auditors that are authorized signatories and that hold duties equivalent to or higher than assistant general manager in respect of their powers and duties must consist of different persons as of January 1, 2013.

According to the Resolution, retail sales companies must apply to EMRA for sales license before December 15, 2012. Along with the application petition, the company's articles of association and shareholding structure shall also be presented to EMRA. Simultaneously with the retail sales company, the distribution company shall apply to EMRA for the revocation of the sales license. Applications made within this context shall be evaluated by EMRA and the sales license held by the distribution company shall be terminated to be valid as of December 31, 2012 and the retail sales company shall be granted a new license which qualifies as the continuation of the previous one to be valid as of January 1, 2013.

Finally, pursuant to the Resolution, unavoidable costs relating to the procedures and transactions required by the legal unbundling realized within the scope of the unbundling of distribution and retail sales shall be compensated by the tariffs applied to the distribution or the retail sales company, as appropriate. However, it is essential for these transactions to have been made with minimum cost. A report must be submitted to EMRA with regard to the costs demanded to be reflected on the tariff and such costs must be documented.

Conclusion

Within the electricity sector, it is essential that unbundling be realized within vertically integrated undertakings in order to support the entry of new players to the market and to prevent discrimination between undertakings within the market. The transition from unbundling of accounts to legal unbundling must be considered as an important step under Turkish Law, even if it is only with respect to distribution and retail sales.

LAW OF OBLIGATIONS

Representation within the Frame of Turkish Code of Obligation*

Att. Pelin Baydar

Representation provisions have been stipulated in articles 40 and following, in Turkish Code of Obligation numbered 6098 ("TCO") which has entered into force on 01.07.2012. The TCO has two sections as *"authorized representation"* and *"representation without authority"*.

Authorized Representation

According to article 40 of TCO, the consequences of a legal proceeding issued in the name and on behalf of principal by an authorized representative shall bind the principal directly.

If the representative issues proceedings without informing his title, then the consequences of such legal proceedings shall bind the representative. However, if the other party is in a position to know existence of such representation relationship or if the issuance of legal proceeding with the representative or the principal does not make any difference, then the consequences of such legal proceeding shall bind the principal directly.

According to article 41 of TCO, while determining the content and degree of the representation authority, it is important to evaluate if such representation authority is raised from a legal proceeding or public law.

If the representation in the name and on behalf of principal is raised from public law, the content and degree of the representation authority shall be determined pursuant to legal provisions and if representation is raised from a legal proceeding, then the content and degree

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* ***Article of October 2012***

of the representation authority shall be determined pursuant to such legal proceeding.

If the representation authority is notified to the third parties, then the content and degree of the representation authority shall be determined in accordance with this notification.

According to article 42 of TCO, it is regulated that the principal may always limit or cancel the representation authority arising from legal proceeding. It is void to withdraw from this right previously.

If the principal informed the third parties directly or indirectly that he has granted authority for representation, then he shall notify such third parties about cancellation in part or in whole of such representation authority. Otherwise, he may not allege against *bonafide* third person that he has cancelled such authority.

Article 43 of TCO regulated termination of representation authority arising from legal proceeding. Accordingly, unless otherwise agreed, the representation authority arising from legal proceeding shall be terminated if (i) the principal or the representative dies; (ii) there is a declaration of absence; (iii) the principal or the representative lost legal capacity; or (iv) the principal or representative is bankrupted. The termination of legal entity also results with the same consequences.

According to article 44 of TCO, it is stipulated that in case that the representative is granted with a certificate of authorization, the representative shall deliver such document to the principal or submit it to the place which the judge determines after termination of representation.

If the representative or its successor does not take the necessary actions in order to deliver the certificate, then they shall indemnify the damages of bonafide third parties.

According to article 45 of TCO, as long as the representative is not informed regarding termination of its authority, then the principal and his successor shall be bond with the consequences of legal proceedings issued by the representative. However, in case the third parties know the termination of such authority, this rule shall not be applied.

Representation without Authority

According to article 46 of TCO, in case a person issues a legal proceeding without an authorization, then the principal may only be bond with this proceeding if he gives his approval.

The other party, with whom the unauthorized representative proceeds, may request from the principal to inform within an appropriate time whether he will give approval or not. If the proceeding is not approved within such time, then other party gets free from being bond with such proceeding.

Article 47 of TCO, regulates that if the principal does not give approval expressly or implicitly, the indemnification of such damage arising from null proceeding may be requested from the unauthorized representative. However, in case the unauthorized representative proves that the other party knows his unauthorized representation then the indemnification of such damage may not be claimed from him.

Indemnification of other damages may also be claimed from unauthorized representative with fault, on an equitable basis.

In Conclusion

The TCO articles 40 and following stipulate representation provisions under two sections as *"authorized representation"* and *"representation without authority"*.

The consequences of a legal proceeding issued in the name and on behalf of principal by an authorized representative shall directly bind the principal. If the representation is raised from a legal proceeding, then the content and degree of the representation authority shall be determined pursuant to such legal proceeding. If the representation authority is notified to the third parties, then the content and degree of the representation authority shall be determined in accordance with this notification. The principal may always limit or cancel the representation authority arising from legal proceeding.

In case a person issues a legal proceeding without an authorization, then the principal may only be bond with this proceeding if he gives his approval. If the principal does not give approval expressly or implicitly, the indemnification of such damage arising from null proceeding may be requested from the unauthorized representative.

The Validity Terms of the Contract of Surety pursuant to New Code of Obligations*

Att. Ceyda Buyukoral

The New Turkish Code of Obligations numbered 6098 ("TCO") which has entered into force on 01.07.2012 regulates the contract of surety under article 581 et seq.

Article 581 of the TCO defines the contract of surety. According to the definition, under a contract of surety, the surety undertakes to be personally liable towards the creditor in case the debtor fails to fulfill his obligations.

The contract of surety is deemed valid in case of the presence of the following conditions:

(i) there shall be a valid primary obligation,

(ii) it shall be made in written form and

(iii) approval of the spouse shall be received.

The Existence of a Valid Primary Obligation

According to article 582 of the TCO, the contract of surety requires the existence of a primary obligation. However, a contract of surety may be concluded for a future or a conditional obligation. In such case, contract of surety takes effect when the obligation becomes due or the condition is satisfied. The existence of primary obligation is not required at the time when the contract of surety is concluded; however primary obligation shall exist at the time when the creditor demands the performance of the contract of surety. The surety granted for a conditional obligation takes effect when the condition is satisfied. On the other hand, if the surety is granted for an obligation affiliated with a condition subsequent, obligation of the surety terminates when the condition is satisfied.

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* ***Article of September 2012***

It is also stipulated in the article that the contract of surety may only be concluded for a valid obligation. Therefore, if the primary obligation is arising from a null and void transaction due to illegality, immorality, initial impossibility, informality, simulation, lack of judicial mind, then the surety granted will be deemed to be invalid.

However, if the person standing surety for performance of an obligation arising from a contract that is not binding upon the debtor as a result of error or incapacity to conclude a contract is liable for such obligation if he was aware of the defect vitiating the contract at the time he gave his commitment. According to article 582, the same applies to any person who stands surety for performance of an obligation that is time-barred for the debtor.

The Form of Contract of Surety

According to article 583, the contact of surety is valid if the surety makes a written declaration and indicates the date of the surety and the maximum amount for which he is liable.

The article provides for a specific written form since some clauses of the contract of surety shall be drafted in handwriting. Accordingly, the surety shall draft the followings in handwriting in the contract of surety:

(i) maximum amount for which he is liable

(ii) the date of surety and

(iii) if he is a joint surety, then he shall state that he is liable for the obligation as a joint surety.

The formal requirements applicable to the contract of surety also apply to the subsequent amendments which increase the total liability.

The same formal requirements also apply to the conferral of special authority to enter into a contract of surety and the promise to stand surety for a third party.

The parties may agree in writing to limit the liability of the surety with a certain portion of the obligation.

The Approval of the Spouse

Article 584 provides for a restriction which concerns a married person. A married person may validly stand as surety only with the written consent of his spouse unless the spouses are separated by court judgment.

The approval of the spouse shall be received in advance or at the latest when the contract of surety is concluded.

The approval of the spouse is not required if the subsequent amendments do not increase the total liability, transform a simple surety into a joint surety or substantially diminish the level of the surety's security.

Conclusion

Under article 581 et seq. of the TCO which has entered into force on 01.07.2012, the contract of surety is defined as *"a contract where the surety undertakes to be personally liable towards the creditor in case the debtor fails to fulfill his obligations"* and it is regulated that the validity of the contract of surety is subject to some conditions.

These conditions are:

(i) there shall be a valid primary obligation,

(ii) it shall be made in written form and

(iii) approval of the spouse shall be received.

The existence of primary obligation is not required at the time when the contract of surety is concluded; however primary obligation shall exist at the time when the creditor demands the performance of the contract of surety.

Furthermore, the primary obligation shall be valid. However, if the person standing surety for performance of an obligation arising from a contract that is not binding upon the debtor as a result of error or incapacity to conclude a contract is liable for such obligation if he was aware of the defect vitiating the contract at the time he gave his commitment. The same applies to any person who stands surety for performance of an obligation that is time-barred for the debtor.

The article provides for a specific written form. Accordingly, the contract of surety shall be concluded in writing and the surety shall draft in handwriting the maximum amount for which he is liable, the date of surety and if so, he is liable for the obligation as a joint surety.

Article 584 provides for a restriction which concerns a married person. Accordingly, a married person may validly stand as surety only with the written consent of his spouse given in advance or at the latest when the contract of surety is concluded.

Distinguishing between Guarantee and Suretyship Agreements*

Att. Fatih Isik

Introduction

As is widely known, legal transactions are formed upon consensus of declarations of intent. The purposes of the parties engaging in the legal transactions are reflected in these declarations of intent. However, the parties' declarations of intent may not reflect the real intention of the parties at all times. In some cases, the real intentions of the parties must be determined. The disputes arising in practice mainly originate from determining the nature of the relationship between the parties, making it necessary to determine the rules applicable to this relationship. Even though parties may define their relationship in a certain way, the determination of the nature of the legal relationship between parties must be made according to their real intentions[1]. This general rule is based on Article 18[2] of the Code of Obligations numbered 818 ("CO") and Article 19 of the Turkish Code of Obligations numbered 6098 ("TCO"). Pursuant to the two articles specified, while determining and interpreting the type and content of an agreement, the real and common intentions of the parties shall be taken into consideration regardless of the words used by the parties by mistake or with the intention to hide their real purposes.

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* ***Article of November 2012***

1 **Kocayusufpaşaoğlu, Necip / Hatemi, Hüseyin / Serozan, Rona / Arpaci, Abdulkadir**, Borçlar Hukuku, Genel Bölüm, Istanbul 2008, p. 332. The author indicates that if the intentions of the parties are declared falsely, the rule of "falsa demonstratio non nocet" shall be applied and the nature of the agreement will be determined through an interpretation of the real intentions of the parties.

2 For critique of the article please see **Kocayusufpaşaoğlu / Hatemi / Serozan / Arpacı**, p. 332. According to the author, the article in question has the assumption that the real intentions of the parties are known and it does not regulate how the unknown intentions will be examined. It is indisputable that the author's critique applies to Art. 19 of TCO, since the above article is the same as Article 18 of CO.

Consequently, the legal nature of the relationship between the parties in all cases shall be determined by considering whether or not the declaration of intent of the parties legally qualifies their relationship[3].

Guarantee or Suretyship?

One of the circumstances which requires interpretation of the parties' intentions under Turkish law is a dispute concerning whether a security relationship between the parties is a guarantee agreement or a suretyship agreement. This matter has been discussed in the doctrine and rulings of the Court for a long time[4].

Determining whether the nature of the security relationship between parties is a guarantee agreement or a suretyship agreement is essential, due to differences in the conditions concerning the formation, features and the articles of the agreements, even though their function of security is similar. It is useful to begin by mentioning the differences between these two agreements briefly[5].

For instance, since the obligations arising from suretyship agreements are accessory to the obligations arising from the main agreement, the invalidity of the main agreement shall result in the invalidity of the suretyship agreement. However, in cases where there is a guarantee agreement independent from the main agreement, the creditor of the guarantee agreement may recourse to the guarantor even if the principal obligation becomes or is deemed invalid.

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3 Even though it may be claimed that interpretation is not necessary if the intentions of the parties are sufficiently clear (in claris non fit interpretatio), this view is justifiably criticized in the doctrine. Please see **Kocayusufpaşaoğlu / Hatemi / Serozan / Arpacı**, p. 333. Even if the parties use clear expressions, the determination of intentions, which are opposite to what has been expressed, can only be determined through interpretation. Not applying the method of interpretation because of the clear expressions of the parties may result in undesirable consequences. Therefore, even if the parties' intentions are clearly expressed, determining the real intention of the parties is important.

4 **Barlas, Nami**, Kefalet Hukukuna İlişkin Bazı Sorunlar/ Yargıtay Uygulaması, Ticaret Hukuku ve Yargıtay Kararları Sempozyumu, 2005, XXI, p. 56 vd.; **Develioğlu, Hüseyin Murat**: Kefalet Sözleşmesini Düzenleyen Hükümler Işığında Bağımsız Garanti Sözleşmeleri, İstanbul, 2009; **Kocaman, Arif**, B., Banka Teminat Mektuplarının Hukuki Niteliği Üzerine, Batider 1990, p. 49 - 64; **Özen, Burak**, Kefalet Sözleşmesi, İstanbul 2012.

5 For detailed explanations concerning the differences between suretyship and guarantee agreements and the regulations adopted by the TCO, please see **Asik Zibel, Berna**, Guarantee and Suretyship Agreements, Erdem - Erdem Newsletter, September 2011.

Another difference between these two agreements is in the exceptions and objections arising from the main agreement. In a suretyship agreement, the surety may exercise the exceptions and objections of the principal debtor against the creditor, whereas the guarantor of a guarantee agreement may not exercise the exceptions and objections of the principal debtor against the principal creditor.

The main difference with respect to these agreements is the form requirements. Suretyship agreements may be concluded only by complying with important form requirements, whereas the validity of a guarantee agreement does not require any special form[6].

As seen, there are important differences between these two security agreements. Therefore, a determination of which agreement the parties desire to sign is important. It is observed that parties often use the terms "suretyship agreement" and "guarantee agreement" interchangeably, thus the real intentions of the parties while signing the agreement must be determined. For instance, a 2001 decision of the General Assembly of the Civil Chambers of the Court of Cassation concluded that an agreement referred to as a guarantee agreement by the parties was actually a suretyship agreement, and the Court ruled that the agreement was invalid, since the requirements of form were not respected[7].

Criteria to be Considered

Certain criteria may be used for distinguishing these two types of agreements[8]. The first criteria to be taken into account are the expressions used by the parties. Despite the fact that the expressions of the

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6 However, Article 603 of the Turkish Code of Obligations is reserved. Namely, pursuant to the aforesaid article, in all security relationships which real persons are party to, including guarantee agreements, the requirements of form set forth for the suretyship agreement shall be complied with.

7 Please see Yarg. HGK. 4.7.2001 Tarih E. 2001/19 – 534, K. 2001/583 (www.kazanci.com) For detailed assessment of the decision please see **Kocaman, Arif, B**., Yargıtay Hukuk Genel Kurulu'nun 4.7.2001 Tarih ve E. 2001/19-534, K. 2001/583 Sayılı Kararı Üzerine Bir Değerlendirme – Kredi Kartı İlişkisinde Bankaya Karşı Verilen Kişisel Teminatın Hukuki Niteliği: Garanti mi, Kefalet mi?, Ticaret Hukuku ve Yargıtay Kararları Sempozyumu, 2003, C.XIX, p. 65 et seq.

8 For detailed information please see **Develioğlu**, p. 225-228.

parties are not sufficient to determine the nature of agreement, it is apparent that these expressions are the starting point for determining the nature of the legal relationship. As has been already indicated, the usage of these two words in place of each other causes substantial problems. This circumstance is mostly observed in translations made from foreign languages into Turkish. The English word "guarantee" is translated into Turkish both as "guarantee" and "suretyship". However, the nature of the agreement is not taken into consideration in the course of translation. Therefore, the expressions used by the parties are important in determining the nature of the agreement. Nonetheless, the clarity of the parties' expressions does not remove the need for interpretation.

Other criteria, which can be used, to distinguish between these two agreements are the clauses stipulated in the agreement. Some of the clauses stipulated in the agreement may indicate the presence of a guarantee agreement, whereas some clauses may indicate the presence of a suretyship agreement. For instance, it may be inferred that a waiver of exception aimed at proceeding against the principal debtor instead of the surety or the exception of foreclosure or waiver of the right of recourse may indicate the presence of a suretyship agreement, since the aforesaid exceptions are seen only in suretyship agreements; and it may be accepted that the clauses on waiver of these rights can only be regarded as a suretyship agreement. Additionally, a clause concerning the several and joint liability of both parties may result in the assessment of the security as a suretyship. Further, a reference in the security agreement to the principal agreement from which the principal obligation arises may indicate the presence of a suretyship agreement, since a suretyship agreement is an accessory to the principal agreement, whereas a guarantee agreement is an agreement independent from the principal agreement from which the principal obligation raises.

Furthermore, clauses regarding payment on first request, being bound by an unconditional and non-recourse obligation or the non-existence of an objection right to the debt may result in the determination that the agreement is a guarantee agreement.

Conclusion

As demonstrated, guarantee agreements and suretyship agreements are two different types of agreements which can be easily mistaken for one another. However, it is important to discern between the two, and the above-stated criteria may be used to do so. However, the criteria stated above are separately insufficient for the determination of the nature of an agreement. Besides, each legal relationship has its unique conditions. Therefore, each situation must be assessed on a case-by-case basis when determining if a security relationship is a guarantee agreement or a suretyship agreement.

Legal Issues on Implementation of Article 18(2) of CO (Article 19(2) of TCO) Regarding the Simulation*

Att. Suleyman Sevinc

Introduction

The simulation is stipulated within Art. 19 of the new Turkish Code of Obligations numbered 6098 ("TCO") which shall enter into force on 01.07.2012 and within Art. 18 of the Code of Obligations numbered 818 ("CO"). Pursuant to these two similar provisions, for assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement. The simulated transactions shall be null and void. However, the issue to be discussed within this article is neither the notion of simulation nor the sanctions in case of simulation; an attempt to explicate the literal meaning and intended meaning -purpose- of Art. 18/2 of CO and Art. 19/2 of TCO shall be made herein this article.

Art. 18(2) of CO and Art. 19(2) of TCO

Pursuant to relevant articles, which are the same in their intended meanings but inscribed differently, a debtor may not plead simulation as a defense against a third party who has become his creditor in reliance on a written acknowledgment of debt issued by the debtor. However, there are some points, which are misinterpreted and misapplied within these relevant articles.

For implementation of this article, there must be a written acknowledgement of debt between the parties and this debt must be null because of simulation (fraudulent transaction). Subsequently, the debt arising from acknowledgement of debt subject to simulation must be assigned to a bona fides third party. Therefore, the fraudulent transaction between debtor and creditor should be the main relation and main transaction and not the assignment of receivable.

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* ***Article of March 2012***

Misinterpretation of the Article and Its Implications

The article is misinterpreted in practice as illustrated in this example case: There is a valid relation between A and B and A issues a written acknowledgement of debt regarding his legally valid debt to creditor B. This receivable of A from B is assigned to C with a simulated assignment transaction. A, who finds out that the assignment transaction is simulated, refuses to pay his debt to C. C claimed the receivable arising from the simulated transaction and the Court decided that A is the debtor and it cannot plead simulation as a defense against C.

The article within this framework is misinterpreted and misapplied beyond the intention of legislator with regards to object, subject and purpose of the article.

To articulate this article with regards to its intended object, and give it a legal effect in this illustration the debt contract between A and B must be a simulated transaction. This simulated debt arrangement shall be subsequently assigned to a third party with a valid assignment transaction. However, it should be noticed in the example scenario that the simulated transaction executed between A and B is not the subject matter governed by the article but the legally valid assignment transaction between B and C is the one to consider closely. In other words, there is a confusion as to which transactions should be considered as simulated for implementation of the article.

When the article is examined attentively with regards to the person stated in the article, it will be noticed that the person who cannot assert the simulation allegations as a defense is the debtor of a simulated debt arrangement. The person against whom the simulation cannot be pleaded is a bone fides third party, who is not party to the simulated transaction. In the example scenario, A, the debtor of a valid debt contract, is not party to the simulated transaction. The most important part with regards to the persons for this article is that C, who is assigned as creditor to the simulated debt arrangement, is not bona fides third party but it is actually a party of the simulated transaction.

The purpose of the article is the most important aspect of expounding the intended signification of the article. The lawmaker's will is protection of the bona fides third party and not protection of the parties to

the simulated transaction. However, in the example scenario, the protected person is not the bona fides third party and it is the party of the simulated transaction. Logically thinking and with extensive interpretation of this article it is inadmissible to accept that the legislator aims to protect the interest of parties to a simulated transaction.

Besides, in case of a simulated transaction, the simulation may be also pleaded by the debtor of the assigned receivable[1]. However, if the misinterpretation of the relevant article as explained within this article persists, the possibility to plead the simulation shall no more exist.

The Turkish doctrine also explains in which case these articles may be exercised:

"The situation stipulated within art. 18/2 of CO is as follows:

B issues a debt bond to A to increase its credibility. However A, assigns the receivable to C as a result of misappropriation. In case C, who has not been informed about the fact that the relation between A and B is simulated, claims the receivable from B, B may not plead simulation as a defense against bona fides C pursuant to art 18/2 of the CO."[2]

"For instance, A and B concluded a simulated sale agreement between themselves. B has issued a bond certifying its so called debt to A and A has assigned this invalid receivable to U, B may not plead simulation against U who became creditor in reliance on the bond issued by B."[3]

Conclusion

As seen above, a legal provision, which seem to be simple may become intricate in its application and explication to the relevant situation and may be stretched to cover its obvious meaning, which is

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1 **Von TUHR, Andreas**; Borçlar Hukukunun Umumi Kısmı, Yargıtay Yayınları No.15, Ankara 1983, sf. 274.

2 **Esener, Turhan**; Borçlar Hukuku – I, Akitlerin Kuruluşu ve Geçerliliği, Ankara Üniversitesi Hukuk Fakültesi Yayınları No. 246, Ankara 1969, sf. 104-105.

3 **Oğuzman, Kemal / Öz, Turgut**, Borçlar Hukuku Genel Hükümler, İstanbul 2011, sf. 139.

beyond the lawmaker's intention. In case of such misinterpretation, the wrongful implementation of the article may result with different outcomes than its proposed object.

Non-Liability Agreements under the Provisions of the Code of Obligations*

Att. Suleyman Sevinc

General

Waiver or release of liability with party agreements can take different forms in practice. The most common form is the intention to waive of liability by the type of the fault. Fault types are classified as intentional tort, gross negligence and slight negligence in our law system. Lawmaker has restricted the non-liability agreements in the Code of Obligations in Articles 99 and 100 No. 6098 (in Articles 115 and 116 of the Code of Obligations (TCO) No. 6098 which shall enter into force on 01.07.2012) based on degrees of fault.

Articles 99 and 100 of the Code of Obligations are as follows:

"Article 99

Every condition that shall hold the debtor exempt from liability in the event of deception or gross negligence shall be null.

In the event of slight negligence, if the creditor is under the service of the debtor when the agreement indicating that the debtor shall not be liable for slight negligence is made or if the liability is due to an action that is subject to concession issued by the state, the judge may consider said condition null based on his discretion."

"Article 100

Person, assigning fulfillment of a debt or exercise of a right arising from a debt to persons who live with him or work under his management in conformity with the laws, shall be responsible for the losses caused by said persons during performance of the works.

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* ***Article of July 2012***

Liability arising from the actions of said persons may be excluded completely or partially with an agreement to be previously made between the parties.

If the creditor is under the service of the debtor or if the liability is due to performance of an action realized under a concession provided by the government, the debtor can only hold himself free of liabilities arising from slight negligence."

Provisions of Article 115 and 116 of the TCO are as follows:

"NON-LIABILITY AGREEMENT

Article 115-

An agreement previously made to the effect that the debtor shall not be responsible for gross negligence shall be strictly null and void.

All kinds of agreements previously made indicating that the debtor shall not be responsible for any debts arising from the service contract signed between the debtor and creditor shall be strictly null and void.

If a service, profession or craft requiring expertise can only be provided with the concession provided by the laws or authorized departments, the agreements previously made indicating that the debtor shall not be responsible for slight negligence shall be strictly null and void."

"LIABILITY FOR ACTIONS OF ASSISTING PERSONS

Article 116

Even if the debtor has assigned the fulfillment of the debt or the exercise of the right arising from the debt relationship to a person who lives with him or his assistants like his employees, the debtor shall be responsible for compensating the losses given to the other party during execution of the work by them.

Responsibility arising from the actions of the assisting persons may be excluded completely or partially with an agreement previously made.

If a service, profession or craft requiring expertise can only be provided with the concession provided by the laws or authorized departments, the agreements previously made indicating that the debtor shall not be responsible for the acts of the assisting persons shall be strictly null and void."

In addition to these, certain contract provisions that are included into the agreements and that are considered as not being related with fault and moreover, all kinds of agreements that weaken the legal status of the creditor may be considered as a non-liability agreement as per the Articles 99 and 100 of the Code of Obligations.

Exemption from liability refers to waive of the liability completely with the agreement of the parties. It is claimed in the doctrine that complete waive of the liability is not possible pursuant to Article 99 of the Code of Obligations. Moreover, it is stated that within the framework of this provision that a non-liability agreement covering intentional tort and gross negligence is strictly null and void and that it is irrelevant to say that the liability is waived completely with non-liability agreements covering slight negligence. However, provisions of 100/2 of Code of Obligations are omitted here. Pursuant to this provision, responsibility of the debtor may be discharged completely from the losses that may be caused by the assisting persons.

Although complete waiver of the liability resulting from actions of the assisting persons can be possible in principle, the debtor cannot sign a non-liability agreement related with losses that are caused by him in terms intentional tort and gross negligence. Thus, when only the agreement related with the assisting persons are taken into consideration it can be said that the liability is waived in terms of the debtor but when the non-liability agreement covering losses resulting from the debtor's own actions is taken into consideration, it can be said that the liability is only subjected to limitation.

In the event of an agreement made for limitation of liability, the issues of limitations in terms of subject, person, assets value, amount, and time shall emerge.

Non-liability statements, which are unilateral expressions of will provided for everyone, shall not be considered as non-liability agreements since these do not contain a will agreement in principle. If the

creditor is given the chance to see the non-liability statement and understand its contents and the contract relationship is established afterwards, it can be assumed that the creditor has accepted said non-liability statement. However, said consequence shall require that the creditor is subject to the conditions to see the non-liability statement with a care that is expected from everyone. Otherwise, the creditor is not liable for searching and finding said records and cannot be expected to read the records that are not written in a way that can be read and understood by everyone. Said kinds of records may be taken into consideration as a cause of reduction of the compensation under the liability of unjust action. The action of the addressee, who has been warned as a result of a unilateral expression of will, failing to pay attention to this warning and suffering a loss as a result of said action, may be considered as a concurrent negligence.

Limits of Non-liability Agreements

Article 19 of the Code of Obligations indicates that the subject of the contract may be determined freely within the limits set by the laws; however, it is stated that these shall be applicable provided that these are not in breach with the laws, ethics, public order and personal rights.

It is stated in Article 27 of the TCO that the agreements that are in breach with the imperative provisions of the law, moral, public order, personal rights and agreements with an impossible subject are strictly null and void.

Article 99 and 100 of the Code of Obligations (articles 115 and 116 of the TCO) regarding non-liability agreements should be mentioned as imperative provisions in our law. Pursuant to the main principle stipulated by Article 99 of the Code of Obligations (115 of TCO), waive of the liability resulting from intentional tort or gross omission of the debtor (gross negligence with the term in Article 115 of TCO) shall be in breach with the law. Pursuant to Article 99, even if the responsibility resulting from slight negligence may be waived, the non-liability agreement may be considered null and void based on the discretion of the judge in the event the debtor is performing actions under a concession provided by the state or if the creditor is an employee of the debtor. However, even if the debtor has ensured that all kinds of lia-

bility due to fault of his assistants are accepted by the creditor, the debtor can only exclude the liability due to slight negligence if the liabilities are due to an action that is performed with a concession provided by the state or if the creditor is in the service of the debtor, pursuant to Article 100 of the Code of Obligations. Evaluation of article 115 and 116 of the TCO jointly shall require reaching of different conclusion that covers the exemptions in Articles 99 and 100 of the Code of Obligations partially. Accordingly, if the liability is due to performance of activities that require expertise or if it is due to fulfillment of debt resulting from an employment agreement between the creditor and the debtor, all existing non-liability agreements shall be strictly null and void.

As stipulated under 99/2 of the Code of Obligations, if the liability arises from execution of a profession that is realized subject to concession granted by the government, the judge shall be entitled to render the previously signed non-liability agreements null and void with regards to slight negligence related with said concession activity. Pursuant to Article 100/3 of the Code of Obligations, if the subject of non-liability agreement that waives the liability of the debtor arising from the actions of others is specific to performance of a profession that is subject to a concession granted by the government, the liability may be waived only for slight negligence. It is apparent that the definition of the craft/business subject to concession shall cover the subject situation in addition to activities provided by entrepreneurs under the concession agreements signed with the administrative authorities.

The principle of losses resulting from activities performed under a concession granted by the state not being made a subject of non-liability agreements, as one of the restrictions in articles 99 and 100 of the Code of Obligations in terms of freedom of contract has been subjected to substantial changes with the TCO No. 6098. With said change, the sanction which was subject to the discretion of the judge in Article 99 of the Code of Obligations has been removed and the freedom of contract for non-liability in the event of slight negligence granted to the debtor in Article 100 of the Code of Obligations has been abrogated in terms of content.

Thus, the limitation of liability for the losses arising from the actions of the debtors performing said kinds of actions is no longer possible with the new law notwithstanding that the actions are performed directly or through assistants. Said kinds of non-liability agreements shall be strictly null and void for both gross negligence and slight negligence.

Usury Limits Under the New Code of Obligations to Set Interest Rates: Shall the Limitations Apply to Business Transactions?*

Att. Fatih Isik

Introduction

The parties to a loan agreement may freely set the interest rate to be applied on the amount subject to the agreement. In case the parties did not decide on the interest rates, the interest rates shall be determined in accordance with the rules set forth under Law no. 3095 on Legal Interest and Default Interest ("Interest Act"). Under the Code of Obligations no. 818 ("CO"), the parties could freely determine the interest rates independent of any limitations. However, the Turkish Code of Obligations no. 6098 ("TCO") which is in force since July 1, 2012, unlike the CO, introduced usury limits to the freedom of the parties to determine the contractual[1] interest rates.

Relevant Dispositions

Pursuant to art. 88 of TCO, – which introduced a cap on the maximum amount of interest – the capital interest to be determined by the parties may not be %50 more than the rate to be determined in accordance with Interest Act. Art. 120 of the TCO have a similar disposition for default interest. Pursuant to this article, the default interest rate to be determined by the parties may not be %100 more than the default interest rate to be determined in accordance with Interest Act. On the other hand, art. 8/1 of the Turkish Commercial Code ("TCC") which is

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* ***Article of June 2012***

1 In Turkish law, the terms "legal interest" and "contractual interest" are wrongfully used also because of the Interest Act. It is seen that the terms "legal interest" and "contractual interest" are used to signify capital interest, the interest which occurs on the capital debt without being subject to any default. However, the interest may be either capital interest or default interest and these interest rates may be determined either legally or contractually. Thus, the usage of "legal interest" and "contractual interest" instead of capital interest is a wrongful practice. Because of this reason, within this article, the term of "contractual interest" is used to signify the interest rate that the parties has agreed on (either capital or default interest) and the term of "legal interest" is used to signify the situation where the interest rate is legally determined.

in force since July 1, 2012 stipulates that the parties may freely determine interest rates for business transactions.

Legal Problem

In this case, it is seen that the usury limitations set forth under TCO and the freedom for determination of the interest rates for business transactions stipulated by art. 8/1 of the TCC contradict. Consequently, the problem is to examine whether the limitations set forth under TCO shall be applied to business transactions despite the provision of art. 8/1 of the TCC. In other words, may the interest rates for business transactions be freely determined despite the provision of TCO? Another provision complicating the problem is art. 9 of the TCC. This article stipulates application of relevant legislation to legal, capital and default interests. Since the provisions of TCO are also a part of the legislation on interests, it is possible to defend that the interest rates limitations shall be applied to business transactions.

This legal problem arises from the fact that the TCO does not include any specification regarding the scope of application of the relevant provisions from the point of persons and this problem is discussed in the doctrine[2]. According to an opinion[3], the TCO does not make any difference between the persons within the scope of application of the article such as merchants or non-merchants. The TCO provisions regarding interest rate limitations aim not only to protect the non-merchants but also the merchants because the excessive interest rates practices which is effective for the occurrence of the idea to limit the contractual interest rates caused negative effects also over the merchants. As a result, it must be accepted that the limitations for interest rates shall be applied also to the merchants.

According to other opinion[4], the relevant TCC provisions have the nature as "specific provision" which entered into force on the same

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2 Legal Hukuk Dergisi, September 2005, Year: 3 No: 34, p. 3641; **AYDOGDU, Murat**, 6098 Sayili Turk Borclar Kanununda Faiz ile İlgili Duzenlemeler, Dokuz Eylul Universitesi Dergisi, 2010, Tome 12, N. 1, p. 95; **OGUZMAN, Kemal/OZ, Turgut**, Borclar Hukuku, Istanbul 2011, p. 523; **ARKAN, Sabih**, Ticari Isletme Hukuku, Ankara 2011, p. 77 vd.

3 **AYDOGDU**, p. 95.

4 **OGUZMAN/OZ**, p. 523.

date as TCO. Because of this fact, the TCC provisions, rather than the TCO, shall apply to the merchants. Within this scope, the interest rate for the business transactions shall be freely determined by the parties. According to this opinion, the reference made to application of legal dispositions concerning the interest is addressed only to conditions of interest, to its calculation, its subsidiary nature and interest rates; so that the reference cannot be accepted as addressed to the limitation of the rates. Another interpretation shall be in contradiction with art. 8/1 of the TCC.

It is also expressed in the doctrine that the interest rates for the business transactions may freely be determined despite the fact that the limitations under TCO are statutory for the non-business transactions[5].

Conclusion

Indeed, it must be accepted that the merchants suffered during the economic crises periods because of the excessive interest rates. However, the fact that the TCC which has the nature of specific provision does not limit the freedom of the parties to determine a contractual interest rate, contrarily it stipulates an explicit freedom for determination of them, should be interpreted as the provisions of the TCO provisions regarding interest rate provisions shall not apply to business transactions. Otherwise, legal value of art. 8/1 shall be discussed. Within this scope, it is possible that the freedom stipulated under art. 8/1 of the TCC shall be interpreted as the freedom is valid within the limitations stipulated under TCO. However, this idea cannot be defended by the justification of the article or the chronological development of the article. If the legislator had the idea to limit the interest rates even for business transactions; it would have stipulated it either explicitly or by a reference to TCO. In this case, it is more convenient to accept that the interest rates shall be freely determined for business transactions. However, it should be always reminded that the freedom to determine the interest rates shall be limited with good faith principle, the situation of economic distress of the merchant or the possibility of reduction of the penal clause[6].

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5 **ARKAN**, p. 77.

6 **OGUZMAN/OZ**, p. 523, **ARKAN**, p. 77.

Agency without Authority*

Att. Pelin Baydar

Agency without authority is regulated under section 10 of the Turkish Code of Obligations No. 6098 ("TCO") between Articles 526-531, entitled *"the rights and obligations of the agent"* and *"the rights and obligations of the principal"*.

In General

The aspects of agency without authority are as follows:

1) The Conduct of business: Agency without authority is defined as the conducting of a business. It is not mandatory that the conduct of the business be a legal transaction.
2) The Business of another person: The agent is legally conducting the business of another person (the principal).
3) Lack of authority: The agent does not have the authority to enter into commitments.
4) The will to conduct business: It is not obligatory that the agent bears the will to conduct business in the principal's interest or that the agent's activities are carried out with the knowledge of the person owning the business. It is sufficient that the agent has in general the will to conduct business; in other words the agent's will is aimed at the conduct of business.

The Rights and Obligations of the Agent

Conduct of Business

According to Article 526 of the TCO, the person who conducts the business of another without authorization is obliged to do so in accordance with the other's best interests and presumed intentions in mind.

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* ***Article of December 2012***

The Liability of the Agent Who Conducts Business without Authority

The liability of the agent who conducts business without authority is regulated under Article 527 of the TCO. Under this article, the agent is liable for negligence. The cases where the liability of the agent is judged more leniently are also explained under Article 527.

Accordingly, if the agent acted in order to avert damage or imminent damage to the principal, his liability is judged more leniently. The TCO speaks of "imminent damage to the principal" besides "present damage to the principal", while in the previous Code of Obligations, it was stipulated that if the agent acted in order to avert present damage to the principal, the agent's liability is judged more leniently.

Under the same article, it is regulated that where an agent's activities are carried out against the express or otherwise recognizable will of the principal, and the prohibition was neither immoral nor illegal, the agent is also liable for chance occurrences. If the agent proves that the damages would have occurred due to chance occurrences without his involvement, he may be released from liability.

Lack of Capacity of the Agent Who Conducts Business without Authority

Article 528 of the TCO regulates that where the agent lacks capacity to enter into contractual commitments, he is liable for his agency activity only to the extent that he is enriched as a result of such commitment or he is liable for his agency activity in the amount which he alienated in bad faith. However, liability in tort is reserved.

The Rights and Obligations of the Principal

Agency in the Principal's Best Interest

Article 529 regulates the principal's rights and obligations where the agent carries out activities in the interest of the principal.

The obligations of the principal within the framework of the article:

1) Principal is obliged to reimburse the agent for all expenses that were necessary or useful and appropriate in conducting their

activity, plus interest.

2) Principal shall release the agent from liability for all obligations assumed.

3) Principal shall compensate the agent for any damage incurred as a result of carrying out their activity.

Article 529 of TCO shall apply to the agent if the agent acted with all due care while carrying out their activity, even if the intended outcome was not achieved.

Where the agent's expenses are not reimbursed, he has the right of claim in accordance with the provisions governing unjust enrichment.

Business Conducted in the Agent's Interest

Article 530 regulates the principal's rights and obligations where the agent carried out activities for his own interest.

Where an agent's activities were not carried out with the best interests of the principal in mind, the principle is nonetheless entitled to appropriate the resulting benefits; however the principal is obliged to compensate the agent and release him from obligations assumed to the extent the principal is enriched.

Approval of Agency Activities

Where the agent's actions are approved by the principal after the agent acted without the authority of the principal, the provisions governing agency become applicable pursuant to Article 531.

Conclusion

Articles 526-531 regulate agency without authority; or situations where an agent willfully conducts business and enters into commitments on behalf of another person (the principal) without their authority. The agent and the principal shall have rights and obligations as a result of the conducting of agency without authority.

The agent is obliged to carry out activities in the best interest of the principal and the principal's assumed will, and the agent is liable for negligence. If the agent acted in order to avert damage or imminent

damage to the principal, his liability is judged more leniently; whereas, if the agent's activities are prohibited expressly or otherwise recognizably by the principle, then the agent's liability is increased.

Where the agent conducts activity in the interest of the principal, the principal is obliged: i) to reimburse the agent for all expenses that were necessary or useful and appropriate in conducting his activity, plus interest; ii) release the agent from all obligations assumed; and iii) compensate the agent for any damage incurred as a result of the conduct of his activity. Where the business is conducted in the agent's own interest, the principal is entitled to appropriate any resulting benefit, and the principal is obliged to compensate the agent and release him from obligations assumed to the extent the principal is enriched. On the other hand, if the principal approves the agent's actions, the provisions governing agency in Article 531 of the TCO become applicable.

Franchise Agreements under Turkish Law*

Att. Berna Asik Zibel

Definition

Under Turkish law, franchise agreement, being a *"sui generis"* type of contract, contains features of various other agreements (e.g. sales & purchase agreement, agency agreement, service agreement, mandate agreement) and provisions of the Turkish Code of Obligation ("TCO") and Turkish Commercial Code ("TCC") that are relating to these contracts may also apply to franchise agreements by way of reference. Apart from that, franchise agreements are governed by the general principles of Turkish law, those related to contracts.

The franchise agreements are defined by the doctrine[1] as well as Turkish Court of Cassation[2] as follows:

"A franchise agreement is between two legally independent parties. It gives the franchisee (i) the right to market a product or service by using the franchisor's trademark or trade name, (ii) the right to market a product or service by using the franchisor's operation methods (know-how), (iii) the obligation to pay a royalty fee for such rights. It also obliges the franchisor to (i) provide know-how or license a trademark (or another IP right) and (ii) to support the franchisee."

Types

In general, there are two types of franchising; i) business format; and ii) product distribution by licensing trademark.

Under the product distribution type of franchising, the franchisor licenses its trademark and logo and provides its products to the franchisee and the franchisee sells and distributes the products of the franchisor under the given trademark license. In general, for such type

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* ***Article of May 2012***

1 **GÜRZUMAR, Osman Berat**; Franchise Agreements, Beta Yayımları, Istanbul – 1995; pgs. 8-10.

2 Court of Cassation, 19th Civil Chamber; 25.06.2001, 2001/819 E. - 2001/4917 K.

of franchising, the franchisor does not provide the franchisee with an entire system for running its business.

On the other hand, business format type of franchising provides the franchise with the opportunity to use of a franchisor's products, services and trademarks, as well as the system and know-how to conduct the business.

Elements

The main elements of the franchise agreements can be considered as follows:

(i) The independency of the franchisee from the franchisor (the franchisee's ability to act on its own behalf and for its own account, independently from the franchisor);

(ii) Know-how utilization in the relevant business system and integration of products and/or services;

(iii) Uniform appearance of trademarks and logos on business items;

(iv) Payment of a royalty fee;

(v) The franchisee's obligation to increase the sales; and

(vi) Permanence.

As indicated above, the use of know-how or to license a trademark constitutes one of the main features of franchise agreements. In case the franchise agreements does not include the use of know-how in the production, operation and marketing system, it is highly likely that the agreement not be construed as a franchise agreement but a different form of contract, depending on its contents: For example, in a permanent sale and distribution type of agreement, if the title to the products passes from the principle to an intermediary, yet the contract does not involve transfer/use of know-how, then such agreement may be construed as a distributorship agreement. If the title to the products shall remain with the principle, yet the contract does not involve transfer/use of know-how, then such agreement shall be construed as an agency agreement.

Termination

The franchise agreement may be drafted for a definite or an indefinite term. Under a franchise agreement for an indefinite term, the agreement may be terminated either (i) by giving a "reasonable notice period" or (ii) upon the occurrence of a just cause (for instance the franchisee's breach of the contract and failure to remedy it within a reasonable cure period). In the absence of a contractual arrangement between the franchisor and the franchise dealing with the termination, the relevant party shall provide an "appropriate" notice period before the effective date of any contemplated termination. As per the Turkish doctrine, there is a tendency to apply, by reference; provisions of the TCC on termination of agency agreements to franchise agreements. The Turkish Court of Cassation's decisions are silent on the "reasonable notice period". Generally accepted period for prior termination notice in case of agency contracts with indefinite term is three months. However, there are also scholars indicating that termination notice for a franchise agreement should not be less than 6 months[3].

Franchise agreement with a definite term, shall automatically terminate upon lapse of the contractual term, unless the parties agree on an automatic renewal system. In any case, any party may rely on occurrence of *"just cause"* to immediately terminate the franchise agreement.

If one of the parties terminates the agreement without a just cause, the other party may request the compensation of its tangible (e.g. direct damages, loss of profit, return of the products remain in stock, etc.) and/or intangible damages (e.g. loss of commercial reputation), which he can prove.

Even though the Turkish Court of Cassation's decisions are silent on compensation of royalty fee and portfolio compensation; doctrine recognize that in case of an unjust termination by the franchisor, a franchisee may, depending on the circumstances, claim the compensation of the advance royalty fee he paid and the portfolio compensation[4].

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[3] **GÜRZUMAR**, p. 169-172; DURUKAN Tülin; Franchising Systems and the Turkish Practice, Asil Yayımları, Istanbul – 2006; p. 127-128.

[4] **GÜRZUMAR**, p. 176 *et seq*.

The portfolio compensation herein is, a goodwill compensation for the benefits derived by the franchisor from the clientele formerly introduced by the franchisee, after termination.

Applicable Rules

As indicated above, there is no particular law that directly regulates franchise agreements in Turkey. As a *sui generis* agreement, franchise agreement is mainly subject to the general principles and rules of contracts law as well as the contract law rules, which are applicable to certain kind of agreements that have similarities with the franchise agreements. Turkish scholars believe that certain provisions of the TCC regulating agency agreements should be applied both to distribution and franchise agreements since there are similarities between these three types of agreements such as:

- continuous relationship between the parties,
- grant of right (either exclusive or non-exclusive) to sell products in a defined territory,
- obligations to protect principles' commercial interests and promote business in the defined territory.

Apart from the above similarities, franchise agreements could differ from agency agreements with the use of know-how, operation system and trademarks.

In addition, a franchise agreement might, in particular, concern other rules and regulations such as Turkish competition and intellectual property laws.

As indicated above, one of the main features of the franchise agreements is the use of intellectual property rights and transfer of know-how. So that, the franchise agreements may well be subject to the Turkish intellectual property rights in the sense of licensing requirement, registration, infringement, etc.

As to the competition laws, a franchise agreement sets forth a vertical relationship between the franchisor and the franchisee. They mostly contain vertical restraints such as exclusivity, non-compete or information exchange provisions. To that end, they would be subject to

prohibitions under Article 4 of Law No. 4054 on Protection of Competition ("Law no. 4054") unless the particular agreement benefits from a block exemption or an individual exemption. Article 5 of Law no. 4054 reads as follows: *"All agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect or possible effect the prevention, restriction or distortion of competition within a product or service market shall be unlawful and prohibited"*. Depending on the content of the transferred know-how, the franchise agreements might fall within the scope of application of "Communiqué No. 2002/2 on Block Exemption for Vertical Agreements" or "Communiqué No. 2008/2 on Block Exemption of Technology Transfer Agreements". These two communiqués introduce different and detailed conditions for block exemption. In order to benefit from the block exemption under either of the communiqués, the agreement must fulfill the conditions laid down in the relevant communiqué and must be devoid of the restrictive covenants set forth in such communiqué.

In addition to the above, franchise agreement may be subject to some other rules and regulations under Turkish law with respect to the business and operational side of the agreement depending on the type of activities conducted by the parties. For example, there might be some licensing and operation requirements for the franchisee.

Conclusion

A franchise agreement is a *sui generis* agreement under which a franchisee participates in franchisor's business model by obtaining franchisor's know-how, operational system and business model, the right to use the trademarks and logos that the franchisor holds. Because of their *sui generis* nature; franchise agreements are governed by the general principles of contract law and provisions applicable to typical agreements, which considered as having similar elements with them such as sales agreements, mandate agreements and agency agreements. In addition, despite the freedom of contract principle, franchise agreements have a restricted nature due to competition rules. Therefore, for a specific case, it is always recommendable to seek legal advice before signing a particular agreement in order to achieve full legal conformity.

Distribution Contracts under Turkish Law*

Att. Berna Asik Zibel

Legal Nature of Distribution Contracts

Distribution contracts are qualified as *sui-generis* contracts under Turkish law. A distribution contract may contain the features of a sales and purchase contract, but it differs from the same as it consists of multiple sale and purchase transactions; and it envisages strong connection and loyalty features between the parties, such as exclusivity (unless otherwise agreed) and the permanent character of the performance.

Distribution contracts have some common features with agency contracts in terms of loyalty and the permanent character of the performance. However, a distribution contract differs from an agency contract due to the ability of the distributor to act independently in its own name and on its own account. In addition, a distributor generates profit from the difference between the purchase price and the sale price, whereas an agent is paid a commission for the sales conducted by the principal.

The main characteristics of a distribution relationship are:

(i) permanence;

(ii) the distributor's ability to act on his own behalf and for his own account, independently from the supplier; and

(iii) the distributor's duty to perform activities aimed at increasing the sales.

The distributor sells the contracted products to its own customers, after purchasing them from the supplier. In this respect, the ownership of contracted goods is transferred to the distributor. The profits generated as a result of the sale and all financial and actual risks pertaining thereto shall therefore lie with the distributor. The distributor is not a representative of the supplier but a legally and economically

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* ***Article of December 2012***

independent merchant[1]. The supplier may allocate an exclusive territory or an exclusive customer group to a distributor. In such a situation, the supplier loses the right to lawfully appoint another distributor in relation to the distributor's exclusive territory or exclusive customer group.

Legislation Applicable to Distributor Relationships

The general principles of contract law under the Turkish Code of Obligations No. 6098 ("TCO") shall in principle be applicable to a distribution relationship. Turkish legislation does not provide any provision dealing specifically with distribution contracts. Before Turkish Commercial Code No. 6102 ("TCC") entered into force in July 2012, according to the Turkish legal doctrine and the well-established Court of Cassation's decisions, certain provisions of the previous Turkish Commercial Code ("PTCC") for agency contracts had applied to distribution contracts by way of analogy to the extent appropriate. We believe this application by way of analogy continues during the term of the TCC.

Taking into consideration the special conditions of each different case, the density of the relationship between the principal and the distributor shall be examined. The more integrated the distributor is into the principal's system; the easier the provisions of the agency contract can be applied. Also, the *ratio legis* of the provisions related to agency contracts shall be reviewed to determine whether they also serve to assure the balance of interests of both parties to the distribution contract. The provisions of the TCC related to agency contracts are less detailed compared to the provisions in German and Swiss laws.

Legally Required Form for a Distribution Contract

As per the general rule under the TCO, the validity of contracts is not subject to any legal form, except where a specific form is held

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1 **İŞGÜZAR, Hasan**, Tek Satıcılık Sözleşmesi, Ankara 1989, s. 14; **TANDOĞAN, Haluk,** Tek Satıcılık Sözleşmesi, Banka ve Ticaret Hukuku Dergisi, Aralık 1982, c. XI, sa. 4, s.1; **ERDEM, Ercüment**, Tek Satıcılık Sözleşmesinde Denkleştirme Talebi (Müşteri Tazminatı), Ünal Tekinalp'e Armağan, c. I, İstanbul 2003, s. 93 vd.; **İNAN, Nurkut**, Tek Satıcılık Sözleşmesi ve Üçüncü Kişiler, Banka ve Ticaret Hukuku Dergisi, Aralık 1993, c. XVII, sa. 2, s. 57.

mandatory under a specific law. As there are no specific laws requiring any such mandatory form (including the relevant provisions of the TCC governing agency contracts) a distribution contract may even be entered into verbally. Notwithstanding the foregoing, in light of Civil Procedures Law No. 6100, a written document. *i.e.* a document signed by a principal and an agent, is required to prove the valid existence of a contract if the disputed amount exceeds TRL 2500 (approx. Euro 1100) should there be any disputes regarding the agency relationship.

Termination of Distribution Contracts

Legal scholars and Turkish legal practice provide six forms of termination for distribution contracts. These are; (i) mutual termination, (ii) ordinary termination (without cause) where a distribution relationship is established for an unlimited period of time, (iii) expiry, in the case of a distribution relationship established for a limited period of time, (iv) termination for cause, (v) bankruptcy of either of the parties, (vi) death of distributor/suspension of his civil rights.

Where a contract ends by mutual termination, it is necessary for both parties to agree on the termination of the contract as well as the terms of termination. Apart from that, the expiry of the contract, the bankruptcy or death of one party are also reasons which usually do not cause any legal discussion or dispute. Therefore, our legal analysis on termination of distribution contracts will focus on the scenarios where there is ordinary termination and termination for cause.

a) Ordinary Termination (Without Cause)

Article 121 of the TCC provides that either party may declare termination of an indefinite-term agency contract by giving three months prior notice to the other party. Turkish legal doctrine accepts that this three-month notice period also applies to distribution contracts[2] and this approach is also followed in Turkish legal practice. However, in

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[2] **İşgüzar**, Tek Satıcılık Sözleşmesi, p. 143 et seq., Tandoğan, Tek Satıcılık Sözleşmesi, p. 29 et seq. In some instances, the Supreme Court of Cassation note that the notice period should be determined in view of "the circumstances surrounding the case, the nature and economic weight of the contract, the nature of the parties" (see 11. HD T. 15.01.1992, E. 1990/001959, K. 1992/000096).

Turkish legal doctrine there is also a view that supports that the notice period may be extended due to the dynamics of the relationship (*i.e.* the length of the distribution, the investments made and the nature of the work).

Article 18/3 of the TCC provides that notices or communications of default or termination are sufficiently given only if delivered via a Turkish notary, by telegram, or by registered mail-return receipt requested, and are deemed to have been given as of the date of proper service in accordance with Turkish law. Therefore, it may be advisable to send the termination notice via a Turkish notary public.

b) Termination for Cause

Distribution contracts may be terminated for cause, similar to any other contract types. The term of the distribution contract does not have any bearing on the legal analysis regarding termination for cause. Termination for cause may be possible for all distribution contracts, whether they are concluded for a limited or for an unlimited period of time.

A cause is deemed justifiable if it results in such detriment to the other party as substantially to deprive him of what he is entitled under the contract. To amount to a justifiable cause, the disturbance must shake the trust between the parties, with the result that the parties cannot reasonably be expected to carry on with the contract.

Turkish law would deem any breach by the Distributor of one of its primary obligations (e.g. default in payment, refusal to report on its activities, fraudulent behavior etc.) as a justifiable cause.

Where a justifiable cause exists, the distribution relationship may be terminated with immediate effect by serving a written notice to the other party. Similar to ordinary termination without cause, the termination notice should be sent via public notary, telegram, or registered mail-return receipt requested.

c) Goodwill Indemnity in case of Termination

Before the TCC which entered into force on July 1, 2012 the goodwill indemnity was not prescribed by the provisions related to agency

contracts under the PTCC. However, well-settled decisions of the Turkish Supreme Court of Cassation[3] and Turkish legal doctrine had recognized the distributor's (and/or the agent's) right to claim goodwill indemnity from the supplier (and/or the principal).

For example, the 19th Circuit of the Supreme Court of Cassation had granted goodwill indemnity in favor of a terminated distributor who improved the clientele and goodwill of the producer company with its decision dated May 4, 2000[4] numbered 2000/3470. In this decision, the Supreme Court of Cassation ruled in favor of the distributor stating that except for termination of a distribution contract for justified grounds, the exclusive distributor losing its clientele and suffering financial distress as a result of such termination is entitled to claim goodwill indemnity. The Supreme Court of Cassation justified its findings by means of factual evidence that the distributor had introduced the goods into the Turkish market and made significant efforts to advertise and market the producer company's trademark. Furthermore, the Supreme Court of Cassation asserted that the exclusive distributor who partially or significantly enlarged the clientele of the producer company's products shall be entitled to an appropriate compensation where the contract is terminated without a justifiable reason.

The TCC adopts a similar approach and fills the gap of the PTCC in relation to claims of goodwill indemnity. Therefore, the provisions of Article 122 of the new TCC are also applicable to exclusive distribution contracts and other continuous contractual relationships granting an exclusive right, as long as the situation shall not be against good faith.

The TCC establishes three major conditions for goodwill indemnity to be claimable. These are: (i) the termination is not based on justifiable grounds; (ii) the supplier must derive significant benefits from the clientele formerly introduced by the distributor (the Distributor) after termination of the distribution; and (iii) payment of the indemnity must be compatible with fairness and equity.

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3 See, *inter alia*, decision of the 19th Chamber, No. 2000/3470 of May 4, 2000.

4 Supreme Court of Cassation, 19th. Circuit of Law, the decision dated 04.05.2000 and numbered 1999/7724 E., 2000/3470 K.

In line with established practices of the Supreme Court of Cassation as well as the doctrine (in parallel with the European Union regulations), goodwill indemnity is to be calculated taking into consideration the clientele created by the distributor and the increase in the business volume of the supplier resulting from the distributor's activities. The method adopted to make such a calculation is to take the average of the distributor's net profit accrued during the last five-year period. If the contract duration was less than five years, then the average of the whole activity period shall be taken into consideration.

The TCC specifically states that if the agent (in our case, the exclusive distributor) himself terminates the contract or the producer company terminates the contract with legitimate cause, he shall not be entitled to claim goodwill indemnity. An advance waiver of the goodwill indemnity claim is not accepted by the TCC and claims must be raised within one year following termination of the contract.

The burden of proof to establish that the conditions for goodwill indemnity are met lies with the distributor. Unless it brings sufficient proof, the distributor will lose its right to claim goodwill indemnity.

Apart from goodwill indemnity, based on this provision of Article 121 of the TCC, the distributor should also be compensated for the actual losses arising from termination of the distributor contract without just cause and without having received three month notice.

Distribution under Turkish Competition Law

Article 4 of the Law on the Protection of Competition No. 4054 ("Competition Law") establishes the principles of restrictive agreements between undertakings, decisions by associations of undertakings and concerted practices. It reads as follows: "All agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect or possible effect the prevention, restriction or distortion of competition within a product or service market shall be unlawful and prohibited".

Article 4 of the Competition Law applies to both horizontal and vertical agreements. Vertical agreements are defined as agreements between undertakings active at different levels of the production chain relating to the conditions under which the parties may purchase, sell or

resell goods or services. Therefore, distribution contracts qualify as vertical agreements within the meaning of Turkish competition laws and the Article 4 prohibition may apply to distribution contracts, to the extent it sets forth a restriction on competition as its object or effect.

Turkish competition laws introduced an exemption system whereby restrictive agreements would not be caught by the Article 4 prohibition, if and to the extent they fulfill the conditions of exemption. The applicable statutory base of the relevant exemption regime is the Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("Communiqué No. 2002/2"). The communiqué provides that the prohibitions of Article 4 of the Competition Law will not apply to vertical agreements, if and to the extent they fulfill the conditions of exemption laid down in the communiqués. Article 5 of the Communiqué No. 2002/2 regulates the non-compete obligations in vertical agreements. To be under the scope of the block exemption, non-compete obligations shall not be longer than five years. In general Turkish law follows the route of EU regulation in that respect. On the other hand, a post-contractual non-compete obligation is not admissible under the Communiqué No. 2002/2. But, a non-compete obligation may be imposed on the purchaser provided that it does not exceed one year as of the expiry of the contract, with the conditions that the prohibition relates to goods and services in competition with the goods or services which are the subject of the contract, it is limited to the facility or the area where the distributor operates during the contract, and it is compulsory for protecting the know-how transferred by the supplier to the distributor.

Representations, Warranties and Due Diligence in Mergers and Acquisitions*

Att. Leyla Orak

In this month's Newsletter article, we will assess the impact of conducting legal due diligence on the responsibilities of the parties for merger and acquisitions. This article shall primarily assess the warranty against defects of a seller arising from a sale and purchase agreement and then the effects of legal due diligence on such liability shall be analyzed.

Warranty against Defects Arising from Sale and Purchase Agreements

The main obligation of the seller under a sale and purchase agreement towards the buyer is to transfer the ownership of the goods that are sold to the buyer. The seller warrants that the good shall be delivered to the user without any defects, which is a secondary obligation to the obligation to transfer the ownership. The warranty against defects is a statutory obligation and it does not require an express representation of the seller that the good lacks any defects.

Types of Indemnities against Defects

A defect is a deficiency on the sold good, arising from the good not possessing the qualities mentioned and promised by the seller, or decreasing or abrogating the value or the benefits of the good as per the agreement, which hampers the benefit of the buyer from the good.

The obligation to warranty against defects arises in two situations: in case the good lacks the qualities mentioned and promised by the seller and in case the good lacks the reasonably expected qualities.

Warranty from Declared Qualities

The seller may make specific representations and promise the qualities of the sold goods in the sale and purchase agreement. Quality

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* ***Article of January 2012***

refers not only to the inherent specifications of the sold good, but also to any material (any adverse quality decreasing or abrogating the value or convenience of the sold good in comparison with the goods of the same type), financial (e.g. past year financial statements of the target company) or legal relationship (e.g. lack of requisite permits for the site of operations of the target company) which may be considered to effect its value. Such declarations may either state that the good possesses a certain quality (affirmative promise) or it lacks certain qualities (adverse promise). Furthermore, even though the seller does not explicitly promise and assure any quality, if an agreement presumes the existence of certain qualities and the seller, by signing the agreement without any reservations, shall be deemed to have implicitly warranted such qualities.

Warranty from Expected Qualities

Although the seller does not explicitly promise that the sold good possesses a certain quality or lacks deficiencies, the sold good shall possess the qualities necessary for the expected purpose of its sale. The seller shall be responsible from such necessary qualities even if it is not aware of such deficiencies or it has not mentioned or promised such qualities. Certain conditions must be met in order for the obligation of warranty to arise:

- There Must Be a Deficiency, Which Decreases or Abolishes the Value or Fitness of the Goods for Particular Purpose.

The purpose of allocation and usage of the goods may be determined as the purpose explicitly or implicitly agreed jointly upon by the parties. Failing such agreement of the parties, the purpose of allocation and usage of the goods shall be determined by taking into consideration the established practice at the place of sale, the particularities of the situation, terms and conditions of the agreement and similar aspects. Deficiencies of such qualities may result in material, economic or legal defects, as explained above while assessing the quality of the goods.

- The lacking of such quality must materially decrease or completely abolish the value or the fitness of the sold goods.

A material defect shall mean a defect, which would have resulted in the non-execution of an agreement or the decrease of its price if it

were known to the parties. The seller shall not be held responsible of nonmaterial defects unless it specifically warrants that such deficiencies are not present or certain qualities are present. Nevertheless, if the seller warrants the existence of a certain quality, the seller may not claim that such defect does not materially decrease the value of the good and shall be held responsible of this nonmaterial defect.

- The defect on the good must be hidden.

Pursuant to article 197 of the Code of Obligations numbered 818 (the "CO"), the buyer shall be presumed to have accepted any defect present on the sold good if it is aware of such defect and nevertheless has purchased the good. The defect shall be classified as detected at first glance if it may be discovered without conducting an examination, and as evident if it may be detected through conducting an examination. If the buyer has bought the good without previously conducting an examination, the seller shall not be held responsible for defects on the good that may be detected at first glance. Yet, if the buyer has conducted an examination prior to the purchase of the sold good, the seller shall further not be responsible from evident (unhidden) defects which could have been detected had the buyer shown necessary and ordinary attention. However, in such a situation, if the seller expressly provides a warranty that such evident defect is not present, its responsibility from warranty against such defect shall endure.

Defects, which may not be detected despite a thorough examination, are hidden defects. The seller shall be held responsible of such defects which are not revealed even through examination, regardless of such defect being warranted or not.

- The deficiency shall be present on the good prior to the transfer of the liability of losses to the buyer.

The seller shall not be held responsible from defects which arise after the liability of loss on the goods is transferred to the buyer and which do not relate to previously present conditions[1]. This rule shall

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[1] Pursuant to the CO, unless stipulated otherwise, the liability of loss shall be transferred to the buyer as of the execution of the sale and purchase agreement. The Code of Obligations numbered 6098 which will come into force on July 1, 2012 has amended this rule. Liability of loss of movable goods shall belong to the seller until its delivery, and the responsibility of immovable goods shall belong to the seller until the registration of the purchase.

apply regardless of whether the defect may be detected at first glance, or is evident or hidden. In order for the seller to be held responsible therefrom, the hidden defect shall be present on the good prior to the transfer of the liability of loss to the buyer.

- The responsibility of the seller shall not be waived by the agreement.

The parties to the sale and purchase agreement may limit or completely waive the obligation of the seller of warranty against defects. Nevertheless, limitations on warranties shall not be valid if the seller has fraudulently hidden the defect, caused the buyer to act based on a mistake and induced the buyer to execute the agreement with the terms and conditions that the buyer wishes.

Referring to the Provisions Governing Warranty against Defects and Requirements of Examination and Notification

In order for the buyer to hold the seller responsible from warranty against defects, it is required for the buyer to have fulfilled the obligation of conducting an examination. The buyer shall examine the sold good as soon as possible and confirm whether the sold good possess the necessary or promised qualities. The buyer may personally conduct the examination or procure the examination to be done by a third party should it necessitate specific professional knowledge.

The buyer shall conduct the examination as soon as possible. Pursuant to article 25/3 of the Turkish Commercial Code, the examination shall be conducted within eight days following the sale for sale and purchase of commercial commodities. In order for the seller to be held liable of defects, the buyer shall immediately notify the buyer of such defects detected through examination (CO art. 198).

The Possibilities of the User Resulting from Warranty against Goods

If the aforementioned conditions for responsibility from warranty against goods are fulfilled, the buyer shall have certain options. The buyer may request either the decrease of the purchase price paid under the sale and purchase agreement, the termination of the agreement or the replacement of the sold good with a good of the same type, if the

good is a fungible good (CO art. 202, 203). The buyer shall select its option in line with its benefits. However, under certain circumstances where the parties have not reached a consensus with respect to the chosen option, a lawsuit may be filed where the judge may rule on another option different from the chosen option. For instance, in case of a termination lawsuit, the judge may decide on the purchase price to be decreased instead of termination if it determines that the loss to be incurred by the buyer and seller are clearly disproportional. The parties may further provide in the agreement the option of the buyer to request the seller to repair and eliminate the defect.

Impact of a Legal Due Diligence on Warranties

In merger and acquisition of companies, the transferring and acquiring parties execute a share purchase agreement. This agreement is regarding the transfer of a target company or enterprise and such enterprise shall be purchased through transfer of shares or assets. The transfer transaction is a sale and purchase agreement of an asset or share certificates, as a result of which the seller has the obligation of warranty against defects explained above in mergers and acquisitions. In practice, the buyer conducts due diligence on the enterprise in order to confirm that the purchased enterprise possesses the qualities defined in the sale and purchase agreement.

Types of Due Diligence

The examination conducted on the sold good may be in relation to legal, operational, strategic or financial matters. Financial due diligence comprises of a detailed investigation of the economic and financial situation of the target enterprise Strategic due diligence is an examination on the characteristics and inclinations of the market in which the target operates. Operational due diligence is the investigation of the management, and information and product technologies of the target.

The legal due diligence on the other hand analyzes the legal structure (establishment, bodies, permits, employees, facility agreements, distribution, license and similar material agreements, legal disputes, assets, intellectual property rights and similar aspects).

Due diligence is beneficial and is of an importance for the buyer in order to determine the risks, liabilities, scope of representations and warranties of the seller and the value of the target enterprise, and for the seller in order to have a possibility to rectify any potential obstacles.

The due diligence may be conducted by the buyer or the seller. The seller shall provide all necessary documentation in relation to the target to the buyer in a virtual or physical environment. The buyer shall have the opportunity to conduct an examination on the target by reviewing such provided documentation.

The seller may also conduct this due diligence (vendor's due diligence). The seller provides the buyer with the result of the due diligence conducted by independent and specialized persons. The seller may warrant that all information provided is accurate and complete. In such a case the seller is in an advantageous position during negotiations for having had the opportunity to take measures against certain risks which may be faced.

Consequences of Conducting a Due Diligence

Due Diligence Conducted Prior to the Execution of the Agreement or Prior to the Transfer of the Rights

The buyer may conduct a due diligence prior to the execution of the agreement. The buyer shall purchase the sold good based on the report prepared as a result of this due diligence. If the seller provides all necessary documents for this examination and the buyer purchases the sold good based on the due diligence, the responsibility of the buyer from the warranty against defect of the sale will be limited. This due diligence shall constitute the examination of the sold good by the buyer. The responsibility of the buyer for warranty against evident defects that may be detected as a result of this examination (and defect that may be detected without any need for examination) will cease.

The acceptance by the buyer of the legal due diligence report prepared by the seller shall delimit the responsibility of the seller with respect to warranty against defects to the same extent as the buyer's due diligence. Nevertheless, such a report may at the same time be considered as a promise of quality in relation to the sale by the seller.

Therefore, if a quality specified in the report is not existent, the seller shall be responsible of the declared quality (as explained above).

However, if the seller did not provide the buyer with certain facts and necessary documents, which could have identified the defects of the examined enterprise by grave fault and fraudulent actions, or has not provided such information in its vendor's due diligence report, its responsibility shall not be limited even if a due diligence has been conducted. Furthermore, the sellers' responsibilities from hidden defects, which may not be detected through examination, shall endure (CO art. 200).

Due Diligence Conducted Prior to the Execution of the Agreement or Prior to the Transfer of the Rights

Such a due diligence shall not have an impact on the responsibility of the buyer on warranty against defects. This due diligence shall constitute the examination that the buyer is legally obliged to conduct after the purchase in order to hold the seller liable from the defects.

Effects of Representations and Warranties on Liability

Pursuant to CO article 187, one of the conditions for the seller to be responsible from defects of a sale is that the defect shall be a hidden defect. As mentioned above, any deficiencies, which are or may be detected as a due diligence conducted prior to the purchase, shall no longer constitute hidden defects. The seller shall not be held responsible from (unhidden) defects, which may be detected by the buyer through a due diligence conducted on the sold good with due attention. The responsibility of the seller shall only endure if the seller has fraudulently hidden certain facts and information or in case of a hidden defect.

Therefore, the parties of a share purchase agreement prefer to draft the representations and warranties of the seller in detail. This is done especially given the difficulty of determining which defect shall continue to be a hidden defect after conducting a legal due diligence. Pursuant to CO article 197, the seller shall not be responsible of such hidden defects. Likewise, the representations and warranties have an important role in determining the mentioned and promised qualities.

The seller warrants under the representations and warranties of the share purchase agreement that the purchased enterprise actually possesses the qualities claimed to be possessed by the enterprise. These provisions determine the qualities of the enterprise and therefore the responsibility of the seller; given that any discrepancies between the declared qualities and the qualities present in the enterprise shall constitute a defect. The buyer is requested to assume certain risks by its representations and warranties; frequently the representations and warranties include a provision that all information and documents provided by the seller during the due diligence are accurate and complete and the seller did not refrain from the provision of any information or document.

Conclusion

The seller is obliged to ensure that the good, whose property is transferred to a buyer under a sale and purchase agreement, does not possess any defects. If the buyer detects that the sold good has defects as a result of conducting an examination thereon and notifies such defect, it may hold the seller responsible from its warranty against defects. In such a case, the buyer may either request a discount in the purchase price, or the termination of the agreement or the replacement of fungible goods. If the buyer purchases the good after conducting an examination, it will be assumed to have accepted the (evident) defects, which may be detected as a result of the examination; and consequently the buyer shall not be held responsible of such defects.

The mergers and acquisitions include the execution of a sale and purchase agreement. The buyer shall examine the sold company or enterprise through conducting a due diligence thereon. Therefore, such a due diligence shall result in the seller not being responsible of defects that are not hidden defects. On the other hand, if the seller knowingly and fraudulently hid certain facts as a result of which certain defects are not identified, the responsibility of the seller with respect to warranty against defects shall continue.

The seller may explicitly warrant that certain evident defects detected through the due diligence are no longer existent. The sellers provide an explicit promise that the purchased company or enterprise

bears certain qualities and does not possess certain defects under the representations and warranties in the share purchase agreements. Such promises define the responsibilities of the seller.

Legal due diligence and the representations and warranties drafted based on the results of such due diligence determines the scope of responsibility of the seller of warranty against defects. Therefore conducting a due diligence and drafting of the representations and warranties in the share purchase agreements in detail are of a material importance.

Defective Goods and Liability for Defective Goods Pursuant to Law No. 4077 on Consumer Protection*

Att. Pelin Baydar

Article 4 entitled "Defective Goods" of the Law No. 4077 on Consumer Protection ("Law No. 4077"), regulates the definition of defective goods; those liable for defects; the consumer's rights to choose from available remedies; and the time periods for using these rights.

The Term of "Defective Goods"

Firstly, "goods" are defined as any movable properties, immovable properties used for residential or vacation purposes, and any software or other intangible audio, visual or similar goods prepared for use in electronic medium subject to purchase or sale.

Pursuant to Article 4 of Law No. 4077, a good that contains, material, legal or economic deficiencies which influence the quality promised or offered on the packaging, labeling, presentation or operating instructions or advertisements or announcements, or which is declared by the seller or established in the standards or technical regulations; which influence the quantity affecting the expected quality; or which decreases or eliminates its value or the benefits expected from such good by the consumer with respect to its fitness, shall be deemed defective.

Consumer's Right to Choose From Available Remedies

The relevant article imposes an obligation on the consumer to notify the seller of the defect within thirty days following the date of delivery of the good. In such case, the consumer shall be entitled to (i) rescind the contract by asking full refund, (ii) demand the replacement of the good with a non-defective good, (iii) ask for decrease in the purchase price proportionally to the defect, or (iv) ask for a gratis repair.

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* ***Article of March 2012***

The seller is under the obligation to realize the request selected by consumer. In addition to the right of choice, the consumer shall also be entitled to claim indemnity from the manufacturer-producer, in the event that the defective good causes death and/or injury and/or damages to other properties in use.

Liability for Defective Goods

The manufacturer-producer, seller, dealer, agent, importer and the lender who extends a facility in accordance with the fifth paragraph of Article 10 shall be held jointly liable for the defective good and the elective rights of the consumer. In the event more than one person is responsible for the loss resulting from the defective good, these persons shall be held jointly responsible. Not knowing that the sold good was defective shall not relieve these persons from responsibility. The manufacturer-producer, seller, dealer, agent, importer and the lender who extends a facility in accordance with the fifth paragraph of Article 10 of Law No. 4077 or of the ninth paragraph of Article 10/B shall be held jointly liable for defective goods and the consumer's elective rights provided in this article. Pursuant to paragraph 9 of Article 10/B, the liability of the housing finance corporation who extends loans is limited to one year commencing from the date of delivery and to the amount of loan lent. It is regulated that even if the loans pursuant to the ninth paragraph of Article 10/B are transferred, the liability of the first lender housing finance corporation shall continue and the transferee corporation shall be exonerated from liability. In the event that more than one person is responsible for the damages caused by the defective good, joint responsibility shall rise from statutory provisions. Not knowing the defect existing in the sold good shall not exonerate from this responsibility.

Statute of Limitations

Liability from defective goods is subject to a statute of limitations of two years following the delivery of goods to the consumer even if the defect appears later on, unless the persons responsible for defects undertake a responsibility of defects for a longer period of time. The statute of limitations is set forth as five years for immovable properties used for residential and vacation purposes. Claims, which arise from

any damages caused by the defective goods, are subject to a time limit of three years. Such claims cannot be made after the ten year period following the day on which the good that caused the damage has been launched to the market; however, it is regulated that in the event the seller intentionally or fraudulently hid the defect of the good from the consumer then time limitations shall not be applied.

Goods Purchased with Acknowledgement of Their Defectiveness

Provisions other than the provisions pertaining to liability for damages caused by defective goods under the Article 4 of Law No. 4077 shall not apply to the goods purchased by acknowledging their defectiveness at the point of sale.

The manufacturer or seller is obliged to affix a label on the good or its package, easily legible by the consumer, bearing the word "defective" clearly displayed on the defective good to be offered for sale. There is no obligation to affix such labeling on the goods at the places where only defective goods are sold, or a store or department, which has been permanently allocated for the sale of defective goods, in a manner easily noticeable through an elementary inspection by a normally diligent consumer. It is regulated that the defectiveness of the good shall be indicated on the invoice, receipt or sales document given to the consumer. Unsafe goods cannot be supplied to the market even with the label "defective".

The provisions of Article 4 of Law No. 4077 shall also apply to all consumer transactions relating to the sale of goods.

The Regulation on Liability of Damages Caused by Defective Goods

"The Regulation on Liability of Damages Caused by Defective Goods" ("Regulation") prepared by the Ministry of Industry and Commerce has been in effect since 2003.

The aim of the Regulation is to establish the procedures and principles of the liability manufacturer/producer for damages caused by defective goods.

The definition of the term "goods" in the Regulation is the same as the definition under the Law No. 4077, but the "defect" is defined dif-

ferently from the Law No. 4077. Pursuant to Article 5 of the Regulation, the goods, which do not provide the security that the consumers expect when taking into consideration launching to the market, reasonable usage and the time of launching to the market of the good and similar aspects, are defective goods. On the other hand, it is expressly regulated that a good shall not be deemed defective based solely on the fact that a more developed and higher quality good is launched to the market.

Pursuant to article 6 of the Regulation entitled "Liability", if a person dies or gets injured or a property is damaged due to a defective good, the producer-manufacturer shall be obliged to compensate such damage without the need to prove negligence.

Pursuant to Article 6 of the Regulation, in the event that more than one person is responsible for the damages caused by the defective good, such persons shall be held jointly responsible as stated in the Law No. 4077. However, if the damage is caused by the consumer or a third person under the responsibility of the consumer, then the manufacturer or the producer's liability may be mitigated or absolved taking into consideration all circumstances.

Article 8 entitled as "Disclaimer" states that any provisions in the agreement or any other document stating that the consumer waives its rights under the Regulation or limiting or removing the producer's/manufacturer's obligations under the Regulation shall be deemed void.

Conclusion

Law No. 4077 and the Regulation defines what a defective good is. The consumer shall notify the seller of the defect within thirty days following the date of delivery of the good. The Law No. 4077 regulates the elective rights of the consumer. In addition to such rights, the consumer is entitled to claim indemnity, in the event that the defective good causes death and/or injury and/or harm to other properties. Persons responsible for defective goods are regulated under the law and joint responsibility is foreseen.

Defects Liability of Contractor under Contract of Work*

Att. Ceyda Buyukoral

Contract of Work is regulated under Articles 470 – 486 of the Turkish Code of Obligations ("TCO") numbered 6098, which has been entered into force as of 01.07.2012 after being published in the Official Gazette dated 04.02.2011 and numbered 27836.

Definition of Contract of Work

Article 470 of the TCO defines Contract of Work as "a contract under which the contractor undertakes to perform a certain specified work whereas the principal undertakes to pay a price in exchange".

The New Code of Obligations worded the terms differently than the abrogated Code of Obligations.

Defects Liability of Contractor

The general liabilities of contractor are regulated under article 471 of the TCO, liabilities of contractor with respect to material and equipment are regulated under article 472 of the TCO and liabilities of contractor with respect to timing and performing work are regulated under article 473 of the TCO. The defects liability of contractor is regulated under article 474 and subsequent articles.

Pursuant to Article 474 of the TCO entitled "Determination of Defect", the principal shall examine the work in due course following the delivery and if there is defect, inform the contractor within a reasonable time.

Each contracting party, at its own cost, may request from an expert to examine the work and compile a report.

Alternative Rights of Principal

In case of a defects liability of the contractor, the alternative rights, which may be exercised by the principal, are set forth under Article

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* ***Article of June 2012***

475 of the TCO.

According to the aforesaid article, in case of a defects liability of the contractor, the principal shall exercise either of the following rights:

1. Revocation of contract provided that the completed and delivered work is not suitable for the intended purpose of principal or the work is not incompliance with the contract and therefore it is not justifiable to force the principal to accept the work.
2. Receiving the work as delivered condition and requesting discount proportionate to defect.
3. Requesting the correction of works from the contractor free of charge unless the repair costs considerable amount.

It is stipulated that apart from the above-mentioned alternative rights, the principal's right to claim compensation in accordance with general rules is reserved. Therefore, in case of an occurrence of defects liability of the contractor, the principal is legally entitled to claim compensation.

If the work is performed on principal's immovable property and removal of works will cause considerable damages, then the principal cannot exercise right to revocation of contract.

The liability of the principal is regulated under Article 476 of the TCO. As per the aforesaid article, the principal cannot exercise rights if defective work results from the principal's instructions despite the contractor's explicit counter notification or if it results from any other faults attributable to the principal.

Acceptance of Work

Pursuant to Article 477 of the TCO entitled "Acceptance of Work", the contractor is exonerated from liability when the principal accepts the work either explicitly or implicitly. However, the contractor is held liable if the contractor conceals the defect willfully or if defect is not apparent and cannot be detected during the regular examination.

If the principal fails to examine the work within a reasonable time and send notification promptly –or as soon as defects are spotted where

defects could only be detected at a future date–, then it is deemed as acceptance of the work.

Limitation Period

In case of defective work, the limitation period for filing a case with respect to movable properties is two years, with respect to immovable properties is five years and if the contractor has gross fault, twenty years commencing from the delivery date.

Conclusion

Contract of Work, defined as a contract under which the contractor undertakes to perform a certain specified work whereas the principal undertakes to pay a price in exchange, is regulated under articles 470–486 of the Turkish Code of Obligations numbered 6098, which has been entered into force as of 01.07.2012

In case of an occurrence of defects liability of the contractor, the principal will have three alternative rights which are (i) revocation of contract, (ii) requesting discount proportionate to defect and (iii) requesting repair of work from the contractor free of charge.

The principal can exercise the right to revocation of contract if the delivered work is not suitable for the intended purpose of principal or the work is not incompliance with the contract and therefore it is not justifiable to force the principal to accept the work.

Apart from the abovementioned alternative rights, the principal's right to claim compensation in accordance with general rules is reserved.

In case of defective work, the limitation period for filing a case with respect to movable properties is two years, with respect to immovable properties is five years and if the contractor has gross fault, twenty years commencing from the delivery date.

LABOR LAW

The Code of Labor Health and Safety and Its Purview*

Att. Alper Uzun

Going beyond the Labor Act numbered 4857, the Code of Labor Health and Safety which provides for the numerous detailed regulations concerning the labor health and safety is promulgated in the Official Gazette in 30 June 2012. Some articles of the Code will enter into force on the publish date, however, general provisions will be enter into force 6 months after the publish date.

The Code regulates duty, competency, responsibility, right and obligations of the employer and employees in order to establish labor health and safety in the working place and to improve the present labor health and safety conditions. The Code will be applied to all affairs, working places, employers in those working places and its agent, including apprentices and interns in the public and private sector regardless of the area of activity. Today, the Code is such as to answer a serious exigency and also this matter is emphasized in its purview.

Working life involves fullest extent of the maters such as labor, working conditions, social security, vocational education, labor health and safety. The article 49 of the Turkish Constitution stipulates *"Working is everyone's right and obligation. State takes all the necessary measures to protect employees and support working in order to enhance the employees' life standards, improve the occupational life. State takes facilitating and protective precautions in order to establish labor peace in employee-employer relations."* Furthermore, the article 56 of the Constitution stipulates *"State provides the continuation of everyone's life in physical and mental health and it realizes the cooperation increasing savings and efficiency of man and material power."* On this matter, concerning labor health and safety the United Nations

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* ***Article of June 2012***

Universal Declaration of Human Rights of 1948 emphasizes *"Everyone has the right to work, to choose its professions and to work in fair and convenient working conditions."* Yet, numerous international agreements regulate that everyone must have fair and convenient working conditions and that the workplaces must provide the necessities of labor health and safety.

The Labor Act numbered 4857 which is currently in force remains limited only with the employees working within scope of a labor contract. Hence, a part of employees in the country stays out of the scope of the Labor Act and for this reason, they cannot benefit from the services concerning the labor health and safety.

Today, taking into consideration the changes in the definition of employee and working place, it can be accepted the insufficiency of the definition of the employee as a working person attached to employer and working place in exchange for a payment. In several country, the notion of worker steps forward rather than the notion of employee. Therefore, without making any discrimination, the health and safety of all the workers must be provided against the risks rising from the work during the exercise of profession even if they are not attached to a work place.

Therefore, the purview of the Code is the existence of a difference between the national health and safety legislation and the provisions accepted internationally and the existence of a necessity of its amelioration. The reason of the publish of this Code is also the fact that the employees encounter the dangers in the working place during their all working life, that there is a necessity to take precautions to protect the health and safety of workers in the workplace and that the frequency of occupational accidents and diseases has not been brought to an acceptable level.

Today, it is interiorized a corrective approach involved general principals concerning creation of constant amelioration and prevention politics, participation of workers to the administration, deliberation, education of employees and representatives. The Code, being prepared in a coherent way with the European Union's legal acquis, underlines that the providing the health and safety of employees' in the working place is one the principal duty of an employer.

The Code aims the exercise the professions of employees' without having concerns of health and safety while they profess and also to create a healthy and peaceful society alongside of efficiency.

Briefly, the Code prioritizes the employees' health and safety at work. However, when we scrutinize, it will be revealed that the Code involves numerous regulations. The Code regulates the following matters;

- The organization of the workplaces to provide a proper working area
- The sufficiency and convenience of the air-conditioning, lightening, the level of noise and vibration and the other conditions of workplace for the employees' health
- Taking the convenient and sufficient precautions in order to prevent the injuries caused by slip, fire, explosion, electric shock and similar risks
- To provide the design, installation and usage of the machines, tools and equipment in order to prevent diseases and accidents
- To take precautions for the labor health and safety when it is compulsory to use dangerous materials which can cause disease and accident
- To use the personal protection equipment provided by the employer in circumstances where common protection measures cannot be provided in order to prevent from risks
- Using vehicles special for the purpose in the employees' transfer
- To design the common places such as cafeteria, rest room, etc. in accordance with the necessities of employees
- To make the necessary arrangements depending on the type and the place of work to determine the measures which will be taken in the workplace
- To search ways and methods to adapt the work to employees' changing physical and physiological conditions and if it is possible to apply those methods
- Making the work convenient for a person

- To foresee that the employees can give different reactions to the incidents in the workplace, taking into consideration the differences of the people in a general working environment evolution and organization
- If it is possible, to arrange working place in compliance with the pleasures of different people, taking into consideration psychological and social conditions at work
- To prevent from monotony, stress and isolation adapting the working conditions to human abilities and depending on this, to provide to the employees the assignment to design their own working conditions
- To make arrangements by employer in order to help to establish the communication between the employers and to effort to establish the coherence between the different positions.

International and national legislation assigns all responsibility regarding work health and security to employers. It is the general obligation of the employer to protect the health and safety of the employees against any perils and risks arising from the workplace or the work they execute. The obligation of the employers to take measures and the obligation of protection for the employees constitutes at the same time an obligation for the state. The completeness of equipment of the employer while executing this obligation shall not abrogate the responsibility of the employer. Moreover, executing part or all of the obligations of the employer by outsourcing is not deemed sufficient, as laid out by jurisprudence. Therefore, as regulated in detail in this Code, the employer shall prioritize ensuring workplace health and security and make the workplace organization accordingly. The employer shall seek to avoid the perils, fight the risks, accordingly amend workplace conditions and even render the work convenient to the employee. Furthermore, the employer shall provide its employees the necessary training. The Code also foresees certain sanctions against employers who do not fulfill their obligations.

The Code stipulates also in which working place workplace health and safety unit will be created and that the election of the people who will be a part of this unit, its working order, duty, authority and responsibility. Moreover, the right to avoid work which is stipulated in the

Labor Act numbered 4857 is improved even if its substance remains the same.

To conclude, this Code contains detailed regulations concerning labor health and safety in conformity with the national and international improvements and answers a serious exigency.

Law of Trade Unions and Collective Bargaining Agreements Has Entered into Force*

Att. Alper Uzun

Scope and Objective of the Law

The new Law No. 6356 on Trade Unions and Collective Bargaining Agreements (the "Law") was published in the Official Gazette dated 07.11.2012 and entered into force upon publication. The law regulates the procedures and principles regarding the establishment, management, operation, inspection, running and organization of employee and employer's unions and confederations. The Law further establishes the procedures and principles for entering into collective bargaining agreements between employees and employers in order to mutually determine their economic and social status and working conditions and for settling disputes amicably and resorting to strike and lock-out.

A new situation regarding the union rights and freedoms emerged with the amendment made to the Turkish Constitution in 2010 with the Law numbered 5982. As a result of these Constitutional amendments, it became inevitable for the laws on the collective labor relations to be re-evaluated in a more liberal manner.

The amendments that were made with a more liberal approach in the articles have been rendered incoherent amongst the non-amended articles of these statutes. In addition, since the partial amendments that were made do not offer coherence, it could not succeed in the solution of the problems encountered in practice. Therefore, the necessity to legislate a long-termed law, which will take the labor relations system a step further in accordance with the current concerns, and at the same time which will bring substantial solutions to working life has arisen.

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* ***Article of November 2012***

The Reforms Brought by the Law

The Law re-regulates union rights and freedoms, right of collective bargaining and free labor negotiations by taking into account international norms and on the basis of principles of a liberal and democratic society. In preparing the Law, the European Union and International Labor Union "ILO" norms, the structural problems of the working life, the judicial precedents and criticisms in the doctrine, were taken into consideration.

The union rights and freedoms, free collective bargaining and the resolution ways of the collective bargaining disputes have played a significant role in the relations between Turkey and ILO from 1932 when Turkey became a member to ILO, until today. The union rights and freedoms and the process of liberated collective bargaining are re-regulated under the Law by taking into account the ILO Convention No. 87 and 98. The issues of establishment of a union, membership to a union, being a manager in the union, union assurances, union activities, the operation and inspection of unions, free collective bargaining, the solution of labor disputes and level of collective bargaining agreements are regulated in parallel with the Conventions No 89 and 97. Within the Law, many provisions of the Revised European Social Charter are taken into consideration including mainly Article 5 on the right to organize and Article 6 on the right to bargain collectively and to strike.

Framework contract and group collective bargaining agreements are defined for the first time with this Law. The Law regulates the establishment, organs, activities and operation of trade unions in addition to collective labor bargaining agreements level, free collective bargaining, resolution of labor disputes and signing of collective bargaining agreements.

In accordance with the Convention No. 87 which provides a liberal internal-organization for unions, the Law has given unions priority in the regulation of the establishment and organization of their activities. In this regard, numerous points will be regulated under bylaws of the unions.

The number of line of businesses is reduced and re-regulated pursuant to world-wide practices. The determination of line of businesses

is no longer a prejudicial issue in the competence disputes. This change was done in order to overcome the problems faced by the unions in the determination of competence. Procedures of becoming a member to unions and resigning from the unions are no longer subjected to notarization. Moreover, the number of documents required in the establishment of unions is reduced and the declaration of the founders is taken as a basis. The restrictions made in the organization of the activities of unions within the Law numbered 2821 were removed and the authority regarding the organization of the activities is left to the organs of the unions or to their bylaws.

The law re-regulates the free collective bargaining regime and the right to conclude collective bargaining agreements, on the basis of a free and democratic society pursuant to the reaction given to international norms by the Turkish business life. In this section, new regulations with respect to collective bargaining regime are brought, especially concerning the resolution of labor disputes. While regulating these issues, ILO Convention No.87 and 98 and the norms of the European Union are taken into consideration. In the preparation of the Law, demands of the parties, judicial precedents and criticisms in the doctrine were taken into account as well. Therefore, in this section of the Law, substantial amendments are made at the right of concluding collective bargaining agreement, strike and lock-out. The group collective bargaining agreement, which had found an application area with the case law before, is defined in the new Law and its scope of application is widened. Therefore, now, it is possible to sign collective bargaining agreement with more than one party in a line of business. The matter of multiple collective bargaining agreements arising with the transferring of a workplace to another employer, that occupied the judiciary mostly, is re-regulated. This issue was regulated in order to resolve the problems in determining the agreement which shall apply in cases where more than one collective bargaining agreement emerges.

Under this purpose, the line of business threshold, which continuously brought Turkey to the agenda of the ILO, is decreased to 3%. The principle requiring for more than half of the employees of a workplace to be member to the union is preserved, however, with respect to enterprises, the threshold is decreased to 40%. Besides, competence, nego-

tiation and mediation process in the collective bargaining agreements is re-regulated.

With these new regulations, unions are foreseen as an active party in all the levels of collective bargaining. The ordinary mediation phase, which used to consist of three methods, is reduced to one. However, pursuant to the Law, the parties can still resort to voluntary reconciliation. The use of voluntary reconciliation and mediation has replaced the private arbitrator mechanism, which was not used frequently, even though was part of Turkish law. Thus, workload of the High Board of Arbitration is reduced.

The matter of strike and lock-out, which was subject to the intervention of the government frequently, is re-regulated. The lawful strike and lock-out is re-defined in accordance with the Constitutional amendments of 2010. The prohibition of strike is restricted. Prohibitions of strike and lock-out are restricted by the essential public services showing vital nature. With this Law, union rights and freedoms, free collective bargaining right and the resolution of the labor disputes are re-regulated in compliance with the universal principles.

Conclusion

Law No. 6356 was prepared in accordance with the norms set forth by the European Union and The International Labor Organization and in consideration of the structural problems of working life, as well as criticisms in the doctrine. It abrogated Trade Union Law No. 2821 and Collective Bargaining, Strike and Lock-out Law No. 2822. The Law aims to regulate activities of the employee and employer's unions and confederations and it also aims to determine issues related to collective labor agreements. The Law provides the establishment principles, the organs, the revenues and auditing principles of the employee and employer's unions and confederations, sets provisions regarding the membership to these organizations, provisions about the activities of these union organizations and general principles of collective bargaining agreement and strike and lock out; the running of confederations and designates the issues related to collective labor agreements.

Job Security Provisions in the Labor Act No. 4857*

Att. Ceyda Buyukoral

"Job Security" is regulated under Article 18 et seq. of the Labor Act No. 4857 ("Labor Act"). The right of an employer to terminate an employment contract by giving prior notice to an employee is restricted by law for the purpose of protecting the job security of an employee.

Termination by Giving a Prior Notice

An employment contract with an indefinite term may be terminated if prior notice is given in accordance with Article 17 of the Labor Act. The Labor Act provides for different notice periods depending on an employee's seniority. Pursuant to Article 17:

"Following the receipt of written notice by either party, the contract of an employee will terminate as follows:

a) at the end of the second week, if the employment lasted less than six months;

b) at the end of the fourth week, if the employment lasted more than six months but less than 1½ years;

c) at the end of the sixth week, if the employment has lasted more than 1½ years but less than three years; or

d) at the end of the eighth week, if the employment lasted three years or more.

The above periods are minimums and may be increased by contracts."

Termination for Valid Cause

The number of employees defines the limits of an employer's latitude to terminate an employment contract. In workplaces where the number of employees is less than thirty, employers are given wide lat-

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* ***Article of November 2012***

itude to terminate employment contracts. However, in workplaces where the number of employees is thirty or more, any dismissal must be justified with a valid cause.

Article 18 of the Labor Act stipulates that in a workplace where there are thirty or more employees, any dismissal of an employee who has been employed for at least six months under an employment contract for an indefinite term shall be subject to a valid cause which may be the requirements of the job or the workplace, or the capacities or behavior of the employee.

The same article enumerates some particular cases that will not constitute valid causes for termination. Pursuant to Article 18, the following cases cannot be deemed as valid causes:

a) membership in a trade union or participation in union activities outside of work hours or within work hours with the consent of the employer;

b) being the trade union representative for the business;

c) the filing of a complaint or participation in proceedings against an employer involving alleged violations of laws or regulations or recourse to competent administrative or judicial authorities;

d) race, color, sex, marital status, family obligations, pregnancy, birth, religion, political opinion and similar reasons;

e) absence from work during maternity leave when female employees must not be engaged in work, as foreseen in Article 74;

f) temporary absence from work during the waiting period due to illness or accident as described in Article 25 of the Labor Act.

As it is explained herein above, in workplaces where there are thirty or more employees, any dismissal must be subject to a valid cause. The job security provisions are applicable for those who have been employed for at least six months under an employment contract with an indefinite term. However, the job security provisions are not applicable to the employer's representative authorized to manage the entire enterprise as well as the employer's representative managing the entire establishment but who is also authorized to recruit and to terminate employees.

The number of employees must be calculated by taking into consideration all employees employed in all workplaces belonging to the same employer in the same sector. Similarly, the minimum six-month seniority of an employee must be calculated by taking into consideration his employment periods in all workplaces of the same employer as a whole.

Procedure for Termination of Contract

Article 19 of the Labor Act regulates the procedure for termination of employee contracts falling within the scope of the job security provisions. Pursuant to Article 19, the employer must issue a written notification where the cause of termination is clearly and precisely specified. If and when the cause is the capacity or behavior of the employee, then the employer shall grant the employee the opportunity to defend himself against the allegations. The right of the employer to terminate a contract for just cause in accordance with Article 25/II without giving prior notice is however reserved.

Procedure of Objection against Termination

Pursuant to Article 20 of the Labor Act, the employee who alleges that no reason was specified for the termination, or who considers that the reasons specified were not valid to justify the termination, shall be entitled to file a lawsuit against that termination in the Labor court within one month following receipt of the notice of termination. If the parties so agree, the dispute may also be referred to private arbitration within the same period.

The burden of proving that the termination was based on a valid reason shall rest on the employer. However, the burden of proof shall be on the employee if he claims that the termination was based on a reason different from the one presented by the employer.

Consequences of Termination without a Valid Reason

If the court or the arbitrator concludes that the termination is invalid, the employer must re-engage the employee in work within one month. If, upon application by the employee, the employer does not re-engage him in work, the employer shall pay to the employee compen-

sation not less than the equivalent of four months' wages and not more than the equivalent of eight months' wages.

In its decision ruling the termination invalid, the court or arbitrator shall also designate the amount of compensation to be paid to the employee in the event he is not re-engaged in work.

The employee shall be paid up to four months' total of his wages and other entitlements for the time he is not re-engaged in work while a final decision is being reached.

If advance notice pay or severance pay has already been paid to the reinstated employee, it shall be deducted from the compensation awarded by the court or the arbitrator. If term of notice has not been given, nor advance notice pay paid, the wages corresponding to the relevant term of notice shall also be paid to the employee not re-engaged in work.

For re-engagement in work, the employee must apply to the employer within ten working days following the date on which the finalized decision was communicated to him. If the employee does not apply within the said period, termination shall be deemed valid, in which case the employer shall be held liable only for the legal consequences of that termination.

Conclusion

The job security provisions are regulated under Article 18 et seq. of the Labor Act. In a workplace where there are thirty or more employees, dismissal of an employee who has been employed for at least six months under an employment contract for an indefinite term shall be in accordance with Article 17, and must be justified with a valid cause. Examples of a valid cause may be the inability to fulfill the job requirements or to perform adequately under workplace conditions, or the employee's behavior. Otherwise, the employee has the right to initiate a lawsuit for wrongful dismissal.

Termination of the Employment Agreement with Valid Reason on the Basis of Incapacity of the Employee*

Att. Fatih Isik

Introduction

Employment agreement creates a constant relation between the employer and the employee and imposes contractual duty on employee to serve to a satisfactory level. Since the employment agreements create constant relations between the parties, the agreements are concluded, in principle, for an undetermined term. The agreement for a determined term may be concluded only in some exceptional cases. Art. 11 of the Labor Act numbered 4857 ("LA") stipulates that the agreements in which the term is not stated shall be deemed as is concluded for an undetermined term. The same article states also the cases in which the employment agreement can be concluded for a determined -or fixed- term. Pursuant to said article, an employment agreement for a determined term can be concluded only if the agreement is concluded for a work which has a specified term or for a specific work or the work is based on the emergence of objective conditions; otherwise, the agreements for determined period cannot be concluded.

The fixed-term agreements, which are duly concluded, expire automatically once the term agreed for the agreement is reached. The fact whether the agreements are "duly" concluded for a determined term presents its importance in Article 11(2) of LA. Pursuant to said article, an employment agreement for a definite term must not be concluded more than once, except when there is an essential reason which may necessitate repeated (chain) contracts. Otherwise, the employment contract is deemed to have been made for an undetermined term from the very beginning.

However, since there is not a fixed term for the agreements for an undetermined term, it is not possible to accept that the parties are bound by the agreement forever. As a solution, it is accepted that the

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* ***Article of March 2012***

agreements for an undetermined term may be terminated in some cases being subject to some procedural requirements.

Valid Reason for Termination of the Agreement

The termination of the employment agreement for an undetermined term by the employer is subject to existence of valid or just reason. However, the employee may terminate the agreement without any just or valid reason provided that the employee fulfills the legal procedural requirements. The agreement may be terminated immediately in case of a just reason whereas the termination for valid reason must be notified to other party granting the time periods stipulated in LA. In this concept, the termination for just reason is defined as "abrupt termination" and the termination for valid reason is defined as "termination by notice". Hence, the party who wishes to terminate the agreement shall notify the other party regarding the termination of the agreement with reasonable period of notice.

The concept having effect on the legislation regarding the proper process of termination of the employment agreement by the employer for valid reason is the concept of "job security", which is accepted in Turkish Labor Act, with Act numbered 4773 and effected the LA. The aim of the job security is to uphold the rights of employees and set legal boundaries to how and in what circumstances an employer can terminate the contract by giving notice. As an effect of the job security concept, the employer shall respect the time periods and have a valid reason for termination.

The LA does not determine what the valid reasons may be; however, it is stated in Article 18 of LA that the valid reasons shall arise from the behaviors or the capacity of the employee or from operational requirements of the enterprise, work place or work.

Even though the valid reason is not defined within the article, the valid reason may be explained as the reasons, which have negative effects on conduct of the work and work place and which are not as serious as the reasons stated in Article 25 of LA.

Underperforming as a Valid Reason for Termination

One of the most prominent valid reasons for termination of the employment agreement is incapacity of the employee. The incapacity of

the employee may be due to professional incompetence or physical incapacity. For instance, the continued ill health may be accepted as physical incapacity whereas continued unsatisfactory performance or inability of the employee to work according to requirements of job may be accepted as a professional incapacity. The valid reasons and especially underperforming is not clearly regulated under the legislation and the details of its implementation are constructed by the court decisions.

As stated by the 9th Civil Chamber of High Court of Cassation in several decisions, the criteria for underperforming must be based on objective principles for a just termination of the agreement on valid reasons. Pursuant to the judicial precedents, the criteria must be determined being particular to that work place and the underperforming shall be evaluated considering also other employees at the same work place. The criteria must be, indeed, realistic and reasonable for a duly termination of the agreement. As a main requirement by the courts, it should be stated that the criteria must be determined before the termination and the employee must be notified by these criteria. Yet, is not possible to terminate the agreement on the basis of incapacity of the employee of which the employee is not aware of.

It should be also added that, sole existence of a valid criteria and of the fact that the employee is underperforming, shall not be sufficient for termination of the employment agreement. Hence, the underperforming of the employee should cause negative effect for conduct of the work in the work place. This requirement arises from the justification of the Art. 18 of LA which defines valid reason as "the reasons which have negative effects on conduct of the work and work place and which are not as serious as the reasons stated in Art. 25 of LA." Also the precedents of the High Court of Cassation require existence of negative effect for a just termination of the agreement on valid reasons.

Conclusion

The incapacity of the employee and their underperformances as a valid reason for termination of the agreement is not explained in detail within the legislative texts. Therefore, existence of valid performance criteria and subsequently existence of a just termination of the agreement shall be evaluated separately for each case considering the precedents of the courts.

The Concept of Contracting Authority within the Subcontract Relations*

Att. Fatih Isik

Introduction

The subcontracts are quite often exercised in both the public and private sectors and it offers employment flexibility. Despite the fact that the concept of subcontract emerged as a result of necessities, its exercise should be limited in order to protect the rights of employees and thus, the exercise of subcontract is rendered subject to restrictive conditions. Besides these requirements, the employer and the subcontractor are held jointly liable for the receivables of the employee.

The Dispositions Regarding Subcontract

The subcontract relation is defined in Article 2/7 of the Labor Act numbered 4857 ("LA") as follows: *"The connection between the subcontractor who undertakes to carry out work in auxiliary tasks related to the production of goods and services or in a certain section of the main activity due to operational requirements or for reasons of technological expertise in the establishment of the main employer (the principal employer) and who engages employees recruited for this purpose exclusively in the establishment of the main employer is called "the principal employer-subcontractor relationship"*.

The same article points also the joint liability of the principal employer with the subcontractor as follows: *"The principal employer shall be jointly liable with the subcontractor for the obligations arising from this Labor Act, from employment contracts of subcontractor's employees or from the collective agreement to which the subcontractor has been signatory."*

As seen, the principal employer is jointly liable with the subcontractor for the receivables of the subcontractor's employees. The lawsuits for receivables of the employees are addressed to both the princi-

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* ***Article of January 2012***

pal employer and the subcontractor; in case the receivables are not paid by the subcontractor, it could be also received from the principal employer which has, in general, a better financial situation.

The Requirements for Subcontract and the Concept of Contracting Authority

The presence of a subcontract relations are subject to some requirements and a subcontract relation shall not exist in each case where another employer does some of the works. Art. 2/7 of the LA requires certain conditions, which are also accepted by the doctrine: (i) the principal employer should employ some employees at the work place, (ii) the work should be done at the work place of the principal employer, (iii) the work should be related to the main activity of the work place, (iv) the work should be undertaken by the subcontractor due to operational requirements or for reasons of technological expertise, (v) the employees should be employed only at the work place of the principal employer.

It should be emphasized that all of the conditions should exist collectively and existence of only one of the conditions or some of them should not be sufficient to constitute a subcontract relation.

The first condition for presence of subcontract relation is employment of employees of the principal employer at the work place. The principal employer should keep the function of employer and it is necessary that the principal employer has not left the whole work to a subcontractor. Accordingly, a subcontractor which undertook to carry out a work to be solely completed, in a turn-key manner, should not be considered as a subcontractor but as a principal employer[1]. The employer, which has given the work to another contractor, should not be considered, as a principal employer and shall be out of the subcontract relation. In this case, the first employer shall be considered as "contracting authority" and shall not be liable for the receivables of the employees of the subcontractors. For instance, in case the General Directorate of Highways shall give the whole work of construction of highways to a construction company, the company shall be the princi-

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1 **Suzek, Sarper**, Is Hukuku, 3. Bası, Istanbul 2006, s. 137.

pal employer and the General Directorate shall be the contracting authority and there will be no subcontracting relation[2].

In some parts of the projects, the contracting authorities appoint some employees in order to control the works. This fact may be interpreted as the contracting authority has employees at the work place. However, this fact should not be interpreted sufficient to accept the contracting authority as a principal employer[3].

The High Court of Cassation has also decided that the contracting authorities should not be considered as a principal employer[4].

"In case the work is carried out in whole by another employer, a subcontract relation would not exist and a joint liability could not be mentioned within the terms of Law numbered 506. Accordingly, in case the employer has granted the task to carry out the work to other persons through tenders without employing employees, the owner of the work (contracting authority) shall not be considered as a principal employer as defined in the legislation and a sub contract relation would not exist."

Conclusion

As seen above, the constitution of a subcontract relation could not be reckoned in each case where a contractor carries out the work. In case the work is carried out in whole by a contractor, the contractor shall be the principal employer and the owner of the work shall be considered as contracting authority. In this case, the contracting authority shall not be included within the subcontract relation and shall not be liable for the receivables of the contractor's employees.

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2 **Suzek, Sarper**, Is Hukuku, 3. Bası, Istanbul 2006, s. 137.

3 **Kılıcoglu, Mustafa / Senocak, Kemal**, Is Kanunu Serhi, 2. Baskı, Istanbul 2008, s. 68.

4 The decision of the Plenary Assembly of High Court of Cassation dated 02.02.2011, Case no. 2010/21-739, Decision no. 2011/5; see also the decision of the 9th Civil Chamber dated 13.9.1994, Case no. 1994/3429, decision no. 1994/11465, the decision of the 21st Civil Chamber dated 24.10.2002, Case no. 2002/7988, Decision no. 2002/9046.

INTELLECTUAL PROPERTY LAW

Infringement of Trademark Rights*

Att. Ceyda Buyukoral

Decree Law no 556 pertaining to the Protection of Trademarks ("Decree Law no 556"), article 61 and the following articles regulate the provisions with regard to infringement of trademark rights.

Act of Infringement and Its Penalty Clauses

Article 61 of Decree Law no 556 regulates the conditions of infringement of trademark rights. According to article 61, following circumstances shall be considered as infringement of a trademark right.

i) violations of Article 9, which regulates the rights arising from trademark registration,

ii) use of the identical or confusingly similar trademark without the consent of the proprietor of the trademark,

iii) in spite of being aware or reasonably expected to be aware that a mark is plagiarized; selling, distributing or putting the goods into commercial use or a place in the custom territory or keeping them in possession for commercial purposes,

iv) to expand the scope of rights acquired by a trade mark license contract or to transfer them to third parties.

Penalty provisions are stipulated under Article 61/A of Decree Law no 556. Accordingly, those who produce or sell or put into commercial market the goods, infringing protected rights of trademark proprietor, shall be sentenced to imprisonment between one and three years and pay a judicial fine up to twenty thousand days.

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* ***Article of January 2012***

Those who remove the registered trademark sign or symbol from the product or package shall be sentenced to imprisonment between one and three years and pay a judicial fine up to five thousand days.

Those who dispose on a trademark right owned by a third person by the way of sale, transfer, rent or pledge without an authority shall be sentenced to imprisonment between two and four years and pay a judicial fine up to five thousand days.

If the above-mentioned crimes are committed by a legal entity, then special precautionary measures shall be implemented additionally.

In order to award the above-mentioned punishments as a penalty for the relevant crimes, the trademark must have been registered in Turkey.

The above crimes are prosecuted on complaint.

Appeals of the Proprietor of the Trademark

According to article 62, a proprietor of a trademark whose rights have been infringed may in particular appeal for the following at the Court:

i) appeal for the cessation of the acts of infringement,

ii) appeal for remedies of infringement and request compensation for damages incurred,

iii) appeal to request the confiscation of the products and the equipment and machinery used to produce these products, which of production and use of such products shall be subject to penalty due to infringement of a trademark right,

iv) appeal for the proprietorship over the products confiscated in accordance with subparagraph (iii); in this case the value of the products shall be deducted from the compensation awarded. If the value of the products established to be above the compensation value awarded, the proprietor of the trademark shall repay the balance to the infringing party.

v) appeal for enforcement measures for the prevention of continued infringement of rights, request the erasing of the trademark from the products and vehicles or if it is essential for the

preclusion of the acts of infringement, request the destruction of the products and vehicles confiscated particularly in accordance with subparagraph (iii),

vi) request the disclosure to the public and to those related with the court's judgment by means of publication, costs of which to be met by the offending party.

Article 63 stipulates the competent courts for the civil proceedings by the proprietor of the trademark against third parties. The competent court, for the institution of civil proceedings by the proprietor of a trademark against the third parties, is the court of the domicile of the plaintiff or of the place where the acts was committed or of the place where the act had effect.

Where the plaintiff is not domiciled in Turkey, the competent court is the court of the domicile of the authorized agent and if the agent's registration has been cancelled, the court of the domicile of the Institute.

The Competent Court, for the institution of proceedings by the third parties against the proprietor of a trademark, is the court of domicile of the defendant. If the applicant or trademark right holder is not domiciled in Turkey, the competent court is the court of the domicile of the authorized agent and if the agent's registration has been cancelled, the court of the domicile of the Institute. Where there are several competent courts, the court at which the proceedings are initiated first shall be the competent court.

General Provisions

Article 64 stipulates the compensation provisions. Pursuant to article 64, the person who, without the consent of the proprietor of the trademark, procedures, sells, distributes or puts the goods into commercial use or imports for commercial purposes or keeps in possession shall be liable to remedy the illegality and to compensate the damages he has caused. Despite being warned by authorized trademark holder to stop further trademark infringement or misuse, the person who used in any form of plagiarized trademark, shall be liable to compensate the damages he has caused.

Article 65 stipulates about the documents evidencing infringement. Accordingly, the proprietor of a trademark can request from the infringing party to present the documents related to unauthorized use of trademark, for valuation of the suffered economic loss resulting from the infringement of the trademark.

According to article 66, the economic loss borne by the proprietor of the trademark includes not only the value of the actual loss but also the loss of income incurred because of the infringement of the trademark rights. In calculation of the profits surrendered, in particular the economic value of the trademark, the term of protection remaining at the time of infringement, the type and number of the licenses outstanding and similar effects shall be taken into consideration.

Where the proprietor of the trademark has selected one of the evaluation options specified in the subparagraphs of Article 66, the Court, at its discretion, may reward further reasonable amount, if the trademark contributes substantially to the economic value of the product. The assessment of the trademark's contribution to the economic value of the product shall be grounded on the verification that the demand for the product results substantially from the trademark.

According to article 68, the proprietor of a trademark may request additional redress for damages incurred from the improper use of trademark by the infringing party, which were detrimental to the reputation of the trademark.

Pursuant to article 69, proprietor of a trademark has no recourse against the purchaser of the sold products by the person who paid compensation for his acts of breach and cannot initiate any of the legal actions drawn under the provisions of the Section 8 titled as "Infringement of Trademark Rights" of the Decree Law no 556.

According to article 70, the provisions of prescription times stipulated under the Code of Obligations shall have effect concerning the time limits for appeals relating to infringements on trademark rights.

Article 71 stipulates that special courts shall have jurisdiction for all of the actions and claims provisioned by the Decree Law no 556. For actions brought in respect of the Institute's decisions within the Decree Law no 556 and for actions brought against the Institute by the

third parties who have suffered from the decision of the Institute, the Ankara special court shall have jurisdiction.

Article 72 stipulates that where a court case is finalized, the successful party may request the promulgation of the final judgment in full or in part, in a daily paper, radio, television or by other means of the media, the costs of which are to be met by the other party.

The nature and extent of the publication shall be determined in the judgment. Right of publication shall be void if it is not exercised within three months of the final judgment promulgation.

Conclusion

Article 61 and the following articles of Decree Law no 556 regulated the provisions with regard to infringement of trademark rights. A proprietor of a trademark, whose rights have been infringed, may in particular appeal at the Court. For the claims the Code of Obligations shall have effect concerning the time limits for appeals relating to infringements on trademark rights and special courts shall have jurisdiction for all of the actions and claims provisioned by the Decree Law no 556.

Protection Period of Trademark and Renewal of Registration*

Att. Ceyda Buyukoral

Protection for a trademark under Decree-Law No. 556 on the Protection of Trademarks ("Decree-Law No. 556") is obtained by registration.

The Scope of Rights Conferred by Registration

The scope of rights conferred by registration is stipulated under Article 9 of the Decree-Law No. 556. Pursuant to the aforesaid article, the proprietor of a trademark exclusively holds the rights conferred by registration and shall be entitled to vindicate his rights against following actions:

a) using any sign that is identical to the registered trademark in relation to goods or services that are identical to those for which the trademark is registered;

b) using any sign that is identical or similar to the registered trademark in relation to goods or services that are identical or similar to those for which the trademark is registered and for this reason there exists likelihood of confusion on the part of the public, including likelihood of association between the sign and the registered trademark;

c) Using any sign that is identical or similar to the registered trademark in relation to goods or services that are not similar to those for which the trademark is registered, in cases where the use of that sign takes unfair advantage of or is detrimental to the distinctive character or reputation of the registered trademark.

According to the article, the followings may be prohibited:

a) Affixing such sign to the goods or to the packaging thereof;

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* ***Article of April 2012***

b) Placing the goods on the market or stocking them for this purpose or offering delivery of the goods under such sign or providing services under such sign;

c) Bringing the goods into the customs territory and placing the goods under customs approved treatment or use;

d) Using such sign on business papers and in advertising;

e) Using identical or similar sign as a domain name, routing code, keyword and etc. on the internet environment in such a manner that creates commercial impact unless the user has right of use or legitimate connection.

Protection Period of a Registered Trademark

Pursuant to article 40 of the Decree-Law No. 556, protection period of a registered trademark is 10 years beginning from the date of filing of the application. Registration may be renewed for further periods of ten years at the request of proprietor.

Renewal of Registration

The registration of a trademark shall be renewed upon the request of the proprietor or its representative provided that the renewal fee envisaged in the Implementing Regulation of the Decree-Law No. 556 ("Regulation") is paid.

Also, the required documents for renewal of registration are set forth in the Regulation.

Pursuant to article 17 of the Regulation the following documents shall be submitted:

a) Application form -petition-;

b) Receipt confirming the payment of the renewal fee;

c) Power of attorney if the application is filed by a representative or reference to the power of attorney in case that it is submitted earlier.

For each trademark, separate renewal application shall be filed.

In case of a reasonable suspicion, the Institute may request to supply documentary evidence including notarized documents from the applicant.

The Institute may inform and warn the proprietor to remind the expiration date of the registration before expiry date or within another specified time -if foreseen by supplementary other legislation. However, sending a reminder is not onerous for the Institute and shall not be liable if it fails to do so.

Application for renewal shall be filed and the renewal fee shall be paid within six months prior to the last day of the month in which protection period expires. In case that time is elapsed, application may be filed within a further period of six months following the last day of the month in which protection period expires provided that an additional fee is paid.

Renewal shall take effect, if approved, on the following day, at which the current registration expires. The renewal shall be recorded in the Register and published.

The trademarks, which are not renewed within six months following the expiry of the protection period, shall no longer be protected.

Termination of Trademark Right

Article 45 of the Decree-Law No. 556 stipulates that trademark right will be terminated upon expiry of the protection period and failure to renew within the prescribed period. The termination of trademark right shall have effect at the date when the cause of the termination arises. The termination of trademark right shall be published in the relevant Bulletin.

Conclusion

Protection for a trademark under Decree-Law No. 556 is obtained by registration. The protection period of a registered trademark is 10 years beginning from the date of filing of the application. Registration may be renewed for further periods of ten years.

It is elaborated further as to what documents shall be submitted when applying for renewal of registration by the Regulation. The application for renewal shall be filed and the renewal fee shall be paid within six months prior to the last day of the month in which protection period expires. In case that time is elapsed, application may be filed within a further period of six months following the last day of the

month in which protection period expires provided that an additional fee is paid.

The trademarks, which are not renewed within six months following the expiry of the protection period, shall no longer be protected.

MISCELLANEOUS

Amendments on the Regulation for Implementation of Foreign Direct Investment Law*

Att. Ozgur Kocabasoglu

Some amendments have been introduced to the Regulation for Implementation of Foreign Direct Investment Law (the "Implementation Regulation") with the Regulation regarding Amendments to the Regulation for Implementation of Foreign Direct Investment Law (the "Regulation") published in the Official Gazette dated 3 July 2012. With the aforesaid legislation, the provisions regarding the establishment and the operation of the liaison offices and the required documents for the application for establishment have been materially changed. Moreover, the authority of the Undersecretariat of Treasury to implement the Regulation is abandoned and ceased, this authority is handed over to the Ministry of Finance.

Amendments Concerning the Establishment of the Liaison Office

The main modification regarding the establishment of the liaison offices introduced by the Regulation is that the permits in order to establish a liaison office and extensions of the term of these permits will be given by the Finance Ministry instead of the Undersecretariat of Treasury. Furthermore, the Regulation provides for a new provision concerning the companies, which have recently been established under to the law in their home country and wish to found a liaison office in Turkey. According to this provision, before granting an operational permit for these types of companies, the Ministry requires the lapse of a period which at minimum is one year after the foundation of the com-

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* *Article of July 2012*

pany by considering aspects such as the field of the operation, the capital, and the number of the employed workers of the company.

Furthermore, there is also a change concerning the time of consideration for the applications made to request the establishment or the extension of the duration. Now, the applications will be concluded within fifteen business days after the date of application, provided that all the required information/documents are whole and complete.

The rule regarding assessment of the requests of foreign companies to establish a liaison office in order to execute operations in the financial areas regulated with special legislation such as money and capital markets and insurance, by the authorized agency and institutions, in context of the special legislation, has not been changed with the new legislation. However, with the new provision introduced, it is set forth that, in the cases where the Ministry deems necessary, the request to establish a liaison office of the foreign companies in the others sectors where obtaining permits, licenses or similar competence to realize the operations are necessary, will be concluded by receiving the opinion of the agency or institutions which give the above-mentioned permit or license.

Amendments Regarding the Required Documents for the Application

New documents are introduced to the required documents for the application to the Finance Ministry in order to establish a liaison office. In addition to the documents mentioned in the article 7, the application form annexed to the Regulation, the declaration concerning the content of the operations carried out by the liaison office, and including the undertaking that the liaison office may not carry out any commercial activities, and indicates document indicating the authority of signature of the representative signing the abovementioned statement are set forth among required documents.

Amendments Regarding the Operation of the Liaison Office

Before the amendment to the Implementation Regulation, the permits of operation to liaison offices were granted for a maximum term of 3 years and extended each time for maximum periods of 3 years,

taking into consideration of the past year's operations and plans and targets oriented to the future. The rule of granting permits for maximum 3 years at the first application for operation permits of liaison offices is not amended. However, from now on, whether the term will be extended and the duration of the extension will be decided according to the characteristics of the executed operation of the liaison office. Pursuant to the Regulation, operation permits of liaison offices authorized for conducting marketing research or to advertise the products or the services of the foreign company shall not be extended. Apart from that, the Regulation sets forth 5 different categories regarding the characteristic of the operation and according to these 5 categories, the duration of extension can be varied as 5 or 10 years. The operation permits of the liaison offices which conduct operations in the following will be extended for 5 years: (i) representation and entertainment (the representation of the foreign company before the sectorial institutions and the relevant organizations, the coordination and the organization of business contacts of the foreign company's officials in Turkey, providing an office to such persons), (ii) control and supervision of the suppliers in Turkey with regards to the quality and standard and procurement of suppliers (the supervision of the companies which produce in the name of the foreign company with regards to its quality standards, the satisfaction of the demand of products and producers of the foreign company), (iii) provision of technical support (providing training and technical support to the distributors, providing support services to the supplier producers in order to increase their quality standards), (iv) Communication and information transfer (gathering and transmitting information regarding the developments in the market tendency of consumers, sale scores of the rival firms and distributors, performance of the distributor company, etc.in order to transfer to the foreign company which has business relations with Turkey,). The permits of liaison offices, which conduct operation as a regional head office (for the units of the foreign company in the other countries, providing management service and coordination in context of the activities such as the creation of strategies of investment and management, planning, promotion, sale, post-sales services, brand management, financial management, technical support, r&d, foreign procurement, testing of newly developed products, laboratory services, research and analysis, education of employees, etc.) may be extended for 10 years.

On the other hand, the characteristics of the realized operations are not the sole element which will be taken into consideration in order to grant an extension of the duration of the operation. The applications for the extension of duration are made to the General Directorate of the Incentive Implementation and Foreign Capital. The Directorate may conclude the request of the extension of duration considering not only the operations but also the past year's operations of the office, the future business plan and the objectives in Turkey of the foreign company, current and foreseen amount of expense and the number of workers employed.

In the cases where a change of address, representative(s) of the office or title of the foreign company comes into question, at latest within 1 month after the realization of the change, the liaison offices will notify to the General Directorate the lease contract indicating the new address, the certificate of authority relating to the new appointed person or the document(s) with respect to the change of title of the foreign company.

The Regulation gives the Ministry the authority to audit the operations of the liaison offices on whether they operate in accordance with their field of operation stipulated under the law and the permits. This control can be made ex officio or upon the written notification of the relevant agency and institutions. As a result of the audit, the offices which are determined to operate out of scope of the granted permit will be given a period of thirty days as of their application in order to receive the permit for the currently executed operation. This period can be extended for a maximum period of thirty days in existence of valid reasons. At the end of the given time, the operation permits of the offices which do not make any applications will be cancelled. At the end of the audit, the permits of the offices, which are determined to carry out commercial operations, will be cancelled and the situation will be notified to relevant authorities.

Conclusion

With the Regulation, the provision regarding the establishment and the operation of the liaison offices and the required documents for the application in order to establish a liaison office have been materially changed, the Undersecretaries of Treasury has been replaced with the

Finance Ministry. The General Directorate of the Incentive Implementation and Foreign Capital will decide whether to extend the duration of permits concerning the liaison offices which desire to extend the duration of operation permits by taking into consideration the operation areas. Furthermore, the Ministry is granted the authority to audit the operations of the liaison offices to determine whether they execute their operations in compliance with the law and with the mentioned operation in their permit, or not.

Professional Liability Insurance*

Att. Begum Taner Hunturk

Introduction

Professional Liability Insurance ("PLI") is a form of liability insurance designed for compensating damages, which may be caused to third parties as a result of professional errors or omissions during the conduct of the vocation of attorneys, accountants, financial consultants, pharmacists, doctors, engineers, etc. In practice, this form of insurance is usually implemented in certain kind of professional practice, where there is a membership of professional groups such as chambers, unions, or associations. PLI is envisaged to be obligatory within the scope of developing EU legislation. The Communiqué Regarding the General Clauses of Professional Liability Insurance ("Communiqué"), which is published in the Official Gazette dated March 16, 2006 and numbered 26110, is effective in Turkey.

PLI is among the liability insurances implemented within our country.

The Scope of PLI

In general, people who are working in the field of services are the insured parties within the coverage of PLI. The insurer guarantees the compensation claims of insured parties' clients arising out of any potential damage caused by the insured party. In other words, the insurer shall remedy the third parties' injury that may occur as a result of material and physical damage arising out of the professional conduct of the insured party. The following claims for damages, occurring during the professional activity limited by the PLI, shall be covered.

- Damages born during the term of the agreement-insurance policy- and which can be claimed during the term of the agreement or afterwards,

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* ***Article of January 2012***

- Coverage, limited up to an amount by the agreement, regarding claims born during the term of the agreement, which may relate to incidents occurring before the agreement or during the term of the agreement.

The Risks Excluded from the PLI's Cover

The Communiqué regulates the certain kind of risk excluded from the PLI in detail. Thus, the following circumstances are not covered:

- Claims arising out of the activities of the insured party, other than his professional activities prescribed under the policy that are limited by law and ethical rules,
- Any conduct or incident intentionally performed by the insured party during his professional activity,
- Incidents caused by use of alcohol, drugs or narcotics by the insured party or its employees during the conduct of their professional activity.

The Communiqué separately prescribes the incidents, compensation claims and payments out of the scope of the coverage. However, it is also regulated that these issues may be covered under the insurance by an agreement on the contrary between the parties.

According to this, incidents that will be excluded from the coverage, unless there is an agreement on the contrary are mentioned herein below:

- The loss of any written, printed or copied documents that are computer based or electronically storable or any other information or equipment that is under the supervision and control of the insured party,
- Any lawsuits initiated before the courts other than Turkish courts and arbitration,
- Any kind of unfair competition.

Compensation claims that will be excluded from the coverage, unless there is an agreement on the contrary are listed herein below:

- Compensation claims arising out of all kinds of violations of intellectual property rights,
- Compensation claims arising out of liability against the insured party's parents, sister or brother, spouse or children- during the course of his professional activity,
- Compensation claims arising out of liability born from all kinds of environmental pollution,
- Compensation claims in relation to any kind of disease arising out of i) pollution from any nuclear fuel or nuclear waste occurring as a result of such nuclear fuel burnt, ii) radioactive, poisonous, explosive, nuclear compounds or particles, iii) existence, production, processing, sale, distribution, storage, release or usage of chemicals mentioned herein under,
- Claims, which are based upon a special agreement or performance of an agreement exceeding the legal liability limit,
- Moral compensation claims.

The following payments will be excluded from the coverage, unless there is an agreement on the contrary:

- All kinds of criminal convictions including administrative and monetary fines and penal clauses,
- Damages that may arise out of the bankruptcy of the insured party,
- Expenses arising out of any criminal proceeding against the insured party.

The Duties and Liabilities of the Insurer and Insured Parties under the PLI

The duties and liabilities of the insurer and the insured parties are given herein below:

- Giving notice to the insurer within five days from the acknowledgement of the occurrence of the risk
- Taking all necessary measures to avert the risk from happening as if there is no insurance coverage and complying with the instructions of the insurer on this purpose,

- Providing information on the occurrence of the incident, realization of the damage, compensation obligation, the amount and recourse right upon the inquiry of the insurer,
- Notifying the insurer in due course if there is a legal or criminal proceeding initiated against him,
- Notifying the insurer if there another insurance agreement on the subject of the same insurance coverage.

Payment of the Compensation

The insurer shall pay the compensation and the expenses, within fifteen business days from the receipt of all required documents including the investigation report in relation to the incident and damages in subject of the compensation, expert report, policy and its attachments, which is notified to its business center by the beneficiary.

Amendments

The policy owner and the insured party are obliged to notify the insurer if there is a change in the circumstances that would have an effect on the risk without the prior consent of the insurer, within eight days from the occurrence of such change. Upon the acknowledgement of this situation by the insurer, he shall have a right to terminate the agreement or demand for additional premiums, in cases where the insurer is required to renew the agreement on more severe terms or to terminate it.

If the relevant change has a relieving nature or causes to apply a cheaper premium, then the insurer shall pay back the premium difference starting from the date of the change until the end of the insurance agreement.

Notifications and Notices

The notices shall be made to the business center of the insurance company or to the address of the agency underwriting the insurance agreement by the policy owner or the insured party.

The notices that will be made by the insurer to the insured party will be sent to the address of the insured party, and if the notices will

be made to the policy owner, they will be sent to the address of the policy owner through notary public or registered mail.

The notice made by using secure electronic signature will be deemed valid if their return receipt can be proved.

Termination of Professional Activity

In case the professional activity subject of the policy is terminated, then the relevant insurance agreement would also cease and premiums in relation to inactive days would be returned to the policy owner.

Confidentiality in relation to Commercial and Professional Secrets

The insurer and people acting behalf of him shall be liable from damages arising out of the disclosure of commercial and professional secrets and confidentiality of the insured party and policy owner, that are acknowledged during the course of the agreement.

Competent Jurisdiction

The Courts, where the business center of the insurer or the underwriting agency is domiciled, shall be competent to resolve any disputes arising out of the insurance agreement.

Prescription Time

The prescription time for claims arising out of insurance agreements is two years.

Clauses and Special Conditions

Clauses, which are the annexes of general conditions, may include more specific conditions than general conditions. Moreover, parties may agree upon special conditions provided that they are not against the insured party or the policy owner.

Conclusion

It is important for professionals to not to face undesired economic losses because of their conduct of activities. PLI is a preventive mechanism for such risks. On the other hand, nowadays corporate structures are increasing. Thereby, it is useful for companies to insure their employees, if professions, where PLI can be applied, exist within their corporate bodies. In this way the risks and losses would be minimized for corporate bodies, if PLI and other liability insurances are implemented.

Nationality of Legal Entities*

Att. Suleyman Sevinc

Introduction

A clear and explicit definition or any criteria regarding the nationality of a company as a legal entity is not explicitly regulated under Turkish legal system. Nonetheless, under the relevant articles of the Turkish Commercial Code ("TCC") numbered 6102, there are some specific articles indicating the nationality of a company.

One of the articles indicating the nationality of a company is art. 421 of TCC regarding the joint stock companies which provides the voting quorum for amendment of the articles of association. Art. 421 states that; *"Unless regulated otherwise by law or under the articles of association, the resolutions for amendment of the articles of association shall be adopted with the majority of votes present at the general assembly meetings in which at least half of the company's capital is represented."* In the same article, it is indicated that the resolutions with regards to moving the headquarters of the company out of Turkey shall be unanimously adopted by the shareholders representing all shares of the capital or by their representatives. This reference indirectly confirms that the concept of 'nationality of a company' is accepted under Turkish law.

Despite the lack of a clear definition, the distinction between domestic and foreign companies is based on headquarters' location as indicated in art. 40 of the TCC. Pursuant to this article; *"the branches of commercial enterprises whose headquarter is registered in Turkey are registered and announced with the trade registry where the branch is located at."* and also *"the branches of commercial enterprises whose headquarter is registered out of Turkey are registered as local commercial enterprises by reserving the provisions of their laws regarding the trade name."*

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* ***Article of October 2012***

Nationality of Entities Regulated under the Banking Law

The Banking Law no 5411 published in the Official Gazette dated 01.11.2005 and numbered 25983 (reiterated) differentiates the companies incorporated in Turkey and the foreign companies incorporated out of Turkey. Article 6 of the Banking Law regulates the establishment or the permission for branch and representative office in Turkey as; *"The establishment of a bank in Turkey or the opening up of the first branch in Turkey by a bank established abroad shall be permitted upon affirmative votes of at least five members of the Banking Regulation and Supervision Board provided that the establishment conditions laid down in this Law are fulfilled."* Under art. 6/4 of the Banking Law, it is stated that; *"The banks established abroad may open up representative offices in Turkey with the permission of the Board provided that they do not accept deposits or participation funds and those they operate within the framework of the principles to be set by the Board."*

Art. 7 of the Banking Law states the conditions for establishment of a bank in Turkey. Moreover, requirements for the opening of a branch in Turkey by the foreigner banks are enumerated in art. 9 such as; *"a) Its primary activities must not have been prohibited in the country where they are headquartered, b)The supervisory authority in the country, wherein the headquarters of the bank is located should not have negative views regarding its operation in Turkey, c)The paid-in capital reserved for Turkey should not be less than the amount indicated in Article 7, d) The members of the board of managers should have adequate professional experience to be able to satisfy the requirements laid down in the corporate governance provisions and to perform the planned activities, e) It must submit an activity program indicating work plans for the fields of activity covered by the permission, the budgetary plan for the first three years as well as its structural organization, f) The group including the bank must have a transparent partnership structure."*

Nationality of Entities regulated under the Mining Law:

The Mining Law no 3213 published in the Official Gazette dated 15.06.1985 and numbered 18785 provides that the mining right is exclusive to the Turkish citizens and that *"the legal persons incorpo-*

rated under Turkish Law" is granted with such exclusivity. Pursuant to the article 6 of the Mining Law; *"Mining rights shall be granted to the Turkish citizens that are qualified to enjoy civil rights, companies that are legal entities established in accordance with the laws of the Republic of Turkey and whose statute prescribes that mining is included in their field of activity, public economic enterprises authorized on this matter and their entities, subsidiaries and affiliates and other public institutions and administrations."*

Nationality of Entities regulated under the Direct Foreign Investment Law:

The Direct Foreign Investment Law no 4875 published in the Official Gazette dated 17.06.2003 and numbered 25141 deems *"the legal entities incorporated in accordance with the foreign countries laws"* as foreign investors. Art. 2 of the Direct Foreign Investment Law, defines a foreign investor as *"1) Real persons who possess foreign nationality and Turkish nationals who reside abroad 2) legal entities established under the laws of foreign countries and international institutions who make foreign direct investment in Turkey."*

Moreover, the clearest and explicit provision is provided in art. 7 of the Foreign Investment Framework Resolution (The Council of Ministers' resolution no 95/6990, dated 07.06.1995; published in the Official Gazette no 22352; the "Decision") which states that the companies and branches incorporated according to the provisions of TCC are Turkish companies and branches subject to the existence of the approvals required by the Law no 6224. However, the Law no 6224 has been abrogated by the Direct Foreign Investment Law and art 5/c of the Direct Foreign Investment Law provides that any reference to the Law no 6224 in the legislation shall be deemed to be done to the Direct Foreign Investment Law.

Conclusion

In the light of the above, although there is not a clear and explicit definition and criteria regarding the nationality of the legal entities, there are some regulations indicated in the TCC, the Banking Law, the Mining Law and the Direct Foreign Investment Law which points the

nationality of legal entities. Considering the relevant regulations, the general opinion under Turkish law is that a company incorporated in Turkey under Turkish law has Turkish nationality.

One Regulation Applicable to All Turkish Ports*

Att. Ozgur Kocabasoglu

The regulation prepared by the Ministry of Transport, Maritime Affairs and Communication which entered into force after being published in the official gazette on 31st of October 2012 ("the Regulation") consolidates all the bylaws, regulations and instructions in a single Regulation. Thus the Port Regulations of Aliağa, Ambarlı, Anamur, Ayvalık, Bandırma, Bodrum, Ceyhan, Çanakkale, Dikili, Enez, Fethiye, Gelibolu, Güllük, Hopa, İskenderun, İstanbul, Karadeniz Ereğli, Karasu, Karataş, Kefken, İzmit, Mersin, Rize, Silivri, Şile, Taşucu, Tekirdağ and Tuzla have been abolished and the operations conducted in 70 ports will now be subject to a single regulation. As defined in article 2 (1), the Regulation frames the duties, powers and responsibility of the port authorities as well as the responsibility of the persons concerned with ships, vessels and shore facilities in relation to their maritime operations towards the port authority, excluding the port authorities situated in inland waters.

Scope

According to the article 2 (2), the Regulation is applicable, unless otherwise is specified, to all ships and vessels and shore facilities operating in the port's administrative zone. Furthermore, the Regulation contains special provisions for passenger ships, excursion ships and hydroplanes. However, state owned ships, military ships, and military shore facilities and vessels or shore facilities belonging to the law enforcement officers are not included in the scope of the Regulation.

Purpose

The Regulation standardizes and updates the port's administrative zones and borders together with the anchorage berths. The new regulation aims to increase the efficiency of the services provided and a better administration of the sea traffic. The rules relating to the navi-

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* ***Article of October 2012***

gation, approaching the dock and leaving the port of the ships and vessels are revised. All forms of load and passenger transportation, place and time, pilotage and towing boat services are reframed. The Regulation attributes great importance to the discipline and precautionary measures. A whole fifth section entitled "Discipline and Order", consists of 17 articles, is reserved for the realization of discipline and order in the ports. The Regulation has other provisions in other sections concerning the obligation to give prior notice in order to promote precautionary measures.

The Obligation to Give Notice to Entering the Port Zone

Ships and vessels under 300 Gross Tons ("GT") used for touristic activities of excursion, entertainment or sport and 'home trade' fisherman boats which approach the shore facilities assigned to them are not subject to the obligation to give notice. However the obligation to notify has been adopted concerning Turkish or foreign flagged ships or vessels navigating internationally (article 9) as well as Turkish and foreign flagged ships carrying dangerous loads (article 18) in two different articles. According to article 9, the abovementioned ships and vessels are obliged to give notice twenty four hours before entering the port zone or if the navigation duration of the ship or vessel to enter the port zone is less than twenty four hours after leaving the relevant port facility. Ships navigating internationally and carrying dangerous loads are also subject to complete the Dangerous Load Manifest Form and notify the port authority in writing. Pursuant to the Regulation, ships carrying petroleum and derivatives thereof or other harmful and dangerous substances should carry out the necessary notifications to the port authority and bear the financial obligations required by the international agreements to which Turkey is a party. The Regulation specifies the administrative sanctions which shall be applied on the violation of these provisions.

Dangerous Substances

The Regulation has stipulated ships carrying dangerous substances both within the obligation to notify as well as adherence to the rules which should be applied and precautions which should be taken by the shore facility. Docks, piers, storehouses, warehouses allocated to

explosive, inflammable, combustible and other dangerous substances shall be defined by the shore facility managements. The loading and unloading of the ships carrying dangerous substances shall be made in the docks and piers reserved to them. Furthermore, if the unloaded dangerous substance cannot be stored in the dock or pier it must be removed from the shore facility within the shortest period of time. Besides regulating the dangerous substances, the Regulation aimed to provide a uniform organization and prevention system by adopting rules which shall be followed and preventive actions which shall be taken by the shore facilities in article 19. This article comprises elements on prevention such as installments and equipment for the loading or unloading of bulk fuel and emergency discharge plan.

Berthing and Anchoring Rules

Rules on berthing and anchoring have been regulated in a comprehensive manner for ships subject to the obligation to give notice. Pursuant to article 10 (1) the ships and vessels in question cannot berth or anchor without obtaining a waybill. No waybill can be obtained for ships and vessels which have more than 24 hours remaining to the expected arrival time affirmed in the general declaration during that time. Article 10 (2) excludes ships and vessels which constantly berth and anchor as well as those which provides certain listed services from this obligation. In order to realize a uniform organization and order, several circumstances have been taken into account while regulating the rules to which the ships and vessels must obey in the situation where there is no berthing space available.

Pilotage and Towing Boat Services

Article 13 of the Regulation requires the presence of a maritime pilot in certain ships and vessels. Tankers over 500 GT, all ships and vessels transporting dangerous substances, Turkish flagged ships and vessels over 1000 GT, foreign flagged ships and vessels over 500 GT and foreign flagged commercial and private yachts over 1000 GT which come alongside or leave the shore facility are obligated to use a maritime pilot. All foreign flagged military ships, when entering or leaving non-military shore facilities, are obligated to use a maritime pilot.

Special Provision for İstanbul and İzmit Port Authorities

The Regulation provides under article 41 special provisions on Turkish and foreign military ships visiting the İstanbul Port Authority. It also specifies that passenger ships can anchor in Dolmabahçe on the condition they obtain prior authorization. Special principles have been adopted concerning the modes of transport of dangerous substances between the European and Asian side in order to promote security. Also limitations have been introduced concerning height restriction in the Istanbul and Izmit Port Authorities. For the Istanbul Port Authority it is stipulated that the ships and vessels which have a height greater than 58 meters cannot pass through. Ships and vessels where height capacity is between 54 and 58 meters can only pass the Bosphorus accompanied by towing boats, the number and strength of which will be defined by the port authority. A similar rule including different figures concerning height restriction has been brought for İzmit Port Authority. Concerning traffic safety, the situation of decrease in the visibility of distance has also been regulated by the Regulation.

Powers of the Port Authority

According to article 8 of the Regulation, the relevant personnel of the ships and vessels which navigate in the port's administrative zone, which are in the shore facility or which wait at anchor as well as relevant personnel in the shore facility or other relevant persons are obligated to follow the directions within the scope of the Regulation and national or international statutory provisions given by the port authority regarding navigation, security of life, property and environment safety and security. The Regulation provides power to the port authority in order to fill the gaps in the security and prevention rules which have not been regulated in the Regulation. The shore facility operator is subject to the directives of the port authority in conformity with the Regulation and statutory provisions. In addition, in emergency situations pilotage and towing boat organizations should follow the directions of the port authority. Even though the Regulation has adopted uniform rules, it has also accorded some discretionary powers to the port authority for the conditions related to navigation, safety, life, property and environment safety which may arise. Furthermore, pursuant to article 22 entitled ˝Matters Subject to the Authorization of the Port

Authority˝, prior authorization of the port authority is necessary for activities such as buoying, diving, seabed and underwater studies, seabed dredging and similar activities within the port administrative zone. In accordance with the article 38, the port authority has the duty and authority to inspect in the port. Another power is stipulated under article 10 (i), for the berthing and departure of tankers carrying LPG, LNG combustible, inflammable explosive loads to the shore facilities during night-time which are authorized only if approved by the port authority.

Conclusion

The port regulation in question aims to install a balance between Turkish ports in terms of competition, effectiveness and security and promotes uniformity. The Regulation is aimed to sustain the continuity of the efforts regarding taking initiatives, renovation, investment and augmentation of effectiveness. It is expected that within the scope of uniform regulation of the general rules with the grant of a limited discretionary capacity to the port authority, the Regulation will have a positive impact on transparency and efficiency hence support the increase of the volume of sea trade.

Incorporation of Private Pension Companies and Funds*

Att. Revan Sunol

Overview

The private pension system is regulated mainly by the Private Pension Savings and Investment System Law No. 4632 ("Law"), the Regulation on the Incorporation and Working Principles of Pension Companies published in the Official Gazette, dated 08.01.2008 and numbered 26750 ("Regulation"), and the Regulation on the Principles regarding the Incorporation and Operation of Pension and Investment Funds, published in the Official Gazette dated 28.02.2002 and numbered 24681 ("Fund Regulation").

A private pension company ("Company") shall commence operation upon obtaining the required approvals from the Undersecretariat of Treasury ("Treasury") and the Capital Markets Board ("Board"), and shall establish a fund for the collection of contributions in compliance with the pension agreements executed with the participants. The contributions collected by the Company are put to use through a pension investment fund ("Fund"). The Fund consists of the assets put together with the purpose of managing the contributions collected from the participants, which are monitored in private pension accounts on behalf of the contributors within the scope of the pension agreement.

The Company may also obtain an operating license in the branches of life insurance and accident insurance. If the Company operates in any branch other than the pension branch, accounts shall be kept separately for each branch.

Company

Permission for Incorporation

The application for permission to incorporate shall be made to the Undersecretariat and permission is granted by the Ministry. The

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* *Article of November 2012*

Company seeking a license to establish is subject to certain requirements; it must:

- be a joint stock company.
- have an area of activity limited to the subjects stipulated in the Law.
- have articles of association that are in compliance with the Law.
- issue share certificates as registered shares to named persons and all of the share certificates must be issued in return for cash.
- The real person founders of the Company and the real persons having the right to manage and audit legal person founders shall:
  - **a.** not directly or indirectly hold a share capital of ten percent or more in any banker, banks, insurance companies and/or other institution operating in monetary and capital markets that has been subject to liquidation;
  - **b.** not have their activities suspended, in whole or in part, permanently or temporarily, for a period of one month or more in the one year period prior to the date of application for incorporation in accordance with the applicable laws;
  - **c.** not be bankrupt or have declared bankruptcy; and shall not have been sentenced to any heavy imprisonment or to imprisonment for more than five years due to infamous crimes such as simple or aggravated embezzlement, secret conspiracy, extortion, bribery, theft, swindling, forgery, breach of trust,, smuggling, conspiracy in relation to public tenders and purchases, money laundering, tax evasion or attempted tax evasion, or any other such crimes as stipulated under the Law.
  - **d.** have the financial capabilities and reputation which a founder should be reasonably expected to have.
- have a nominal capital of at least twenty trillion Turkish Lira and at least ten trillion Turkish Lira of capital paid-in; the remainder of which must be paid within a maximum period of three years.

- ensure that at least fifty-one percent of the Company capital is held by legal persons with the adequate knowledge and experience about financial markets. The amount of capital required for the incorporation can be increased by the Undersecretariat, provided that it does not exceed an amount equal to twice the Wholesale Price Index established by the State Statistics Institute.

Company Organization and Bodies

There are also certain requirements which need to be fulfilled by the members of the Board of Directors of the Company. In this context, the Board of Directors must consist of at least five persons. The simple majority of the Board of Directors must have obtained at least an undergraduate degree and must have working experience in the areas of insurance and business management and administration.

The general manager, the deputy general manager and others executives who are authorized signatories are also required to have at least an undergraduate degree. General managers must have at least ten years work experience. Deputy general managers and other executives who are authorized signatories and hold offices equal to or higher than that of the deputy general manager must have at least seven years work experience.

Operation License

The Company must obtain an operation license ("License") in the pension branch in order to start its activities after incorporation. The License is granted by the Undersecretariat. The application criteria are as follows:

- the Company must have devised its operation in a manner that will allow it to serve at least one hundred thousand contributors within two years;
- the arrangements foreseen in the system design and business plan shall have been made;
- human resources, the physical site, and the technical and administrative infrastructure shall be compatible and function in complete harmony.

The License application and the required documents must be provided and complete within one year of the incorporation date; otherwise the permission of incorporation shall automatically become invalid. If the Company does not apply to the Board to establish a Fund within three months after obtaining the License, or if the application is rejected, both the incorporation permission and License shall automatically become invalid.

Amendments to the articles of association, Transfer of shares and assets, Mergers

Amendments to the articles of association, the transfer of shares and assets and mergers are subject to permission. Registrations without any permission are deemed invalid.

The approval of the Undersecretariat is required to amend the articles of association. Without approval, amendment drafts cannot be negotiated in the general assembly and cannot be registered to the trade registry. The following are also subject to prior consent from the Ministry (to which the Undersecretariat of Treasury is attached):

- Transfer of shares granting privilege for appointing members to the board of directors and auditors or granting a usufruct right;
- Transfer of all the company's assets and liabilities to another pension company or the merging of the company with one or more pension companies;
- The direct or indirect transfer of capital shares of the legal entity shareholders holding ten percent or more of the company capital.

Permission will be granted for share transfer transactions on the condition that the new shareholder fulfills the same set of criteria as the Company's founders. In the event that the capital shares that determine the control and management of the legal entity are owned by another legal entity, these provisions shall be enforced until real person shareholders are determined.

The following share transactions are subject to the permission of the Prime Ministry:

- obtaining shares representing directly or indirectly 10% or more of the capital of the Company by a real or legal person;
- obtaining a share pledge and right to vote exceeding the ratios of 10%, 20%, 33% and 50%;
- share transfers resulting in a capital share of the shareholders which exceed or fall below 10%, 20%, 33% and 50% of the company capital.

Sanction

The Prime Ministry may require the Board of Directors to take certain actions in the event that the rights and benefits of the participants are endangered by Company practices, the Company neglects the obligations arising from the agreement or the financial structure of the company is weakened in a way that may endanger the rights and benefits of the contributors. Once such actions are required by the Prime Ministry, the Company is obliged to prepare a recovery plan within ten days following notification and must notify the Undersecretariat of said plan.

Should the Company fail to take the actions provided in the recovery plan on time or if there is no improvement in the present condition although the required actions have been taken, the Prime Ministry is entitled to require the realization of heavy measures such as the declaration of the Company as bankrupt, the cancellation of the operation license and the transfer of the funds as deemed appropriate.

Pension Investment Fund

The Fund is not a legal entity and it cannot be established and used for purposes and obligations other than those stated in the Law, the pension agreement, the fund by-laws and the related legislation. The fund is established for an indefinite period of time. The Fund's assets cannot be subject to pledge, provided as a guarantee for transactions other than those regarding the portfolio and cannot be seized by the third parties.

In order to establish a fund, the Company should apply to the Board with the Fund by-laws, the pension agreement and other docu-

ments as required by the Board. The Fund by-laws is an agreement between the contributors and the Company, the portfolio keeper and the portfolio manager which contains general provisions and regulates the keeping of the portfolio in accordance with the principals of fiduciary ownership and the management of the portfolio in accordance with the provisions of the proxy agreement.

The portfolio is managed by portfolio managers within the framework of the Fund by-laws, the pension agreement and related legislation.

For the establishment of the Fund, the fund by-laws shall be registered with the trade registry where the Company is registered within six business days following obtaining of the approval document received pursuant to the approval of the Board and shall be published in the Turkish Trade Registry Gazette ("TTRG").

In order for the Fund to commence its operation, an application shall be made to the Board within six months after the Company receives incorporation permission, along with a request to register the contribution documents and other required documents. If the application is not made on time, the Fund by-laws are removed from the trade registry.

If the approval of the Board is obtained, at least three Funds consisting of different investment instruments as determined by the Board and which have different portfolio structures will be established. At least 5% of the capital will be registered with the Board for each Fund and the established Fund will amount to the shares that are 5% of the capital. In the event that the total amount of shares that are provided by the contributors exceed the amount of the registered shares, an application shall be made with the Board for the registration of the excess shares with the Board.

The Board shall collect a registration fee, which shall not exceed 0,005% of fund's net asset value, upon receiving the approval of the Undersecretariat by the last business day of the aforementioned three-month period.

The accounts and the transactions of the Fund are subject to independent audit at least once per year.

Conclusion

The private pension company and its Funds are subject to the regulation of the Undersecretariat and the Board upon receipt of a license of establishment. The requirements which need to be fulfilled by the company during incorporation must be maintained at all times with an end to maintaining continuity and reliability with respect to the rights of the contributors.

Amendments Made to the Land Registry Law*

Att. Sedef Ustuner

Amendments made to the Land Registry Law No. 2644 ("Law") have been published in the Official Gazette dated May 18, 2012.

Acquisition of Immovable Properties (Land or Real Estate) By Foreigners

With the amendments made to Article 35 of the Law, the foreign national buyers -the list of eligible country citizens whom are to be determined by Council of Ministers-, are entitled to acquire immovable properties or limited rights in rem in Turkey for improved international bilateral relations and where there is a feasible benefit to the country provided that statutory restrictive conditions are fully complied. The provisions, which lifted the existing "reciprocity principle", introduced new concepts, "better international bilateral relations and feasible benefit to country" as the standard benchmark test for the acquisition of ownership rights on properties by the foreign natural persons. The amendments also expand the maximum size of immovable properties that can be acquired on a land and independent and continuous limited rights in rem, permissible to be acquired by foreign natural persons. As per the amendment, the maximum size cannot exceed ten percent of the surface area of a municipal province where the immovable in question is located and for each person it cannot exceed thirty hectares (equivalence to 74.12 Acres, or 328.000 Square Feet) within the country.

Authority of the Council of Ministers

The Council of Ministers is authorized to increase the size of area within the country permissible for each person, up to twofold.

Furthermore, the Council of Ministers is vested with authorization -in exceptional circumstances- to restrict, partially or fully cease or prohibit acquisition of ownership of a land in any form, on the bases of

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* ***Article of May 2012***

determinant factors *i.e.*, personal, geographical regional, duration, quantity, quality, ratio, classification and size by foreign natural or legal persons (entities), which are established in foreign countries in accordance with laws of their origin countries.

Off-Plan (Pre-Construction) Immovable Properties

The foreign national real persons or incorporated companies which are established in foreign countries in accordance with laws of their origin countries, are obliged to submit the projects of an acquired property, that has yet to be built, for the approval of the relevant Ministry within two years. The projects approved upon the determination of beginning and completion dates shall be sent to the relevant Directorates of Land Registry for registration under the declaration columns. The relevant Ministry shall supervise whether the projects are completed within the determined time limits.

Acquisition by Foreigners of Areas within Military Zones, Strategic Zones and Private Security Zones

The data relating to maps and coordinates of prohibited military zones, military security zones and strategic zones shall be provided within one year (at the latest) following the entry into force of the Law and the amendment decisions shall be provided within one month (at the latest) following the date on which amendments made to maps and coordinates, by the Ministry of Defense to the relevant Ministry that the General Directorate of Land Registry and Cadastral is affiliated with.

The data relating to maps and coordinates of private security zones and amendment decisions on them shall also be provided within the aforesaid period by the Ministry of Internal Affairs to the relevant Ministry that the General Directorate of Land Registry and Cadastral is affiliated with.

Title deed transactions shall be conducted in accordance with the supplied documents and information upon the expiry of one year from the entry into force of the Law.

Use in Violation of Article 35

The ownership rights acquired on a land may be ordered to be disposed within one year time limit granted by Ministry, if: (i) the acquisition transaction is not compliant with the conditions set forth under Article 35 of the Law; (ii) the properties are used against their acquisition purposes; (iii) the off-plan properties, which are not notified to the relevant Ministry or the projects of which are not completed within the time limits; (iv) the properties acquired by inheritance apart from the restrictions within the scope of the first subparagraph of Article 35. If the owner does not dispose the property within one year of the time limits granted by the Ministry of Finance, the property shall be disposed and the sums received after disposal shall be paid to the beneficiaries.

Acquisition of Immovable Properties by Foreign Investors

The conditions set forth under Article 36 of the Law, regarding acquisition of ownership rights on a land or use of limited rights in rem or immovables by the foreign investors in order to perform activities specified in articles of associations of the incorporated companies in Turkey, which they established or participated in, are amended. As per the amendment, foreign national natural persons and legal entities incorporated in accordance with legislation of foreign countries and incorporated companies established in Turkey, fifty percent or more shares of which are owned by international institutions or the authorization of assignment and release of majority of directors for which are granted to international institutions, can acquire ownership rights on a land.

The foreign capital companies apart from the foregoing shall acquire ownership on a land in accordance with the provisions envisaged for the domestic capital companies.

The use of immovable, acquired in accordance with Article 36 of the Law, shall be supervised by governorships at regular intervals within the frame of land registrations.

Use in Violation of Article 36

The ownership rights in any form acquired on immovable properties, which are not acquired or used in compliance with the conditions

set forth under Article 36 of the Law shall be disposed and the sums shall be paid to the beneficiaries, if they are not disposed by the proprietors within the time limits granted by the Ministry of Finance.

Transfer by Inheritance

Pursuant to the new article in Law, the relevant Directorate of Land Registry shall apply to court for certificate of inheritance if transfer by inheritance is not registered within two years following the death of the proprietor.

The relevant Directorate of Land Registry shall update the record by registration of co-ownership in accordance with the certificate of inheritance.

Entry into Force

The amendments made to Article 36 will enter into force three months after publication and the other articles will enter into force through publication.

LEGAL DEVELOPMENTS

Important International Agreements

- Resolution of the Council of Ministers dated 08.12.2011 pertaining to the ratification of the Culture, Education, Science, Publication, Youth and Sports Application Program between the Government of the Republic of Turkey and the Grand Duchy of Luxembourg that was signed in Luxembourg on 06.06.2011 was published in the Official Gazette dated 12.01.2012 and numbered 28171.
- Resolution of the Council of Ministers dated 13.12.2011, pertaining to the ratification of Prevention of Double Taxation on Income Tax between the Republic of Turkey and the Confederation of Switzerland that was signed in Bern on 18.06.2010 and approved by Law dated 19.10.2011 and numbered 6240 was published in the Official Gazette dated 12.01.2012 and numbered 28171.
- Resolution of the Council of Ministers dated 16.12.2011, pertaining to the ratification of the Prevention of Double Taxation of Income and Tax Evasion between the Government of the Republic of Turkey and the Government of the Federative Republic of Brazil that was signed in Foz do Iguaçu on 16.12.2010 and approved by Law dated 25.10.2011 and numbered 6244 was published in the Official Gazette dated 12.01.2012 and numbered 28171.
- Resolution of the Council of Ministers dated 28.11.2011 pertaining to the ratification of the Council of Europe Convention on the Prevention of Terrorism that was signed in Strasbourg on 19.01.2006 and approved by Law dated 23.02.2011 and numbered 6135 was published in the Official Gazette dated 13.01.2012 and numbered 28172.
- Law pertaining to the ratification of the Intergovernmental Framework Agreement regarding Supplying the Water Demand of the Northern Turkish Republic of Cyprus between the

Government of the Republic of Turkey and the Government of the Northern Turkish Republic of Cyprus was published in the Official Gazette dated 14.01.2012 and numbered 28173.

- Resolution of the Council of Ministers dated 16.12.2011 pertaining to the ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the European Commission on Secondment of Turkish Officials to the European Commission that was signed in Strasbourg on 28.09.2011 was published in the Official Gazette dated 14.01.2012 and numbered 28173.
- Resolution of the Council of Ministers dated 08.12.2011 pertaining to the ratification of the Reciprocal Incentive and Protection of Investments Between the Government of the Republic of Turkey and the Czech Republic that was signed in Prague on 29.04.2009 and approved by Law dated 19.10.2011 and numbered 6241 was published in the Official Gazette dated 15.01.2012 and numbered 28174.
- Resolution of the Council of Ministers dated 08.12.2011 pertaining to the ratification of the Memorandum of Understanding on Planning Cooperation between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan that was signed in Islamabad on 31.03.2010 and approved by Law dated 27.10.2011 and numbered 6246 was published in the Official Gazette dated 16.01.2012 and numbered 28175.
- Resolution of the Council of Ministers dated 13.12.2011 pertaining to the ratification of the Commercial Cooperation Agreement between the Government of the Republic of Turkey and the Government of the Republic of Equator that was signed in Ankara on 01.12.2010 and approved by Law dated 19.10.2011 and numbered 6239 was published in the Official Gazette dated 16.01.2012 and numbered 28175.
- Resolution of the Council of Ministers dated 27.12.2011 pertaining to the ratification of the Reciprocal Incentive and Protection of Investments Between the Government of the Republic of Turkey and the Government of Kuwait that was

signed in Kuwait on 27.05.2010 and approved by Law dated 25.10.2011 and numbered 6243 was published in the Official Gazette dated 20.01.2012 and numbered 28179.

- Resolution of the Council of Ministers dated 27.12.2011 pertaining to the ratification of the Turkey-Azerbaijan Long Term Economic and Commercial Cooperation Program and Execution Plan that was signed in Baku on 06.11.2007 and approved by Law dated 27.10.2011 and numbered 6245 was published in the Official Gazette dated 20.01.2012 and numbered 28179.
- Resolution of the Council of Ministers dated 27.12.2011 pertaining to the ratification of the Reciprocal Administrative Aid on Custom Issues between the Government of the Republic of Turkey and the Government of the Federative Republic of Brazil that was signed in Brasilia on 27.05.2010 and approved by Law dated 25.10.2011 and numbered 6242 was published in the Official Gazette dated 20.01.2012 and numbered 28179.
- Resolution of the Council of Ministers dated 16.01.2012 pertaining to the ratification of the Prevention of Double Taxation of Income and Tax Evasion between the Government of the Republic of Turkey and the Federal Republic of Germany that was signed in Berlin on 19.09.2011 and approved by Law dated 23.12.2011 and numbered 6263 was published in the Official Gazette dated 24.01.2012 and numbered 28183.
- Law pertaining to the ratification of Framework Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of China regarding Improving and Developing the Reciprocal Commercial and Financial Collaboration that was signed in Ankara on 08.10.2010 was published in the Official Gazette dated 26.01.2012 and numbered 28185.
- Law pertaining to the ratification of Cooperation and Reciprocal Aid Agreement pertaining to Custom Matters between the Government of the Republic of Turkey and the Government of the Jordan Kingdom that was signed in Amman on 01.12.2009 was published in the Official Gazette dated

26.01.2012 and numbered 28185.

- Resolution of the Council of Ministers dated 10.01.2012 on the Ratification of the Administrative Agreement between the Government of the Republic of Turkey and the Government of the Republic of Croatia on the Application of Social Security Agreement that was signed in Zagreb on 12.06.2006, was published in the Official Gazette dated 09.02.2012 and numbered 28199.
- Resolution of the Council of Ministers dated 10.02.2012 on the Ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence that was signed in İstanbul on 11.05.2011, was published in the Official Gazette dated 08.03.2012 and numbered 28227.
- Resolution of the Council of Ministers dated 06.02.2012 on the Ratification of the Air Transportation Agreement that was signed between the Government of the Republic of Turkey and the Government of the Russian Federation that was signed in Ankara on 12.05.2010, was published in the Official Gazette dated 10.03.2012 and numbered 28229.
- Resolution of the Council of Ministers dated 17.02.2012 on the Ratification of the Protocol Pertaining to Prevention of Double Taxation on Income Tax Between Turkish Republic and Finnish Republic that was signed in İstanbul on 06.10.2009, was published in the Official Gazette dated 24.03.2012 and numbered 28243.
- Council of Ministers resolution on Approval of Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia with its Statement is published in the Official Gazette dated 28.04.2012 and numbered 28277.
- Resolution of the Council of Ministers dated 16.03.2012 pertaining to the ratification of the Framework Agreement on the Development and Deepening of Bilateral Commercial and Economic Cooperation between the Republic of Turkey and the People's Republic of China that was signed on 08.10.2010 in

Ankara was published in the Official Gazette dated 05.05.2012 and numbered 28283.

- Resolution of the Council of Ministers dated 02.04.2012 pertaining to the ratification with a statement and reservation of the International Agreement on the Prevention of Nuclear Terrorism that was signed on 14.09.2005 in New York, was published in the Official Gazette dated 08.05.2012 and numbered 28286.
- Resolution of the Council of Ministers dated 02.04.2012 pertaining to the ratification of the Framework Agreement between the Republic of Turkey and the United Nations Development Program that was signed on 11.03.2011 was published in the Official Gazette dated 10.05.2012 and numbered 28288.
- Resolution of the Council of Ministers dated 16.04.2012 pertaining to the ratification of the Cultural Cooperation Program between the Republic of Turkey and Ukraine that was signed on 22.12.2011 in Ankara was published in the Official Gazette dated 10.05.2012 and numbered 28288.
- Resolution of the Council of Ministers dated 16.04.2012 pertaining to the ratification of the Cooperation and Mutual Aid in Customs between the Republic of Turkey and the Republic of Korea that was signed on 15.06.2010 in Seoul was published in the Official Gazette dated 19.05.2012 and numbered 28297.
- Resolution of the Council of Ministers dated 14.05.2012 on the ratification of the Loan Agreement Third Programmatic Environmental Sustainability and Energy Sector Development Policy Loan between Republic of Turkey and International Bank for Reconstruction and Development dated 06.04.2012 and its annexed letter that was signed with the mentioned bank, was published in the Official Gazette dated 06.06.2012 and numbered 28315.
- Law on the ratification of the Memorandum of Understanding Between the Government of Turkish Republic and the Government of Azerbaijan Republic concerning the Development of the Exclusive Pipeline in order to Transport

over the Lands of the Turkish Republic the Natural Gas Originating From the Republic of Azerbaijan Passing in Transit from the Republic of Azerbaijan that was signed in Ankara on 24.12.2011 was published in the Official Gazette dated 12.07.2012 and numbered 28351.

- Law on the ratification of the Agreement between the Government of the Turkish Republic and the Government of the Azerbaijan Republic concerning the Sale of the Natural Gas to the Turkish Republic, the Transit of the Gas Originating from the Republic of Azerbaijan over the Lands of Turkish Republic and the Development of the Exclusive Pipeline in order to Transport the Natural Gas over the Lands of the Turkish Republic that was signed on 25.10.2011 in İzmir was published in Official Gazette dated 12.07.2012 and numbered 28351.
- Resolution of the Council of Ministers dated 22.06.2012 on the ratification of the Agreement Regarding Mutual Visa Exemption Between Government of Republic of Turkey and Government of Saint Christopher (St. Kitts) and Nevis that was signed in London on 19.04.2012 was published in the Official Gazette dated 04.08.2012 and numbered 28374.
- Resolution of the Council of Ministers dated 05.07.2012 on the Ratification of the Agreement Regarding Cooperation on Military Education Between Government of Republic of Turkey and Government of Kingdom of Bahrain that was signed in Manama on 23.05.2012 was published in the Official Gazette dated 08.08.2012 and numbered 28378.
- Resolution of the Council of Ministers dated 16.04.2012 on the entry into force of the Memorandum of Understanding Between the Ministry of Finance, Financial Crimes Investigation Board (MASAK) of the Republic of Turkey and the Financial Intelligence Unit of the Netherlands Concerning Cooperation in the Exchange of Financial Intelligence Related to Money Laundering and Terrorism Financing, was published in the Official Gazette dated 15.08.2012 and numbered 28385.
- Resolution of the Council of Ministers dated 30.07.2012 pertaining to the ratification of the Memorandum of Understanding

between the Government of the Republic of Turkey and the Government of the United States of America pertaining to the Host Nation Support that would be Provided During Exercise Anatolian Falcon 2012 that would be Conducted in Turkey that was signed in Ankara was published in the Official Gazette dated 08.09.2012 and numbered 28405.

- Resolution of the Council of Ministers dated 31.05.2012 pertaining to the ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Iran pertaining to the Joint Use of the Land Border Crossing Points of Esendere and Sero that was signed in Ramsar on 22.03.2010 approved by Law dated 24.05.2012 and numbered 6320 was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 30.07.2012 pertaining to the ratification of the Agreement between the Government of the Republic of Turkey and the United Nations Development Programme concerning the Establishment of the UNDP-Istanbul International Center for the Private Sector in Development (IICPSD) that was signed in Ankara on 11.03.2011 approved by Law dated 19.04.2012 and numbered 6294 was published in the Official Gazette dated 11.09.2012 and numbered 28408.
- Resolution of the Council of Ministers dated 31.07.2012 pertaining to the ratification of the Agreement between the Government of the Republic of Turkey and the United Nations Development Programme (UNDP) Regarding Contribution to the UNDP Private Sector in Development Trust Fund, that was signed in Ankara on 09.12.2011 approved by Law dated 24.05.2012 and numbered 6320 was published in the Official Gazette dated 11.09.2012 and numbered 28408.
- Resolution of the Council of Ministers dated 30.07.2012 pertaining to the ratification of the Board of Governors Resolution regarding the Amendment to the Establishment Agreement of the Black Sea Trade and Development Bank approved by Law dated 17.05.2012 and numbered 6315 was published in the Official Gazette dated 11.09.2012 and numbered 28408.

- Resolution of the Council of Ministers dated 30.07.2012 pertaining to the amendment of article 21 of the Economic Cooperation Organization Bank of Commerce and Development was published in the Official Gazette dated 11.09.2012 and numbered 28408.
- Resolution of the Council of Ministers dated 30.07.2012 pertaining to the approval of the Agreement amending the Framework Agreement between the Government of the Republic of Turkey and the Economic Cooperation Organization was published in the Official Gazette dated 11.09.2012 and numbered 28408.
- Resolution of the Council of Ministers dated 08.08.2012 pursuant to the ratification of the Second Executive Programme of the Agreement between the Government of the Republic of Turkey and the Government of the Italian Republic on Scientific and Technical Cooperation for the years 2012-2014 that was signed in Rome on 08.05.2012, was published in the Official Gazette dated 25.09.2012 and numbered 28422.
- Resolution of the Council of Ministers dated 10.09.2012 pertaining to the Accession to the Convention on the Simplification on Formalities in Trade in Goods and the Convention on a Common Transit Procedure was published in the Official Gazette dated 04.10.2012 and numbered 28431.
- Resolution of the Council of Ministers dated 24.09.2012 on the ratification of the Memorandum of Understanding between the Government of Republic of Turkey and the Government of the Republic of Azerbaijan concerning the Development of a Standalone Pipeline for the Transportation of Natural Gas Originating and Transiting from the Republic of Azerbaijan across the Territory of the Republic of Turkey that was signed in Ankara on 24.12.2011 was published in the Official Gazette dated 11.10.2012 and numbered 28438.
- Resolution of the Council of Ministers dated 24.09.2012 on the ratification of the Agreement the Government of Republic of Turkey and The Government of the Federal Republic of Nigeria

Concerning the Promotion and Protection of Investments that was signed on 02.02.2011 was published in the Official Gazette dated 11.10.2012 and numbered 28438.

- Resolution of the Council of Ministers dated 06.12.2012 pertaining to the ratification of IPARD Assistance Under Component 5 of the Instrument For Pre-Accession IPA Agreement between The European Commission and the Republic of Turkey amending the Multi-Annual Financing Agreement 2007-2010 was published in the Official Gazette dated 19.12.2012 and numbered 28502.
- Resolution of the Council of Ministers dated 06.12.2012 pertaining to the ratification of the Financing Agreement for the Turkish National Program of 2012 within the scope of Support of Mediator-Transitional Period prior to Succession and Institutional Structuring Component-Section 1-A between the Government of Turkish Republic and European Commission and, together with the Notes pertaining to the Declarations regarding the Agreement was published in the Official Gazette dated 19.12.2012 and numbered 28502.
- Resolution of the Council of Ministers dated 26.11.2012 pertaining to the entry into force of the Grant Agreement between the Government of the Republic of Turkey, represented by the Undersecretariat of Treasury, Prime Ministry and Organization For Economic Co-operation and Development (OECD) that was signed on 05.09.2012, was published in Official Gazette dated 21.12.2012 and numbered 28504.

Important Resolutions of the Council of Ministers

- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2541 on the Principles amending the Principles pertaining to the Employment of Contracted Personnel was published in the Official Gazette dated 10.01.2012 and numbered 28169.
- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2543 on the Employment and Remuneration of Temporary Personnel to Conduct Temporary Works in Public Institutions was published in the Official Gazette dated 10.01.2012 and numbered 28169.
- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2544 on Urgent Expropriation by State Railway Administration Directorate General of some Real Estates and its Innovations under the scope of Establishment and Renewal of Signalization, Electrification, Communication and Security Facilities was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2545 on Urgent Expropriation by State Railway Administration Directorate General of some Real Estates and its Innovations located between Bursa and Yenişehir for the Construction of the Planned Fast Train Railway Line under the Bandırma-Bursa-Ayazma-Osmaneli project was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2546 on Urgent Expropriation by State Railway Administration Directorate General of some Real Estates and its Innovations for the Construction of the Logistic Center of Kocaeli-Köseköy was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 08.12.2011 and numbered 2011/2547 on Urgent Expropriation by State Railway Administration Directorate General of some Real

Estates and its Innovations for the construction of the Logistic Center of Kahramanmaraş-Türkoğlu was published in the Official Gazette dated 11.01.2012 and numbered 28170.

- Resolution of the Council of Ministers dated 02.01.2012 and numbered 2012/2638 on Urgent Expropriation by State Water Administration Directorate General of some Real Estates for the Watering of Mut Field under the Mersin-Mut Project was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 02.01.2012 and numbered 2012/2642 on Urgent Expropriation by State Water Administration Directorate General of some Real Estates for the Watering of Göksu Sol Beach and the Construction of the Drainage Pumping Building under the Below Göksu II Merhale Project was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 02.01.2012 and numbered 2012/2643 on Urgent Expropriation by State Water Administration Directorate General of some Real Estates under the Ilısu Dam and HEP (GAP) Project was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 16.12.2011 and numbered 2011/2595 on amending the Decision pertaining to the Application of certain Articles of the Customs Code was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Resolution of the Council of Ministers dated 27.12.2011 on the Abrogation of the Istanbul Port By-Law entered into force through publication in the Official Gazette dated 19.01.2012 and numbered 28178.
- Resolution of the Council of Ministers dated 09.02.2012 and numbered 2012/2771 on the Ratification by law of the Resolution on the Amendment of Resolution Pertaining to the Principles and Procedures regarding Treasury Support to be provided to the Loan Guarantee Institutions was published in

the Official Gazette dated 18.02.2012 and numbered 28208.

- Resolution of the Council of Ministers dated 10.02.2012 on the Implementation of the Temporary Protective Measures in Imports of Low Density Polyurethane (AYPE) was published in the Official Gazette dated 06.03.2012 and numbered 28225.
- Resolution of the Council of Ministers dated 17.02.2012 on the Amendment to the Resolution Pertaining to the Application of Some Articles of Customs Law numbered 4458 was published in the Official Gazette dated 08.03.2012 and numbered 28227.
- Resolution of the Council of Ministers dated 20.02.2012 on the implementation of the Resolution Pertaining to the Amendment to the Resolution on Determination of Value Added Tax Percentages to be Applied to Goods and Services was published in the Official Gazette dated 24.03.2012 and numbered 28243.
- Resolution of the Council of Ministers Pertaining to the Implementation of the Principles with regard to Tenders to be Held in Accordance with Article 3 Subparagraph (b) the Law numbered 4734 on Public Tenders was published in the Official Gazette dated 27.03.2012 and numbered 28246.
- Resolution of the Council of Ministers dated 02.04.2012 amending the Decision Numbered 32 on the Preservation of the Value of Turkish Currency was published in the Official Gazette dated 06.05.2012 and numbered 28284.
- Resolution of the Council of Ministers dated 02.05.2012 pertaining to the Application on Protection Measures for Import of Specified Electronic Devices was published in the Official Gazette dated 07.05.2012 and numbered 28285.
- Resolution of the Council of Ministers dated 27.04.2012 pertaining to the Entry Into Force of the Decision on Special Consummation Tax on Certain Goods was published in the Official Gazette dated 07.05.2012 and numbered 28285.
- Resolution of the Council of Ministers dated 27.04.2012 amending the Decision on Provisional Article 67 of the Income Tax Code numbered 193 and on Certain Withholding Amounts

under Articles 15 and 30 of the Corporate Tax Code numbered 5520 was published in the Official Gazette dated 18.05.2012 and numbered 28296.

- Resolution of the Council of Ministers dated 15.06.2012 and numbered 2012/3305 on the Ratification of the Resolution on the State Aids was published in the Official Gazette dated 19.06.2012 and numbered 28328.
- Resolution of the Council of Ministers dated 24.08.2012 on the entry into force of the Additional Resolution on Importation Regime was published in the Official Gazette dated 02.09.2012 and numbered 28399.
- Resolution of the Council of Ministers dated 27.08.2012 on the entry into force of the Additional Resolution on Importation Regime was published in the Official Gazette dated 06.09.2012 and numbered 28403.
- Resolution of the Council of Ministers dated 30.07.2012 on the Urgent Expropriation of Some Immovable Properties by the General Directorate of the State Hydraulic Works for the Construction of Section 2 of the Feeding Canal Silvan Dam (Silvan Tunnel) of Sivan 1st Phase Project of GAP (Southeastern Anatolia Project) was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 30.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Zincirli Hydroelectric Power Plant in the Districts of Manavgat and Serik of the Province of Antalya was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 30.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Transmittal Lines of Çobanlı Hydroelectric Power Plant in the Provinces of Sivas and Erzincan was published in the Official Gazette dated 08.09.2012 and numbered 28405.

- Resolution of the Council of Ministers dated 16.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Angutlu Hydroelectric Power Plant in the District of Dereli of the Province of Giresun was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 16.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building the Energy Transmittal Lines that would Connect Tuzköy Hydroelectric Power Plant Project that would be Implemented in the Central District and in the District of Gülşehir of the Province of Nevşehir to the National Electricity System was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 30.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building the Energy Transmittal Lines for the Tırmalı Hydroelectric Power Plant Project and the Çankırı TM- Bayan KÖK-Bayat KÖK-Çorum II TM Energy Transfer Line to be established in the Central District and the District of Kızılırmak of the Province of Çankırı was published in the Official Gazette dated 08.09.2012 and numbered 28405.
- Resolution of the Council of Ministers dated 16.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Koçak Regulator and Hydroelectric Power Plant and the Energy Transfer Line in the District of Çamoluk of the Province of Giresun was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Lalapaşa DC-Dombay KÖK Energy Transmittal Lines of the Hydroelectric Power Plant in the District of

Lalapaşa of the Province of Edirne was published in the Official Gazette dated 09.09.2012 and numbered 28406.

- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of some Immovable Properties by the General Directorate of the State Hydraulic Works under the Scope of Elevation of Mehmetli Dam Project was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of some Immovable Properties by the General Directorate of the State Hydraulic Works for the Construction of Naipköy Dam under Tekirdağ Potable Water Project was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Ministry of Transportation Maritime and Communication with the Purpose of the Construction of Kemalpaşa Logistics Village was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Ministry of Transportation Maritime and Communication with the Purpose of the Building of the Energy Transmittal Lines that are Needed to Enable Commissioning of Şırnak and Bingöl Airports was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties by the General Directorate of the State Railways of the Republic of Turkey under the Scope of the Project for the Construction of Irmak-Karabük-Zonguldak Signaling, Electrification, Telecom Facilities, and for the Renewal of the Infrastructure was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties, which

are Needed for the Displacement of the Sections of Ankara-Sivas-Kars Railways that would Remain under the Reservoir Because of the Construction of Bağıştaş Dam in the Province of Erzincan, by the General Directorate of the State Railways of the Republic of Turkey was published in the Official Gazette dated 09.09.2012 and numbered 28406.

- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of some Immovable Properties by the General Directorate of the State Hydraulic Works with the Purpose of the Implementation of Amik-Afrin (Reyhanlı Dam and Irrigation) Project was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of some Immovable Properties by the General Directorate of the State Hydraulic Works with the Purpose of the Construction of the 2nd Section of the 2nd Phase of the Main Conveyance Line of Izmir Potable Water Network was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 24.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Natural Gas Combined Cycle Power Plant in the District of Erzin of the Province of Hatay was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 24.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Şırnak Hydroelectric Thermal Power Plant in the Central District of the Province of Şırnak was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 27.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of Gevne-Karapınar Hydroelectric Power Station in the District of Alanya of the Province of Antalya was published

in the Official Gazette dated 09.09.2012 and numbered 28406.

- Resolution of the Council of Ministers dated 30.07.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of the Sancar Regulator and Hydroelectric Power Plant-Doğanşehir DM Energy Transfer Line in the District of Doğanşehir of the Province of Malatya was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers dated 13.08.2012 on the Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority with the Purpose of Building of the Ekinözü I-II Hydroelectric Power Plant in the District of Koyulhisar of the Province of Sivas was published in the Official Gazette dated 09.09.2012 and numbered 28406.
- Resolution of the Council of Ministers on Determination of Special Consumption Tax Rate and Sums and the Rate of Title Deed Duties was published in the Official Gazette dated 22.09.2012 and numbered 28419.
- Resolution of the Council of Ministers dated 09.10.2012 and numbered 2012/3792 on the Ratification of the Resolution on the Private Consumption Tax Applied to the Goods Located in the (B) Sheet of the Annexed List numbered (I) of the Private Consumption Tax numbered 4760 was published in the Official Gazette dated 09.10.2012 and numbered 28436.
- Resolution of the Council of Ministers dated 02.10.2012 and numbered 2012/3802 on the Ratification of the Resolution on the Amendment of the Resolution on the State Aids was published in the Official Gazette dated 13.10.2012 and numbered 28440 to be valid as of 19.06.2012.
- Resolution of the Council of Ministers dated 08.10.2012 and numbered 2012/3903 on the Ratification of the Resolution on the Support of Interest Provided to the Credits Used from the Banks by the Rightful Owners pursuant to Law numbered 6306 was published in the Official Gazette dated 13.10.2012 and numbered 28440.

- Resolution of the Council of Ministers dated 22.10.2012 on the Amendment of the Resolution Concerning Export Limits of Loan Instruments (Resolution No.2012/3878), entered into force through publication in the Official Gazette dated 03.11.2012 and numbered 28456.
- Resolution of the Council of Ministers dated 08.10.2012 on the Amendment of the Resolution Concerning the Transportation over Turkey of Petroleum and Jet Fuel by Land, Road or Railroad (Resolution No.2012/3850), entered into force through publication in the Official Gazette dated 04.11.2012 and numbered 28457.
- Resolution of the Council of Ministers dated 05.11.2012 pertaining to Amendment on the Decision Regarding the Procedures and Principles of Application of the Law numbered 3996 Pertaining to the Execution of Certain Investments and Services Through the Build-Operate-Transfer Model was published in the Official Gazette dated 05.12.2012 and numbered 28488.
- Resolution of the Council of Ministers dated 31.10.2012 on the Urgent Expropriation of Some Immovable Properties by the Akdeniz Electricity Distribution Corporation for the Establishment of the Elmalı-Gömbe Energy Transmission Line in Antalya for Registration on behalf of the General Directorate of Turkish Electricity Distribution Corporation Energy was published in the Official Gazette dated 06.12.2012 and numbered 28489.
- Resolution of the Council of Ministers dated 09.11.2012 on the Urgent Expropriation of Immovable Property by the Energy Market Regulatory Authority on behalf of Treasury for the establishment of Bedirdüzü-2 Hydroelectric Electricity Plant in District of Çayırlı of the province Erzincan was published in the Official Gazette dated 06.12.2012 and numbered 28489.
- Resolution of the Council of Ministers dated 09.11.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of Kuzey I-II Regulator and Hydroelectric Electricity Plant in District of Kabataş of the Province Ordu,

was published in the Official Gazette dated 06.12.2012 and numbered 28489.

- Resolution of the Council of Ministers dated 20.11.2012 on Urgent Expropriation of some Immovable Properties by the Turkish Electricity Distribution Corporation Energy General Directorate on behalf of the Treasury for the establishment of Türkgeldi KÖK-Düğüncübaşı-Oklalı Energy Transmission Line and Türkgeldi Hayvancılık-Alacaoğlu Energy Transmission Line in District of Lüleburgaz of the Province Kırklareli, was published in the Official Gazette dated 06.12.2012 and numbered 28489.
- Amendment Resolution of the Council of Ministers dated 12.11.2012 pertaining to the Resolution numbered 32 on Protection of the Value of Turkish Currency was published in the Official Gazette dated 13.12.2012 and numbered 28496.
- Amendment Resolution of the Council of Ministers dated 28.12.2012 pertaining to the Resolution on Utilization of the Income Generated with regards to Implementation of Law numbered 6292 on Improvement and Development of Forest Villagers and To Reclaim Forests Excluded from National Forest Category and Sale of National Agricultural Areas was published in the Official Gazette dated 20.12.2012 and numbered 28503.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of Some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the Establishment of the Akpınar Hydroelectric Electricity Plant located within the provincial border of Adıyaman and Kahramanmaraş was published in the Official Gazette dated 30.12.2012 and numbered 28513.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of the Sofular Hydroelectric Electricity Plant within the provincial border of Malatya and Sivas was published in the Official Gazette dated 30.12.2012 and numbered 28513.

- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of the Çağlayan Regulator and Hydroelectric Electricity Plant within the provincial border of Diyarbakır and Elazığ was published in the Official Gazette dated 31.12.2012 and numbered 28514.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of Okkayası Regulator and Şehitlik Hydroelectric Electricity Plant in Kahramanmaraş, Central District was published in the Official Gazette dated 31.12.2012 and numbered 28514.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of Silivri Windpower Plant in district of Silivri of the Province İstanbul was published in the Official Gazette dated 31.12.2012 and numbered 28514.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Turkish Electricity Transmission Company General Directorate within the scope of the General Directorate's 154Kv Edirme Substation Renovation Project was published in the Official Gazette dated 31.12.2012 and numbered 28514.
- Resolution of the Council of Ministers dated 04.12.2012 on Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority on behalf of the Treasury for the establishment of natural gas distribution system in District of Susurluk of the Province Balıkesir was published in the Official Gazette dated 31.12.2012 and numbered 28514.

Important Changes and Developments in Laws

- Law numbered 6266 Pertaining to Amending By Law numbered 375 and Certain Laws was published in the Reiterated Official Gazette dated 13.01.2012 and numbered 28172. Different dates of entry into force have been determined for the articles of the Law.
- Law on Amendment on the Retirement Fund Code of the Republic of Turkey and Certain Other Codes was published in the Official Gazette dated 26.01.2012 and numbered 28185. Different dates of entry into force have been determined for the articles of the Law.
- Law on the Election of the President of the Republic entered into force through publication in the Official Gazette dated 26.01.2012 and numbered 28185.
- Law Amending the Cheque Act entered into force through publication in the Official Gazette dated 03.02.2012 and numbered 28193.
- Law Amending the Law Numbered 6111 Pertaining to the Debt Restructuring and the Social Security and General Health Assurance and Certain Other Laws and By-Laws and the Law Numbered 4749 on Public Financing and Regulation of the Debt Management was published in the Official Gazette dated 11.02.2012 and numbered 28201. First article of this Law entered into force by being published effective from 25.02.2011 and other articles entered into force by being published.
- Law Pertaining to the Editing of the Reproduced Intellectual Property was published in the Official Gazette dated 29.02.2012 and numbered 28219. The Law entered into force six months as of its date of publication.
- Law on the Amendment to Social Security and General Health Insurance Law was published in the Official Gazette dated 08.03.2012 and numbered 28227. Different dates of entry into force have been determined for the articles of the Law.

- Law Pertaining to the Protection of Family and the Prevention of Violence against Women entered into force through publication in the Official Gazette dated 20.03.2012 and numbered 28239.
- Law Amending the Value Added Tax Law and Law on Making Some Investments and Services through Build-Operate-Transfer Model and Public Tender Law (Law No. 6288) entered into force through publication in the Reiterated Official Gazette dated 04.04.2012 and numbered 28254.
- Law on Improvement and Development of Forest Villagers and To Reclaim Forests Excluded from National Forest Category and Sale of National Agricultural Areas (Law No. 6292) entered into force through publication in the Official Gazette dated 26.04.2012 and numbered 28275.
- Law Amending Certain Laws and the By-Law Pertaining to the Public Surveillance, Accounting and Auditing Standards entered into force through publication in the Official Gazette dated 10.05.2012 and numbered 28288.
- Law Amending the Law Pertaining to the Execution of Penalty and Security Measures entered into force through publication in the Official Gazette dated 10.05.2012 and numbered 28288.
- Law Amending the Land Registry Law and Cadaster Law entered into force through publication in the Official Gazette dated 18.05.2012 and numbered 28296.
- Law pertaining to Eskişehir 2013 Turkish World Capital of Culture entered into force through publication in the Official Gazette dated 18.05.2012 and numbered 28296.
- Law amending the Law on Principle Provisions of Election and Electoral Registries and Various Laws entered into force through publication in the Official Gazette dated 18.05.2012 and numbered 28296.
- Law amending the Law on Pharmacists and Pharmacies and Inspection of Narcotics entered into force through publication in the Official Gazette dated 31.05.2012 and numbered 28309.

- Law Pertaining to the Amendments to Certain Laws (Law No. 6321) entered into force through publication in the Official Gazette dated 03.06.2012 and numbered 28312.
- Law on the Amendment to the Law on Procedure of Collection of the Public Receivables and Certain Laws was published in the Official Gazette dated 15.06.2012 and numbered 28324. Different dates of entry into force have been determined for the articles of this Law.
- Law on the İzmir EXPO Area entered into force through publication in the Official Gazette dated 15.06.2012 and numbered 28324.
- Law on the Mediation for the Legal Disputes was published in the Official Gazette dated 22.06.2012 and numbered 28331. Articles 28 to 32 and the temporary articles of this Law entered into force through publication and other articles of this Law shall enter into force one year as of its date of publication.
- Law on the Ombudsman Institution was published in the Official Gazette dated 29.06.2012 and numbered 28338. 17th article of this Law shall enter into force nine months later following its date of publication, and other articles entered into force through publication.
- Law on the Occupational Health and Safety was published in the Official Gazette dated 30.06.2012 and numbered 28339. Different dates of entry into force have been determined for the articles of this Law.
- Law on the Turkish Human Rights Institution entered into force through publication in the Official Gazette dated 30.06.2012 and numbered 28339.
- Law on the Amendment to the Turkish Commercial Code and on the Amendment to the Law Pertaining to the Entry into Force and Enforcement of the Turkish Commercial Code was published in the Official Gazette dated 30.06.2012 and numbered 28339. The Law entered into force on 01.07.2012.

- Trade Unions and Collective Agreements Act (Act No. 6356) entered into force through publication in the Official Gazette dated 07.11.2012 and numbered 28460.
- Act on Amendment of Public Procurement Act (No.6359) entered into force through publication in the Official Gazette dated 10.11.2012 and numbered 28463.
- Act on Expo 2016 entered into force through publication in the Official Gazette dated 10.11.2012 and numbered 28463.
- Financial Leasing, Factoring and Financing Companies Act numbered 6361 entered into force through publication in the Official Gazette dated 13.12.2012 and numbered 28496.
- Capital Markets Law entered into force through publication in the Official Gazette dated 30.12.2012 and numbered 28513.

Important Changes and Developments in Regulations

- Regulation pertaining to Amending Regulation on Type Approval of Motor Vehicles with respect to Emissions from Light Passenger and Commercial Vehicles (Euro 5 and Euro 6) and on Access to Vehicle Repair and Maintenance Information ((EC) 715/2007) entered into force through publication in the Official Gazette dated 05.01.2012 and numbered 28164.
- Regulation on the Implementation of Notification Law entered into force through publication in the Official Gazette dated 25.01.2012 and numbered 28184.
- Regulation on the Amendment of the Regulation on the Banking Supervision Measuring Liquidity Efficiency and Evaluation was published in the Official Gazette dated 10.02.2012 and numbered 28200.This Regulation entered into force through publication effective from 31.12.2011.
- Regulation on the Amendment of the Implementation Regulation Pertaining to the Work Permits of the Foreign Persons entered into force through publication in the Official Gazette dated 14.02.2012 and numbered 28204.
- Regulation on the "CE" Sign entered into force through publication in the Official Gazette dated 23.02.2012 and numbered 28213.
- Regulation on the Amendment of the İstanbul Stock Exchange Regulation entered into force through publication in the Official Gazette dated 28.02.2012 and numbered 28218.
- Regulation on the Amendment of the İstanbul Stock Exchange Developing Markets Regulation entered into force through publication in the Official Gazette dated 28.02.2012 and numbered 28218.
- Shipping Agencies Regulation was published in the Official Gazette dated 05.03.2012 and numbered 28224. The regulation entered into force through publication, effective from 02.03.2012.
- Regulation on the Amendment to the Regulation on the Principles that Apply to Foreign Language Education and

Education in Foreign Language in Higher Education Institutions entered into force through publication in the Official Gazette dated 06.03.2012 and numbered 28225.

- Regulation on the Amendment to the Regulation Pertaining to the Chemical Fertilizers for Agricultural Use entered into force through publication in the Official Gazette dated 09.03.2012 and numbered 28228.
- Regulation on the Amendment to Chemical Fertilizer Audit Regulation entered into force through publication in the Official Gazette 09.03.2012 and numbered 28228. Regulation Pertaining to the Identification and Registration of the Immovable Cultural Asset Properties that Need to be Protected entered into force through publication in the Official Gazette dated 13.03.2012 and numbered 28232.
- Regulation on the Amendment to the Regulation Pertaining to the Procedures and Principles Pertaining to Tax Label (Banderole) Application entered into force through publication in the Official Gazette dated 13.03.2012 and numbered 28232.
- Regulation on the Amendment to the Regulation Pertaining to the Procedures and Principles on the Production, Processing, and Domestic and Foreign Trade of Tobacco entered into force through publication in the Official Gazette dated 14.03.2012 and numbered 28233.
- Regulation on the Procedures and Principles Pertaining to the Permission Process for the Domestic Market Bond Issues by the Local Administrations of Government and their Associations and Public Enterprises entered into force through publication in the Official Gazette dated 15.03.2012 and numbered 28234.
- Regulation on the Private Education Institutions of the Ministry of Education entered into force through publication in the Official Gazette dated 20.03.2012 and numbered 28239.
- Regulation on the Amendment to the Highways Traffic Regulation was published in the Official Gazette dated 21.03.2012 and numbered 28240. Different dates of entry into force have been determined for the articles of the regulation.

- Civil Procedural Code Regulation entered into force through publication in the Official Gazette dated 03.04.2012 and numbered 28253.
- 84 Regulations of the Prime Ministry, Ministries, Some Related Institutions and Universities Regarding Reduction of Formalities and Simplification of Actions are published in the Official Gazette dated 03.04.2012 and numbered 28253.
- Regulations of Some Ministries Regarding Reduction of Formalities and Simplification of Actions are published in the Official Gazette dated 04.04.2012 and numbered 28254.
- Civil Aviation Enterprises Authorized Supervision Institutions Regulation (SHY-YDK) entered into force through publication in the Official Gazette dated 05.04.2012 and numbered 28255.
- Regulation on the Amendment to the Notary Public Law Regulation entered into force through publication in the Official Gazette dated 07.04.2012 and numbered 28257.
- Regulation on Preparation of Expert Lists by the Regional Courts of Justice Judicial Justice Commissions is published in the Official Gazette dated 08.04.2012 and numbered 28258.
- Regulation on the Amendment to the Highways Traffic Regulation entered into force through publication in the Official Gazette dated 08.04.2012 and numbered 28258.
- Regulation on the Center for Risk Management of Banks Association of Turkey entered into force through publication in the Official Gazette dated 10.04.2012 and numbered 28260.
- Regulation on the Abrogation to the Regulation Pertaining to Procedures and Principles of the Activities of the Turkish Accounting Standards Institution entered into force through publication in the Official Gazette dated 13.04.2012 and numbered 28263.
- Regulation on the Amendment to the Building Inspection Implementation Regulation entered into force through publication in the Official Gazette dated 14.04.2012 and numbered 28264.

- Regulation on the Amendment to the Planned Zones Construction Regulation entered into force through publication in the Official Gazette dated 14.04.2012 and numbered 28264.
- Regulation Pertaining to the Principles on Authorization and Activities of Rating Institutions entered into force through publication in the Official Gazette dated 17.04.2012 and numbered 28267.
- Regulation on the Amendment to the Regulation on Social Security Transactions entered into force through publication in the Official Gazette dated 17.04.2012 and numbered 28267.
- Regulation on High Council for Protection of Cultural Assets and Regional Councils for Protection of Cultural Assets entered into force through publication in the Official Gazette dated 19.04.2012 and numbered 28269.
- Regulation on Membership and Listing within the Stock Exchanges (Resolution No. 2012/3111) entered into force through publication in the Official Gazette dated 26.04.2012 and numbered 28275.
- Regulation on Establishment and Organization of the Stock Exchanges entered into force through publication in the Official Gazette dated 26.04.2012 and numbered 28275.
- Regulation amending the Regulation pertaining to Allocation of the Public Immovable Properties to the Tourism Investments entered into force through publication in the Official Gazette dated 23.05.2012 and numbered 28301.
- Regulation pertaining to Health Facilities Conducting Diagnostic and Treatment on Outpatients entered into force through publication in the Official Gazette dated 27.05.2012 and numbered 28305.
- Regulation on the Amendment to the Regulation Pertaining to the Unions was published in the Official Gazette dated 01.06.2012 and numbered 28310.Second article of this Regulation shall enter into force on 01.05.2013 and the other articles entered into force through publication.

- Regulation on the Amendment to the Stock Exchange Business Regulation entered into force through publication in the Official Gazette dated 03.06.2012 and numbered 28312.
- Regulation on the Amendment to the Chamber Business Regulation entered into force through publication in the Official Gazette dated 03.06.2012 and numbered 28312. Regulation on the Amendment to the Customs Regulation entered into force through publication in the Official Gazette dated 12.06.2012 and numbered 28321.
- Regulation on the Amendment to the Regulation Pertaining to the Natural Gas Market Certificates entered into force through publication in the Official Gazette dated 12.06.2012 and numbered 28321.
- Regulation on the Amendment to the Regulation Pertaining to the Notary Public Law entered into force through publication in the Official Gazette dated 12.06.2012 and numbered 28321.
- Regulation on the Customs and Trade Council entered into force through publication in the Official Gazette dated 22.06.2012 and numbered 28331.
- Regulation Pertaining to the Evaluation of the Capital Adequacy of the Banks was published in the Official Gazette dated 28.06.2012 and numbered 28337. This Regulation entered into force on 01.07.2012.
- Regulation Pertaining to the Internal Control Systems of the Banks was published in the Official Gazette dated 28.06.2012 and numbered 28337. This Regulation entered into force on 01.07.2012.
- Regulation on the Amendment to the Regulation for Implementation of Foreign Direct Investment Law entered into force through publication in the Official Gazette dated 03.07.2012 and numbered 28342.
- Regulation on the Abolishment of the Regulation concerning the Protection and the Usage of the Agricultural Estate entered into force through publication in the Official Gazette dated 03.07.2012 and numbered 28342.

- Regulation on the Amendment to the Regulation regarding the Procedures and Principles of the Production and the Trade of the Tobacco Products entered into force through publication in the Official Gazette dated 04.07.2012 and numbered 28343.
- Regulation amending the Regulation of the Minimum Wage entered into force through publication in the Official Gazette dated 07.07.2012 and numbered 28346.
- Regulation pertaining to the Organization and Function of the Institution of the Public Monitoring, Accounting and Auditing Standards entered into force through publication in the Official Gazette dated 08.07.2012 and numbered 28347.
- Regulation of the Audit of the Customs and Trade entered into force through publication in the Official Gazette dated 14.07.2012 and numbered 28353.
- Regulation regarding the Procedures and Principles of the Determination, Registration and Approval of the Protected Areas entered into force through publication in the Official Gazette dated 19.07.2012 and numbered 28358.
- Regulation of the Ministry of Customs and Trade on the Supervision of the Market entered into force through publication in the Official Gazette dated 19.07.2012 and numbered 28358.
- Regulation regarding the Processing of the Personal Data and Protection of the Privacy in the Electronic Communications Sector was published in the Official Gazette dated 24.07.2012 and numbered 28363. It is decided that the Communiqué shall enter into force six months following its publication.
- Regulation amending the General Regulation regarding the Establishment and Working Principles of the Precious Metal Exchange Market entered into force through publication in the Official Gazette dated 25.07.2012 and numbered 28364.
- Regulation regarding the Procedures and Principles of the Organization of the Brokerage Operations oriented to Real Estate entered into force through publication in the Official Gazette dated 27.07.2012 and numbered 28366.

- Regulation amending the Regulation regarding the Control of the Industrial Disasters entered into force through publication in the Official Gazette dated 31.07.2012 and numbered 28370.
- Regulation on the Amendment to the Organized Industrial Zone Implementation Regulation entered into force through publication in the Official Gazette dated 08.08.2012 and numbered 28378.
- Regulation on the Amendment to the Regulation Regarding Procedure and Principles to be Respected During Tax Investigations entered into force through publication in the Official Gazette dated 08.08.2012 and numbered 28378.
- Regulation on the Immovables of the Social Security Institution entered into force through publication in the Official Gazette dated 10.08.2012 and numbered 28380.
- Regulation on the Amendment to the Implementation Regulation on Construction Works Tenders was published in the Official Gazette dated 13.08.2012 and numbered 28383. The Regulation entered into force on 01.09.2012.
- Regulation on Settlement of the Disputes Arising from the Practice of Health Professions through Conciliation entered into force through publication in the Official Gazette dated 14.08.2012 and numbered 28384.
- Regulation on the Amendment to the Regulation Concerning Authorization and Activities of the Institutions, which Shall Provide Evaluation Services to the Banks entered into force through publication in the Official Gazette dated 14.08.2012 and numbered 28384.
- Regulation on the Acquisition of Immovable Property or Limited Real Rights by the Companies and Participations within the scope of Article 36 of the Deed Act numbered 2644, was published in the Official Gazette dated 16.08.2012 and numbered 28386. The Regulation entered into force on 18.08.2012.
- Regulation on Collection of the Copied Literary and Artistic Works entered into force through publication in the Official Gazette dated 18.08.2012 and numbered 28388.

- Regulation on the Amendment to Cosmetic Regulation entered into force through publication in the Official Gazette dated 18.08.2012 and numbered 28388.
- Regulation on Institutions of Aircraft Maintenance Education (SHY-147) entered into force through publication in the Official Gazette dated 18.08.2012 and numbered 28388.
- Regulation on the Amendment to Seaman Regulation entered into force through publication in the Official Gazette dated 23.08.2012 and numbered 28390.
- Regulation on Audit of Commercial Companies by the Ministry of Customs and Trade entered into force through publication in the Official Gazette dated 28.08.2012 and numbered 28395.
- Regulation on Determination of the Minimum Content of the Annual Activity Report of the Companies entered into force through publication in the Official Gazette dated 28.08.2012 and numbered 28395.
- Regulation on Electronic General Assembly of the Joint Stock Companies was published in the Official Gazette dated 28.08.2012 and numbered 28395. The Regulation entered into force on 01.10.2012.
- Regulation on the Amendment of Futures and Options Market entered into force through publication in the Official Gazette dated 07.09.2012 and numbered 28404.
- Regulation on the Amendment of the Regulation Pertaining to the Principles of Establishment and Operations of Futures and Options Markets entered into force through publication in the Official Gazette dated 07.09.2012 and numbered 28404.
- Regulation on the Amendment of the Regulation Pertaining to Limitation, Detection and Control Affairs of Immovable Properties entered into force through publication in the Official Gazette dated 26.09.2012 and numbered 28423.
- Regulation on Exercise of Supervision on Importation (Serial No: 2012/5) was published in the Official Gazette dated 27.09.2012 and numbered 28424. The Regulation entered into force on the 30th day following the publication.

- Group Life Insurance Regulation entered into force through publication in the Official Gazette dated 10.10.2012 and numbered 28437.
- Ports Regulation entered into force through publication in the Official Gazette dated 31.10.2012 and numbered 28453.
- Regulation on the Amendment of the Regulation on Rules and Procedures Concerning Acceptance, Withdrawal of Deposits and Funds and the Expired Deposits, Funds, Consignation and Assets was published in the Official Gazette dated 01.11.2012 and numbered 28454. Second article of the Regulation entered into force on 01.11.2012 whereas the other articles shall enter into force six months from the date of publication.
- Regulation on the Amendment of the Regulation on Definition, Characteristics and Classification of Small and Medium Sized Enterprises (Resolution No.2012/3834) entered into force through publication in the Official Gazette dated 04.11.2012 and numbered 28457.
- Regulation on the Amendment on the Regulation on Movable Assets (Resolution No.2012/3832) entered into force through publication in the Official Gazette dated 08.11.2012 and numbered 28461.
- Regulation on the Private Pension System was published in the Official Gazette dated 09.11.2012 and numbered 28462.
- Regulation on the Principles and Procedures of Radio and Television High Council Terrestrial Broadcast and Classification Tender entered into force through publication in the Official Gazette dated 09.11.2012 and numbered 28462.
- Regulation on the Amendment of the Regulation Concerning Control of Industry Related Air Pollution entered into force through publication in the Official Gazette dated 10.11.2012 and numbered 28463.
- Regulation on the Amendment of the Regulation on Foundation and Activity Principles of Asset Management Companies entered into force through publication in the Official Gazette dated 14.11.2012 and numbered 28467.

- Regulation on the Amendment of the Implementation Regulation on the Framework Agreement Tenders was published in the Official Gazette dated 14.11.2012 and numbered 28467. The Regulation entered into force on 01.12.2012.
- Regulation on the Amendment of the Implementation Regulation on Electronic Tenders was published in the Official Gazette dated 14.11.2012 and numbered 28467. The Regulation entered into force on 01.12.2012.
- Regulation on the Derivatives and Options Market of the Istanbul Stock Exchange entered into force through publication in the Official Gazette dated 15.11.2012 and numbered 28468.
- Regulation on the Amendment of Customs Regulations entered into force through publication in the Official Gazette dated 20.11.2012 and numbered 28473.
- Regulation on the Amendment of the Regulation for the Implementation of the Habitation Act entered into force through publication in the Official Gazette dated 21.11.2012 and numbered 28474.
- Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Representatives of Ministry of Customs and Trade to be Present in these Meetings was published in the Official Gazette dated 28.11.2012 and numbered 28481.
- Licensing Regulation for Health Services entered into force through publication in the Official Gazette dated 30.11.2012 and numbered 28483.
- Regulation on the Amendment of the Regulation on Procedures and Principles Concerning Proceedings and Collections of Receivables by the Savings Deposit Insurance Fund entered into force through publication in the Official Gazette dated 30.11.2012 and numbered 28483
- Regulation amending the Regulation pertaining to Opening a Workplace and Work Permits entered into force through publication in the Official Gazette dated 06.12.2012 and numbered 28486.

- Amendment on the Regulation amending the Regulation amending the Regulation pertaining to Principles and Procedures on the Acceptance and Withdrawal of Deposit and Participation Fund and the Time-Bared Deposit, Participation Fund, Escrow and Receivables entered into force through publication, effective as of 01.11.2012, in the Official Gazette dated 14.12.2012 and numbered 28497.
- Regulation amending the Regulation pertaining to Risk Center of the Banks Association of Turkey entered into force through publication in the Official Gazette dated 19.12.2012 and numbered 28502.
- Regulation amending the Regulation pertaining to Principles of Implementation of Tariffs in the Highways Motor Vehicles Liability Insurance was published in Official Gazette dated 25.12.2012 and numbered 28508. The regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Determination the Quality of Loans and Other Receivables of the Banks and the Principles and Procedures on Provisions Allocated For Them entered into force through publication in the Official Gazette dated 25.12.2012 and numbered 28508.
- Regulation on Independent Auditing entered into force through publication in the Official Gazette dated 26.12.2012 and numbered 28509.
- Regulation amending the Regulation pertaining to Technical Regulations in Foreign Trade and Standardization was published in the Official Gazette dated 31.12.2012 and numbered 28514. The Regulation shall enter into force on 01.02.2013.

Important Changes and Developments in Communiqués

- Communiqué Pertaining to Administrative Monetary Fines under the Environmental Law numbered 2872 (No: 2012/1) was published in the Official Gazette dated 10.01.2012 and numbered 28169. The Communiqué entered into force effective from 01.01.2012.
- Communiqué on Surveillance on Imports (Communiqué No: 2012/1) was published in the Official Gazette dated 10.01.2012 and numbered 28169. The Communiqué entered into force on the 30th day following its publication.
- Communiqué Pertaining to Administrative Monetary Fines under the Environmental Law numbered 2872 (No: 2012/2) was published in the Official Gazette dated 12.01.2012 and numbered 28171. The Communiqué entered into force effective from 10.01.2012.
- Communiqué on Preventive Measures on Importation (No: 2012/2) entered into force through publication in the Official Gazette dated 25.01.2012 and numbered 28184.
- Communiqué on Preventive Measures for Importation (No: 2012/1) entered into force through publication in the Official Gazette dated 26.01.2012 and numbered 28185.
- Communiqué on the Classification of Goods and Services with respect to Trademark Applications (TPE: 2012/2) was published in the Official Gazette dated 28.01.2012 and numbered 28187. The Communiqué entered into force effective from 01.01.2012.
- Communiqué regarding Prevention of Unfair Competition in Importations (No: 2012/1) entered into force through publication in the Official Gazette dated 31.01.2012 and numbered 28190.
- Communiqué regarding Prevention of Unfair Competition in Importations (No: 2012/2) entered into force through publication in the Official Gazette dated 31.01.2012 and numbered 28190.

- Communiqué (Serial: IV, No: 57) on the Amendment of the Communiqué Pertaining to the Setting Out and Application of the Corporate Governance Principles (Serial: IV, No: 56) entered into force through publication in the Official Gazette dated 11.02.2012 and numbered 28201.
- Communiqué on the Principles Pertaining to the Open Joint Stock Companies of Which Shares to be Traded on Free Trade Platform (Serial: IV, No: 58) entered into force through publication in the Official Gazette dated 11.02.2012 and numbered 28201.
- Communiqué on the Amendment of the Communiqué Pertaining to the Surveillance on Imports (Communiqué No: 2010/6) entered into force through publication in the Official Gazette dated 18.02.2012 and numbered 28208.
- Communiqué Pertaining to Management of the Quota and Tariff Quota on Imports (No: 2012/1) entered into force through publication in the Official Gazette dated 22.02.2012 and numbered 28212.
- Communiqué (Serial IV, No: 59) on the Amendment of the Communiqué Pertaining to the Principles of the Registered Capital System (Serial: IV, No: 38) entered into force through publication in the Official Gazette dated 22.02.2012 and numbered 28219.
- Communiqué on the Amendment to Communiqué (Communiqué No: 2008/8) Pertaining to the Implementation of Supervision of Imports entered into force through publication in the Official Gazette dated 02.03.2012 and numbered 28221.
- Communiqué on the Amendment to the Communiqué (No: 2010/2) Pertaining to Communicating and Announcement of the Form Checkbooks would be Printed; of the Sum which Banks are Obligated to Pay to the Check Holder and; of the Decisions on Prohibition of Opening Check Accounts (No: 2012/2) entered into force through publication in the Official Gazette dated 03.03.2012 and numbered 28222.

- Communiqué on the Amendment to the Communiqué (Communiqué No: 2009/8) Pertaining to the Implementation of Supervision of Imports entered into force through publication in the Official Gazette dated 13.03.2012 and numbered 28232.
- Communiqué of the Principles of Usage of the Security Deposits that had been deposited by the Portfolio Management Companies (Serial: V, No: 130) entered into force through publication in the Official Gazette dated 13.03.2012 and numbered 28232.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/3) entered into force through publication in the Official Gazette dated 14.03.2012 and numbered 28233.
- Communiqué Pertaining to the International Arbitration Fees Tariff was published in the Official Gazette dated 16.03.2012 and numbered 28235. The communiqué entered into force by being published, effective from 15.03.2012.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/5, 2012/7) entered into force through publication in the Official Gazette dated 20.03.2012 and numbered 28239.
- Communiqué on the Amendment to Communiqué (Serial No: 1) Pertaining to Stamp Tax and Charge Exemption for Activities that Generate Foreign Currency Income (Serial No: 5) was published in the Official Gazette dated 21.03.2012 and numbered 28240.
- Communiqué on the Amendment to Communiqué (Export No: 2008/6) Pertaining to Exemption from Tax, Charges and Duties of Export, Transit Trade, Sales and Transfers and Services and Activities that Generate Foreign Currency Income (Export No: 2012/6) was published in the Official Gazette dated 21.03.2012 and numbered 28240.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/6, 2012/8) entered into force through publication in the Official Gazette dated 21.03.2012 and numbered 28240.

- Communiqué on the Amendment to the Communiqué Pertaining to the Principles Regarding the Investment Funds (Serial: VII, No: 43) entered into force through publication in the Official Gazette dated 21.03.2012 and numbered 28240. Communiqué 2012/1 on the Amendment to the Communiqué on Branding of Turkish Products Abroad, establishment of the Image of Turkish Products and Support of TURQUALITY® (Communiqué No: 2006/4) entered into force through publication in the Official Gazette dated 22.03.2012 and numbered 28241.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/4) entered into force through publication in the Official Gazette dated 27.03.2012 and numbered 28246.
- Communiqué Pertaining to the Protective Measures in Imports No: 2012/3, No. 2012/4, No. 2012/5 entered into force through publication in the Official Gazette dated 06.04.2012 and numbered 28256.
- Communiqué Pertaining to Adaptation of the Dispositions Establishing Preferences in Articles of Association of Joint Stock Companies (No: Domestic Trade 2012/1) entered into force through publication in the Official Gazette dated 11.04.2012 and numbered 28261.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/9) entered into force through publication in the Official Gazette dated 19.04.2012 and numbered 28269.
- Communiqué Pertaining to Determination of the Security Risks of the Consumer Products is published in the Official Gazette dated 20.04.2012 and numbered 28270. This Communiqué entered into force on 01.01.2013
- Communiqué Pertaining to the Protective Measures in Imports (No: 2012/7) entered into force through publication in the Official Gazette dated 21.04.2012 and numbered 28271.
- Communiqué Pertaining to the Protective Measures in Imports No: 2012/6 and No: 2012/8 entered into force through publication in the Official Gazette dated 27.04.2012 and numbered 28276.

- Communiqué Amending the Communiqué (Numbered: 2005/1) on Mandatory Considerations (Serial No: 2012/4) entered into force through publication in the Official Gazette dated 12.05.2012 and numbered 28290.
- Communiqué amending the Communiqué pertaining to the Repurchase and Promise of Sale and Sale and Purchase of Securities (Serial: V, No: 131) entered into force through publication in the Official Gazette dated 12.05.2012 and numbered 28290.
- Communiqué amending the Communiqué pertaining to the Principles regarding Real Estate Investment Companies (Serial: IV, No: 33) entered into force through publication in the Official Gazette dated 12.05.2012 and numbered 28290.
- Communiqué on International Supervision and Company Status (Product Safety and Audit: 2012/26) was published in the Official Gazette dated 14.05.2012 and numbered 28292.
- Communiqué pertaining to the Prevention of Unfair Competition in Import (No: 2012/11) entered into force through publication in the Official Gazette dated 16.05.2012 and numbered 28294.
- Communiqué pertaining to the Prevention of Unfair Competition in Import (No: 2012/12) entered into force through publication in the Official Gazette dated 16.05.2012 and numbered 28294.
- Communiqué pertaining to the Registered Electronic Mail Catalog and the Registered Electronic Mail Account Addresses entered into force through publication in the Official Gazette dated 16.05.2012 and numbered 28294.
- Communiqué pertaining to the Protective Measures in Imports (No: 2012/9) entered into force through publication in the Official Gazette dated 17.05.2012 and numbered 28295.
- Communiqué pertaining to the Prevention of Unfair Competition in Export (No: 2012/10) entered into force through publication in the Official Gazette dated 22.05.2012 and numbered 28301.

- Communiqué (Communiqué No: Domestic Trade: 2012/2) on the Abrogation of the Communiqué Pertaining to the Adaption of the Provisions Providing Privileges under the Articles of the Association of the Joint Stock Companies (Communiqué No: Domestic Trade: 2012/1) entered into force through publication in the Official Gazette dated 01.06.2012 and numbered 28310.
- Communiqué on the Application of the Resolution Pertaining to the State Aids for the Investments was published in the Official Gazette dated 20.06.2012 and numbered 28329, and entered into force by being published.
- Communiqué on the Amendment to the Communiqués Pertaining to the Turkish Accounting Standards (Sequence No: 1) was published in the Official Gazette dated 29.06.2012 and numbered 28338.
- Communiqué pertaining to the Procedures and Principles of the Urban Transformation and the Announcement of the Development Zone in the Areas belonging to Public Property or at the Disposal of the Public entered into force through publication in the Official Gazette dated 04.07.2012 and numbered 28343.
- Communiqué amending the Communiqué pertaining to the Principles regarding the Asset Finance Fund and the Stocks and Bonds Based on the Asset (Serial: III, Number: 47) entered into force through publication in the Official Gazette dated 04.07.2012 and numbered 28343.
- Communiqué pertaining to the Implementation of the Supervision in the Importation (Number: 2012/2) was published in the Official Gazette 05.07.2012 and numbered 28344. The Communiqué entered into force in the 30th day following the publication.
- Communiqué pertaining to the Protective Measures in Importation (No: 2012/10) entered into force through publication in the Official Gazette dated 06.07.2012 and numbered 28345.

- Communiqué pertaining to the Prevention of the Unfair Competition in the Importation (No: 2012/14, 2012/16) entered into force through publication in the Official Gazette dated 10.07.2012 and numbered 28349.
- Communiqué amending the Communiqué pertaining to the Monitoring and the Safeguard Measure in the Importation and the Implementation of the Monitoring of the Importation entered into force through publication in the Official Gazette dated 11.07.2012 and numbered 28350.
- Communiqué regarding the Safeguard Measure in the Importation (No: 2012/11, 12, 13, 14) entered into force through publication in the Official Gazette dated 19.07.2012 and numbered 28358.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/18) entered into force through publication in the Official Gazette dated 03.08.2012 and numbered 28373.
- Communiqué (N. 2012/8) Amending the Communiqué (No. 2005/1) pertaining to the Mandatory Reserves was published in the Official Gazette dated 03.08.2012 and numbered 28373. The Communiqué entered into force on 17.08.2012.
- Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/15), Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/17) and Communiqué on the Prevention of Unfair Competition in Imports (No: 2012/19) entered into force through publication in the Official Gazette dated 07.08.2012 and numbered 28377.
- Communiqué on the Distribution of Advance on Dividends entered into force through publication in the Official Gazette dated 09.08.2012 and numbered 28379.
- Communiqué on the Amendment to the Communiqué 2004/14 pertaining to the Implementation of Supervision of Imports, Communiqué on the Amendment of the Communiqué 2007/5 pertaining to the Implementation of Supervision of Imports, Communiqué on the Amendment of the Communiqué 2007/9 pertaining to the Implementation of Supervision of Imports were published in the Official Gazette dated 15.08.2012 and

numbered 28385. The Communiqués entered into force thirty days after publication.

- Communiqué (N. 2012/9) on the Amendment to the Communiqué (No: 2005/1) Pertaining to the Mandatory Reserves was published in the Official Gazette dated 17.08.2012 and numbered 28387.
- Communiqué on the Amendment -to the Communiqué (Communiqué No: 2007/6) pertaining to the Implementation of Supervision of Imports, Communiqué on the Amendment of the Communiqué (Communiqué No: 2008/2) pertaining to the Implementation of Supervision of Imports, Communiqué on the Amendment of the Communiqué (No: 2012/4) pertaining to the Implementation of Supervision of Imports were published in the Official Gazette dated 18.08.2012 and numbered 28388. The Communiqués entered into force on the 30th day as of its publication.
- Communiqué on the Principles Concerning Practice of Cumulative Voting in General Assemblies of Non-Public Joint Stock Companies entered into force through publication in the Official Gazette dated 29.08.2012 and numbered 28396.
- Communiqué on the Electronic General Assembly System in General Assemblies of Joint Stock Companies was published in the Official Gazette dated 29.08.2012 and numbered 28396. The Communiqué entered into force on 01.10.2012.
- Communiqué on the Assemblies to be Electronically Held in Commercial Companies Except for the General Assemblies of Joint Stock Companies was published in the Official Gazette dated 29.08.2012 and numbered 28396. The Communiqué entered into force on 01.10.2012.
- Communiqué on Keeping the Records of the Devices that Contain Electronic Identification Details entered into force through publication in the Official Gazette dated 06.09.2012 and numbered 28403.
- Amendment Communiqué (Serial: IV, No: 61) on the Communiqué (Serial: IV No 56) pertaining to the Determination and Application of the Corporate Governance Principles (Serial: IV No 56) entered into force through publi-

cation in the Official Gazette dated 13.09.2012 and numbered 28410.

- Amendment Communiqué (Serial No: 2012-32/40) on the Communiqué pertaining to the Resolution 32 Regarding the Protection of the Value of the Turkish Currency (Serial No: 2008-32/34) entered into force through publication in the Official Gazette dated 26.09.2012 and numbered 28423.
- Amendment Communiqué (Communiqué No: 2012-32/41) on the Communiqué pertaining to the Resolution 32 Regarding the Protection of the Value of Turkish Currency (Communiqué No: 2006-32/32) entered into force through publication in the Official Gazette dated 26.09.2012 and numbered 28423.
- Communiqué on the Supervision of the Importation of Certain Consumer Products (Product Safety and Supervision 2012/30) was published in the Official Gazette dated 04.10.2012 and numbered 28431. This Communiqué will enter into force 30 days after its publication.
- Communiqué on the Amendment of the Communiqué (Communiqué No: 2009/5) on the Sponsorship of the Attendance to the Expositions Performed Abroad (Communiqué No: 2012/5) was published in the Official Gazette dated 06.10.2012 and numbered 28433.
- Communiqué on the Amendment of the Communiqué pertaining to Uniform Chart of Accounts and Offering Circular Applied by Participation Banks was published in the Official Gazette dated 17.10.2012 and numbered 28444. This Communiqué entered into force on 01.11.2012.
- Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2012/20, Communiqué No: 2012/21) was published in the Official Gazette dated 18.10.2012 and numbered 28445, and entered into force by being published.
- Communiqué on the Principles Regarding Registered Capital System in Non-Public Companies was published in the Official Gazette dated 19.10.2012 and numbered 28446, and entered into force by being published.

- Communiqué on the Amendment (Serial No: 2012/12) of the Communiqué pertaining to Required Reserves (Serial No: 2005/1) was published in the Official Gazette dated 19.10.2012 and numbered 28446. This Communiqué entered into force on 24.10.2012.
- Communiqué on the Cooperation between the Registries Pertaining to the Structural Amendments of the Companies and Undertaking Capital in Kind entered into force through publication in the Official Gazette dated 31.10.2012 and numbered 28453.
- Communiqué on the Amendment of the Communiqué on the Implementation of Importation Supervision (Communiqué No: 2010/2) was published in the Official Gazette dated 08.11.2012 and numbered 28461.
- Communiqué on Implementation of Importation Supervision (No: 2012/6) was published in the Official Gazette dated 08.11.2012 and numbered 28461.
- Communiqué on the Implementation of Importation Supervision (No: 2012/7) was published in the Official Gazette dated 15.11.2012 and numbered 28468.
- Communiqué on the establishment of New Minimum Amounts for Capital Increases by Joint Stock and Limited Companies, and on the Determination by Joint Stock Companies as to when the Amendment of Foundation and Articles of Association is Subject to Authorization, entered into force through publication in the Official Gazette dated 15.11.2012 and numbered 28468.
- Communiqué on the Amendment of the Communiqué (No: 2005/1) on Required Reserves (No: 2012/13) was published in the Official Gazette dated 21.11.2012 and numbered 28474.
- Communiqué (Serial: VII, No: 44) on the Amendment of the Communiqué (Serial: VII, No: 10) on Principles Concerning Investment Funds was published in the Official Gazette dated 24.11.2012 and numbered 28477.

- Communiqué on the Prevention of Unfair Competition in Imports (Communiqué no: 2012/22), the Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2012/23) and the Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2012/24) were published in the Official Gazette dated 27.11.2012 and numbered 28480.
- Communiqué on Increasing the Inferior Limit of Administrative Fine until 31.12.2013 with respect to article 16/1 of the Act numbered 4054 on the Protection of Competition (Communiqué No: 2013/1) was published in the Official Gazette dated 06.12.2012 numbered 28489.
- Communiqué on the Application of Principles and Procedures pertaining to General Investment and Financing Facility of 2013 was published in the Official Gazette dated 12.12.2012 and numbered 28495. Different dates of entry into force have been determined for different provisions of the Communiqué.
- Amendment Communiqué (Serial No: IV, No:62) on the Communiqué (Serial No: IV, No: 28) pertaining to the Principles and Procedures with regards to Keeping Records of Dematerialized Capital Market Instruments entered into force through publication in the Official Gazette dated 13.12.2012 and numbered 28496.
- Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2012/25) entered into force through publication in the Official Gazette dated 14.12.2012 and numbered 28497.
- Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2012/26) entered into force through publication in the Official Gazette dated 14.12.2012 and numbered 28497.
- Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2012/27) entered into force through publication in the Official Gazette dated 14.12.2012 and numbered 28497.

- Communiqué on Commercial Books entered into force through publication in the Official Gazette dated 19.12.2012 and numbered 28502.
- Communiqué on the Protection Methods in Imports (Communiqué No: 2012/16) entered into force through publication in the Official Gazette dated 21.12.2012 and numbered 28504.
- Amendment Communiqué (Serial No: 2012/14) pertaining to Communiqué (No: 2008/6) on International Bank Account Number entered into force through publication in the Official Gazette dated 21.12.2012 and numbered 28504.
- Communiqué on the Principles and Procedures in Claims For Foreign Notification and Rogatory was published in the Official Gazette dated 25.12.2012 and dated 28508. The Communiqué entered into force on 01.01.2013.
- Amendment Communiqué (Communiqué No: 2012/28) on the Communiqué pertaining to the Prevention of Unfair Competition in Imports (Communiqué No: 2008/33) entered into force through publication in the Official Gazette dated 25.12.2012 and numbered 28508.
- Communiqué on Classification of Goods and Services with respect to Trademark Registry Applications (TPI: 2012/3) was published in the Official Gazette dated 25.12.2012 and numbered 28509. The Communiqué entered into force on 01.01.2013.
- Communiqué on Compulsory Earthquake Insurance Tariff and Directive was published in the Official Gazette dated 29.12.2012 and numbered 28512. The second paragraph of the first article of the Communiqué shall enter into force on 01.03.2013 and the other provisions entered into force on 01.01.2013.
- Amendment Communiqué on the Communiqué pertaining to the Supervision Implementation in Imports (Communiqué No: 2012/7) entered into force through publication in the Official Gazette dated 29.12.2012 and numbered 28512, effective as of 15.12.2012.

- Communiqué on Determining the Default Interest Rate with respect to Late Payments Made to the Creditor for Supply of Goods and Services was published in the Official Gazette dated 29.12.2012 and numbered 28512. The Communiqué entered into force on 01.01.2013.
- Amendment Communiqué (Communiqué No: 2012/3) on the Communiqué pertaining to the Merger and Acquisitions Requiring the Permission of the Competition Board (Communiqué No: 2010/4) was published in the Official Gazette dated 29.12.2012 and numbered 28512. The Communiqué entered into force on 01.01.2013.
- Communiqué on Liquidation and Deleting Trade Registry Entry of Joint-Stock and Limited Companies and Cooperatives Which Are Not Dissolved despite being Liquidated entered into force through publication in the Official Gazette dated 30.12.2012 and numbered 28513.
- Communiqué on Supervision of Complying With the Standards in Import (Security and Supervision of Good: 2013/1) was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Provisional article 1 of the Communiqué entered into force on 01.01.2013, the first paragraph of the article 6 and the fourth paragraph of article 9 on 01.07.2013 and the others on 15.02.2013.
- Amendment Communiqué (Serial No: 2) on the Communiqué pertaining to Turkish Financial Reporting Standards with regards to Financial Instruments (TFRS 9) (Serial No: 172) entered into force through publication in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513.
- Amendment Communiqué (Serial No: 3) on the Communiqué pertaining to Turkish Financial Reporting Standards with regards to Financial Instruments (TFRS 9) (Serial No: 211) entered into force through publication in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513.
- TFRS 7 Financial Instruments: Amendment Communiqué (Serial No: 4) on the Communiqué pertaining to Turkish Financial Reporting Standards (TFRS 7) With Regards to the

Explanations (Serial No: 42) entered into force through publication in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513.

- Amendment Communiqué (Serial No: V, No: 133) on the Communiqué pertaining to Purchase on Credit, Short Selling and Borrowing and Lending Transactions of Capital Market Instruments (Serial No: V, No:65) entered into force through publication in the 4. Reiterated Official Gazette dated 31.12.2012 and numbered 28514.

Important Changes and Developments in General Communiqués

- General Communiqué on Income Tax (Serial No: 281) was published in the Official Gazette dated 03.01.2011 and numbered 28162.
- General Communiqué on Corporate Tax (Serial No: 5) was published in the Official Gazette dated 19.01.2012 and numbered 28178.
- General Communiqué on Expense Tax (Serial No: 89) was published in the Official Gazette dated 19.01.2012 and numbered 28178.
- General Communiqué on Value Added Tax (Serial No: 116) was published in the Official Gazette dated 19.01.2012 and numbered 28178.
- General Communiqué on Income Tax (Serial No: 282) was published in the Official Gazette dated 19.01.2012 and numbered 28178.
- General Communiqué on Tax Procedural Code (Serial No: 412) and General Communiqué on Tax Procedural Code (Serial No: 413) were published in the Official Gazette dated 20.01.2012 and numbered 28179.
- General Communiqué on Customs (Custom Transactions) (Serial No: 88) entered into force through publication in the Official Gazette dated 31.01.2012 and numbered 28190.
- General Communiqué on Tax Procedural Law (Sequence No: 414) was published in the Official Gazette dated 18.02.2012 and numbered 28208.
- General Communiqué of Customs (Customs Transactions) (Serial No: 90) was published in the Official Gazette dated 06.03.2012 and numbered 28225, and entered into force by being published.
- General Communiqué on National Estate (Serial No. 344) was published in the Official Gazette dated 09.03.2012 and numbered 28228.

- General Communiqué for Law No. 6111 on Restructuring of Some Receivables (Serial No: 3) is published in the Official Gazette dated 07.04.2012 and numbered 28257.
- General Communiqué on Value Added Tax (Serial No. 117) is published in the Official Gazette dated 14.04.2012 and numbered 28264.
- General Communiqué on Corporate Tax (Serial No: 6) was published in the in the Official Gazette dated 05.05.2012 and numbered 28283.
- General Communiqué pertaining to the Value Added Tax (Serial No: 118) was published in the Official Gazette dated 16.05.2012 and numbered 28294.
- General Communiqué on Customs (Customs Tariff Prospectus) (Serial No: 2) was published in the reiterated Official Gazette dated 29.05.2012 and numbered 28307.
- General Communiqué on the Customs (Transit Procedure) (Serial No: 2) was published in the Official Gazette dated 05.06.2012 and numbered 28314, and entered into force by being published.
- General Communiqué on the Law on Fees was published in the Official Gazette dated 16.06.2012 and numbered 28325.
- General Communiqué on the Value Added Tax (Serial No: 119) was published in the Official Gazette dated 23.06.2012 and numbered 28332.
- General Communiqué on the Law No. 6111 Pertaining to the Restructuring Certain Receivables (Serial No: 4) was published in the Official Gazette dated 26.06.2012 and numbered 28335.
- General Communiqué on the Tax Procedure Law (Sequence No: 415) was published in the Official Gazette dated 26.06.2012 and numbered 28335, and entered into force by being published.
- General Communiqué on the Tax Procedure Law (No: 417) was published in the Official Gazette dated 29.06.2012 and numbered 28338.

- General Communiqué of the National Estate (Serial Number: 345) entered into force through publication in the Official Gazette dated 04.07.2012 and numbered 28343.
- Communiqué amending the General Communiqué pertaining to the Public Procurement entered into force through publication in the Official Gazette dated 15.07.2012 and numbered 28354.
- General Communiqué pertaining to the Payment of Salaries through the Bank (Serial Number: 1) entered into force through publication in the Official Gazette dated 17.07.2012 and numbered 28356.
- Communiqué (Custom Transactions) (Serial Number: 91) amending the General Communiqué of Custom (Custom Transactions) (Serial Number: 90) entered into force through publication in the Official Gazette dated 25.07.2012 and numbered 28364.
- General Communiqué of Custom (Custom Transactions) (Serial Number: 93) entered into force through publication in the Official Gazette dated 27.07.2012 and numbered 28366.
- General Communiqué of Income Tax (Serial Number: 283) entered into force through publication in the Official Gazette dated 27.07.2012 and numbered 28366.
- General Communiqué of Custom (Custom Transactions) (Serial Number: 92) entered into force through publication in the Official Gazette dated 31.07.2012 and numbered 28370.
- General Customs Communiqué (Customs Transactions) (Serial No: 94) entered into force through publication in the Official Gazette dated 04.08.2012 and numbered 28374.
- Communiqué on the Amendment to the Public Tenders General Communiqué was published in the Official Gazette dated 13.08.2012 and numbered 28383. The Communiqué entered into force on 01.09.2012.
- Communiqué (Serial No: 2) on the Amendment to the General Communiqué (Serial No: 1) Pertaining to Granting Tax

Exemption to the Foundations was published in the Official Gazette dated 15.08.2012 and numbered 28385.

- Communiqué (Serial No: 2) on the Amendment to the General Customs Communiqué (Processing Abroad – Temporary Export) (Serial No: 1) was published in the Official Gazette dated 17.08.2012 and numbered 28387.
- General Communiqué on Private Consuming Tax (Serial No: 24), was published in the Official Gazette dated 17.08.2012 and numbered 28387.
- General Customs Communiqué (Customs Transactions) (Serial No: 95) entered into force through publication in the Official Gazette dated 18.08.2012 and numbered 28388.
- General Communiqué on Value Added Tax (Serial No: 120) entered into force through publication in the Official Gazette dated 18.08.2012 and numbered 28388.
- General Communiqué on Act of Real Estate (Serial No: 60) was published in the Official Gazette dated 28.08.2012 and numbered 28395.
- General Communiqué of Customs (Customs Transactions) (Serial No: 97) was published in the Official Gazette dated 04.09.2012 and numbered 28401.
- General Communiqué of Duties Act (Serial No: 68) was published in the Official Gazette dated 25.09.2012 and numbered 28422.
- General Communiqué on the Customs (Serial No: 98) entered into force through publication in the Official Gazette dated 04.10.2012 and numbered 28431.
- National Estate General Communiqué (Serial No: 346, Serial No: 347, Serial No: 348) entered into force through publication in the Official Gazette dated 10.10.2012 and numbered 28437.
- General Communiqué on the Private Consumption Tax (Serial No: 25) was published in the Official Gazette dated 11.10.2012 and numbered 28438.

- General Communiqué on the Tax Procedures Act (Serial No: 419) was published in the Official Gazette dated 10.11.2012 and numbered 28466.
- General Customs Communiqué (Customs Transactions) (Serial No: 100) entered into force through publication in the Official Gazette dated 13.11.2012 and numbered 28466.
- Communiqué on the Amendment of the General Customs Communiqué (articulated lorry operations) (Serial No: 1) entered into force through publication in the Official Gazette dated 15.11.2012 and numbered 28468.
- Communiqué on the Amendment of the General Customs Communiqué (authorized customs consultancy) (Serial No: 2) entered into force through publication in the Official Gazette dated 15.11.2012 and numbered 28468.
- General Communiqué on Tax Procedural Law (Serial No: 420) was published in the Official Gazette dated 07.12.2012 numbered 28490.
- General Communiqué on Tax Procedural Law (Serial No: 421) entered into force through publication in the Official Gazette dated 14.12.2012 and numbered 28497.
- Amendment Communiqué (Transit Transactions) (Serial No: 4) on the General Custom Communiqué (Transit Transactions) (Serial No: 3) entered into force through publication in the Official Gazette dated 20.12.2012 and numbered 28503.
- General Custom Communiqué (Custom Transactions) (Serial No: 101) was published in the 4. Reiterated Official Gazette dated 31.12.2012 and numbered 28514. The Communiqué entered into force on 01.01.2013.
- General Communiqué on Tax Procedural Code (Serial No: 422) was published in the 4. Reiterated Official Gazette dated 31.12.2012 and numbered 28514.
- General Communiqué on Value Added Tax (Serial No: 121) was published in the 4. Reiterated Official Gazette dated 31.12.2012 and numbered 28514.

- General Custom Communiqué (Custom Transactions) (Serial No: 101) was published in the 4. Reiterated Official Gazette dated 31.12.2012 and numbered 28514. The Communiqué entered into force on 01.01.2013.

Important Changes and Developments in Other Legislation

- Prime Ministry Circular numbered 2012/1 pertaining to the Financial and Technical Cooperation Package with the Least Developed Countries was published in the Official Gazette dated 05.01.2012 and numbered 28164.
- Prime Ministry Circular numbered 2012/4 pertaining to the Determination of Income of Insured Persons under General Health Insurance was published in the Official Gazette dated 11.01.2012 and numbered 28170.
- Investment Incentive Documents Lists for December, 2011 was published in the Official Gazette dated 28.01.2012 and numbered 28187.
- List of Incentive Certificates for the Month of January of the Year 2012 was published in the Official Gazette dated 29.02.2012 and numbered 28219.
- List of Incentive Certificates Cancelled on the Month of January of the Year 2012 was published in the Official Gazette dated 29.02.2012 and numbered 28219.
- By-law amending the By-law Pertaining to Carrying Out of Mediation Activities for the Adoption of Minors entered into force through publication in the Official Gazette dated 09.03.2012 and numbered 28228.
- Circular on the Amendment of the Circular of the Central Bank of the Republic of Turkey that is Numbered I-M Pertaining to Resolution 32 Regarding the Protection of Turkish Currency and to Communiqué 2008-32/34 of the Undersecretariat of Treasury of the Treasury (Number: 2012/1) entered into force through publication in the Official Gazette dated 17.03.2012 and numbered 28236.
- Circular 2012/6 of the Prime Ministry Pertaining to "Single Window" System Customs Services was published in the Official Gazette dated 20.03.2012 and numbered 28239.
- Customs and Trade Ministry Circular numbered 2012/1 on the Principles to be Implemented for Applications to be Made to

Trade Registry, Chambers and Commodity and Merchants and Craftsman Registry entered into force through publication in the Official Gazette dated 04.04.2012 and numbered 28254.

- Tariff Amending the Minimum Attorney Wages Tariff entered into force through publication in the Official Gazette dated 02.05.2012 and numbered 28280.
- Finance Ministry Resolution on Foreign Trade Capital Companies was published in the Official Gazette dated 15.05.2012 and numbered 28293.
- List of Incentive Certificates for the Month of April of the Year 2012 was published in the Official Gazette dated 01.06.2012 and numbered 28310.
- List of Incentive Certificates Cancelled on the Month of April of the Year 2012 was published in the Official Gazette dated 01.06.2012 and numbered 28310.
- By-Law abrogating the By-Law on Notices entered into force through publication in the Official Gazette dated 07.08.2012 and numbered 28377.
- List of Investment Incentive Certificates for the Month of July of the Year 2012 and the List of Incentive Certificates that Have Been Annulled for the Month of July of the Year 2012 was published in the Official Gazette dated 04.09.2012 and numbered 28401.
- Resolution of the Banking Regulation and Supervision Board dated 28.09.2012 and numbered 4963 on the Authorization of Operation of Odea Bank A.Ş. was published in the Official Gazette dated 02.10.2012 and numbered 28429.
- List of Incentive Certificates for the Month of August of the Year 2012 was published in the Official Gazette dated 05.10.2012 and numbered 28432.
- List of Incentive Certificates Cancelled on the Month of August of the Year 2012 was published in the Official Gazette dated 05.10.2012 and numbered 28432.
- Ministry of Development Circular on the Preparation of the Investment Program for the period of 2013-2015 numbered

2012/1 was published in the Official Gazette dated 09.10.2012 and numbered 28436.

- National Estate General Communiqué (Serial No: 346, Serial No: 347, Serial No: 348) was published in the Official Gazette dated 10.10.2012 and numbered 28437, and entered into force by being published.
- Governmental Accounting Standard 11 Construction Agreements of the Governmental Accounting Standards Board was published in the Official Gazette dated 10.10.2012 and numbered 28437.
- Procedures and Principles on the Amendment of the Procedures and Principles on the Allocation of the Immovable of the Government to Investments was published in the Official Gazette dated 16.10.2012 and numbered 28443.
- Procedures and Principles for the Amendment of the Procedures and Principles Related to the Allocation of Public Immovables for Investment entered into force through publication in the Official Gazette dated 15.11.2012 and numbered 28468.
- List of Investment Incentives effective from the month of October 2012 was published in the Official Gazette dated 23.11.2012 and numbered 28476.
- List Investment Incentives Which Have Been Cancelled was published in the Official Gazette dated 23.11.2012 and numbered 28476.
- Amendment Tariff and Directive pertaining to Tariff and Directive on Compulsory Liability Insurance for Hazardous Materials was published in the Official Gazette dated 25.12.2012 and numbered 28508. The Tariff and Directive entered into force on 01.01.2013.
- Amendment Tariff and Directive pertaining to Tariff and Directive on Compulsory Highway Transport Financial Liability Insurance was published in the Official Gazette dated 25.12.2012 and numbered 28508. The Tariff and Directive entered into force on 01.01.2013.

- Attestation Fee Tariff of 2013 was published in the Official Gazette dated 28.12.2012 and numbered 28511. The tariff entered into force on 01.01.2013.
- General Conditions amending the General Conditions on Compulsory Earthquake Insurance was published in the Official Gazette dated 29.12.2012 and numbered 28512. The Tariff entered into force on 01.01.2013.
- Minimum Attorney Fee Tariff entered into force through publication in the Official Gazette dated 29.12.2012 and numbered 28512.

Important Legislation and Decisions regarding Competition

- The Competition Board ("Board") decided in response to the claim that Miele Elektrikli Ev Aletleri Dış Tic. ve Paz. Ltd. Şti. maintained the resale prices for Miele branded products sold and marketed in Turkey, it was decided UNANIMOUSLY that initiating an investigation concerning the claim under article 41 of the Act no 4054 was not necessary and the complaint was rejected. (29.12.2011, 11-64/1660-590)
- The Board decided as a result of the examination conducted in response to the request for the grant of a certificate of negative clearance/exemption to the "Supplemental Agreement to the Yapı Kredi-Anadolubank World Credit Card Program Cooperation Agreement dated 30.06.2008", signed between Yapı ve Kredi Bankası A.Ş. and Anadolubank A.Ş. on 13.12.2011, that (a) a certificate of negative clearance could not be granted to the "Supplemental Agreement to the Yapı Kredi-Anadolubank World Credit Card Program Cooperation Agreement dated 30.06.2008", signed between Yapı ve Kredi Bankası A.Ş. and Anadolubank A.Ş. on 13.12.2011, (b) the Agreement in question could not benefit from block exemption under the Block Exemption Communiqué on Vertical Agreements no 2002/2 since Yapı ve Kredi Bankası A.Ş. and Anadolubank A.Ş. were competing undertakings, and (c) as a result of the assessment conducted within the framework of article 5 of the Act no 4054, an exemption under paragraph two of the aforementioned article should be granted to the Agreement in question since the conditions listed in paragraph one were fulfilled. (12.01.2012, 12-01/10-7)
- The Board decided as a result of the examination conducted in response to the request for the authorization under article 7 of the Act no 4054, or in case it is decided that an authorization is not necessary, for the grant of a certificate of negative clearance under article 8 of the same act to the sum of transactions consisting of the formation of a new joint-stock company by United Arab Shipping Company, United Arab Shipping Company Services DMCCO, Aratrans Transport and Logistics Service

LLC, Cemil GANDUR and Mişel ŞAŞATİ, and the employee transfer between the newly-established company and Fevzi Gandur Denizcilik ve Nakliyat Temsilcilik ve Tic. A.Ş., Riva Denizcilik ve Taşımacılık Tic. A.Ş., Mitaş Uluslararası Nakliyat ve Gemi Acenteliği Tic. Ltd. Şti., it was decided that (a) the relevant transaction was not a transaction of acquisition under article 7 of the Act no 4054 and the Communiqué no 2010/4 on Mergers and Acquisition Calling for the Authorization of the Competition Board which was issued under the aforementioned article, and (b) a certificate of negative clearance under article 8 of the Act no 4054 should be granted to the transaction on request. (12.01.2012, 12-01/29-12)

- The Board decided as a result of the examination conducted in response to the claim that undertakings titled Turkcell İletişim Hizmetleri A.Ş., Vodafone Telekomünikasyon A.Ş., Avea İletişim Hizmetleri A.Ş., which operate in the GSM operation business, made agreements to take advantage of the gaps in the various regulations of the Information and Communication Technologies Authority, that initiating an investigation was not necessary under the Act no 4054. (19.01.2012, 12-02/78-22)
- The Board decided as a result of the examination conducted in response to the claim that TTNet A.Ş.'s presence in the same area as Türk Telekomünikasyon A.Ş. would lead to competition infringements and that TTNet made bids for fixed-line telephony service provision tenders which other operators could not match, it was decided that initiating an investigation was not necessary under the Act no 4054 and the complaint should be rejected. (26.01.2012, 12-03/96-35)
- The Board, as a result of the examination made in response to the claim that Coca Cola Satış ve Dağıtım A.Ş. does not allow the sale of water of other brands in restaurants and cafés where Damla branded water, which belongs to Coca Cola Satış ve Dağıtım A.Ş., is sold, decided that it was not necessary to open an investigation according to the Act No. 4054. (09.02.2012; 12-06/186-48)

- As a result of the re-evaluation of the subject of the file following 13th Chamber of the Council of State decision dated 12.12.2007 and numbered 2006/1941 E., annulling the Board decision dated 05.01.2006 and numbered 06-02/47-8 which was taken in relation to the claim that Türk Telekomünikasyon A.Ş. abused its dominant position in the market for the infrastructure necessary for the provision of Internet access services both within these markets and in the Internet access services markets; the Board decided to impose an administrative fine of TL 1,136,376.80, calculated at five per ten thousand, by discretion, of the gross income of the Türk Telekomünikasyon A.Ş. as generated at the end of the year 2000 and in consideration of the article 16 of the Act no 4054 as amended by the Act dated 23.1.2008 and numbered 5728. (08.03.2012, 12-10/328-98)
- As a result of the examination conducted in response to the claim that ADSL service prices provided by TTNet A.Ş. and Superonline İletişim Hizmetleri A.Ş. were similar and these undertakings did not make changes to their pricing due to an agreement they signed, the Board decided that initiating an investigation was not necessary under the Act no 4054 and the complaint should be rejected. (14.03.2012, 12-11/366-101)
- As a result of the examination conducted in response to the claim that companies bidding in the wind power plant connection point tenders initiated by Türkiye Elektrik İletim A.Ş. violated the Act no 4054 by colluding to allocate the transmission capacity and submit low contribution bids, the Board decided that initiating an investigation was not necessary under the Act no 4054. (14.03.2012, 12-11/370-105)
- As a result of the examination conducted in response to the claim that Akbank T.A.Ş., Finans Bank A.Ş., Türkiye Garanti Bankası A.Ş. and Türkiye İş Bankası A.Ş. granted the opportunity to provide sales on credit with credit cards for up to 12 months without implementing a commission but demanded 1.5-2% commissions from the small business owners, thereby causing unfair competition, the Board decided that initiating an investigation under the Act no 4054 was not necessary. (14.03.2012, 12-11/374-109)

- As a result of the examination made in response to the claim that Toyota Pazarlama ve Satış A.Ş. has violated the Act no 4054 and Block Exemption Communiqué no 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, the Board decided that it was not necessary to open an investigation. (06.04.2012, 12-17/459-134).
- The Final Decision on the Investigation Regarding Certain Undertakings Operating in the Cement Sector is announced on 12.04.2012. As a result of the investigation, the Board has decided, by majority of the votes, that the relevant enterprises has violated article 4 of the Law no. 4054. Within this scope, the Board decided, by majority of the votes, (i) to impose administrative fines, which amount to, by discretion, 2% of the annual gross revenue which generated at the end of the fiscal year 2011 as follows: TRY 4.959.857,04 to Adana Çimento Sanayii T.A.Ş., TRY 3.376.238,67 to Çimko Çimento ve Beton Sanayi Ticaret A.Ş., TRY 7.758.016,08 to Çimsa Çimento Sanayi ve Ticaret A.Ş., TRY 1.120.842,98 to Kars Çimento Sanayi ve Ticaret A.Ş., TRY 2.957.990,69 to KÇS Kahramanmaraş Çimento Beton Sanayi ve Madencilik İşletmeleri, TRY 2.502.165,95 to Mardin Çimento Sanayii ve Ticaret A.Ş.; (ii) to impose administrative fines, which amount to, by discretion, 3% of the annual gross revenue which generated at the end of the fiscal year 2011 as follows: TRY 10.745.776,24 to Aşkale Çimento San. T.A.Ş., TRY 2.902.958,76 to Elazığ Altınova Çimento San. Ticaret A.Ş., TRY 10.283.220,47 to Limak Çimento Sanayi ve Ticaret A.Ş., TRY 2.557.954,55 to Yurt Çimento Sanayi ve Ticaret A.Ş. (06.04.2012, 12-17/499-140)
- The Board granted negative clearance certificate to information exchange among Heavy Commercial Vehicles Association (TAID) members by entering data about monthly sales of TAID members to online database on TAID's website. (12.04.2012, 12-20/518-154)
- The Board granted negative clearance certificate to the "Wet-lease" airplane leasing agreement to be signed between Türk Hava Yolları A.O. and Güneş Ekspress Havacılık A.Ş. (12.04.2012, 12-20/517-153)

- The Final Decision on the Investigation Regarding Certain Undertakings Operating in the Automotive Sector is announced on 17.04.2012. As a result of the investigation, the Board has decided, by majority of the votes, to impose administrative fines, which amount to, by discretion, (i) 0,5% of the annual gross revenue which generated at the end of the fiscal year 2009 as follows: TRY 109.418,33 to İriyıl Otomotiv İnşaat Turizm Tic. ve San. Ltd. Şti., TRY 2.689,47 to Egeılısal Otomotiv Pazarlama Ltd. Şti., TRY 18.791,83 to İrde Motorlu Araçlar Servis Tic. A.Ş., TRY 124.648,96 to Yıldırım Otomotiv San. ve Tic. Ltd. Şti.; (ii) 0,5% of the annual gross revenue which generated at the end of the fiscal year 2008 as TRY 63.810,48 to Parlar Otomotiv ve Turizm Ltd. Şti. (12.04.2012, 12-20/557-141)
- Announcement Related to Applications about Building Inspection Services is published on the website of the Competition Authority on 27.04.2012.
- As a result of the examination conducted in response to the claim that the Act no 4054 and the Communiqué no 2002/2 were violated by OMV Petrol Ofisi A.Ş. through vertical agreements and various practices, the Board decided that (a) The vertical relationship between OMV Petrol Ofisi A.Ş. and Ömer AKSU, which was found to have been established first by the 16-year usufruct rights granted to POAŞ on 08.06.2006, could benefit from block exemption under the Communiqué no 2002/2 until 08.06.2011, and it was left out of the scope of the aforementioned block exemption after this date, (b) An individual exemption could not be granted to the relevant agreement under article 5 of the Act no 4054, (c) Therefore, under paragraph 3, article 9 of the Act no 4054, the Presidency should be charged with rendering opinion to the relevant undertakings, stating that they should terminate the vertical agreement existing between the parties within sixty days following the notification of the decision, and that otherwise proceeding would be started under the Act no 4054. (03.05.2012, 12-24/669-191)

- As a result of the examination conducted in response to the claim that, despite the dealership agreement with BP Petrolleri A.Ş. was terminated, usufruct rights were not deleted, the Board decided that (a) The vertical agreement between Ağaoğlu Akaryakıt Sanayi ve Ticaret Ltd. Şti. and BP Petrolleri A.Ş., consisting of the usufruct rights dated 15.06.2001 for a duration of 15 years and the most recent dealership agreement with a date of 21.03.2005, could benefit from the block exemption under the Communiqué no 2002/2 until 18.09.2010 and it was left out of the scope of the aforementioned block exemption after this date, (b) An individual exemption could not be granted to the relevant agreement under article 5 of the Act no 4054, (c) Therefore, under paragraph 3, article 9 of the Act no 4054, the Presidency should be charged with rendering opinion to the relevant undertakings, stating that they should terminate the vertical agreement existing between the parties within 60 (sixty) days following the notification of the decision, and that otherwise proceeding would be started under the Act no 4054. (03.05.2012, 12-24/670-192)
- As a result of the investigation conducted in response to the claim that Digital Platform Teknoloji Hizmetleri A.Ş./Digital Platform İletişim Hizmetleri A.Ş. abused its dominant position in the satellite platform operation sector by refusing to make an agreement to the disadvantage of Cinebeş Filmcilik ve Yapım A.Ş., the Board decided that (a) The relevant practices of Digital Platform İletişim Hizmetleri A.Ş. and Digital Platform Teknoloji Hizmetleri A.Ş. could not be constituted as an abuse of dominant position under article 6 of the Act no 4054 on the Protection of Competition, (b) Within this framework, imposing administrative fines on the relevant undertaking under article 16 of the Act no 4054 was not necessary. (03.05.2012, 12-24/710-198)
- As a result of the examination conducted in response to the claim that public institutions' practice of paying the salaries of their employees via a single bank within the framework of the protocols signed with banks, the Board decided that initiating an investigation was not necessary and the complaint should be rejected. (03.05.2012, 12-24/677-197)

- As a result of the examination conducted in response to the claims that Ulusal Cad ve GIS Çözümleri Mühendislik Bilgisayar Eğt. Tic. A.Ş. abused its dominant position, and Ak Mühendislik Bilgisayar Ticaret Ltd. Şti. and Netcad Yazılım Bilgisayar Eğitim Hizmetleri Proje Mühendislik Ticaret A.Ş. implemented a merger without the authorization of the Board, the Board decided that, initiating an investigation was not necessary, since the transactions related to the acquisition of Ak Mühendislik Bilgisayar Ticaret Ltd. Şti. by Netcad Yazılım Bilgisayar Eğitim Hizmetleri Proje Mühendislik Ticaret Ltd. Şti., and of Netcad Yazılım Bilgisayar Eğitim Hizmetleri Proje Mühendislik Ticaret Ltd. Şti. by lusal Cad ve GIS Çözümleri Mühendislik Bilgisayar Eğt. Tic. A.Ş., all of which were determined to be part of the same economic entity, did not carry the nature of an acquisition between undertakings under article 7 of the Act no 4054. (09.05.2012, 12-25/729-209)
- In relation to the request to establish that the protocol of 28.09.2009 and the dealership agreement and the transfer of usufruct rights agreement of the same date, signed between LUKOİL Eurasia Petrol A.Ş. and Yaşarlar Petrol Madencilik Otomotiv Taşımacılık Turizm Gıda İnşaat Pazarlama San. ve Tic. Ltd. Şti. benefited from the block exemption under the Communiqué no 2002/2 for 5 years following 28.09.2009, the Board decided that the condition, set forth in the Board decision dated 27.10.2011 and numbered 11-54/1390-498 in order for the agreement signed between LUKOİL Eurasia Petrol A.Ş. and Yaşarlar Petrol Madencilik Otomotiv Taşımacılık Turizm Gıda İnşaat Pazarlama San. ve Tic. Ltd. Şti. to fall under the block exemption for five years after 28.09.2009, was fulfilled; establishing new administrative action concerning the vertical agreement in question signed between the parties was not necessary. (16.05.2012, 12-26/762-216)
- Concerning the request for the grant of a certificate of negative clearance / exemption to the multiform open points of sales agreement, which was prepared after the revision of the uniform open points of sales availability agreement signed by Efes Pazarlama ve Dağıtım A.Ş. and/or the dealers/distributors of

Efes Pazarlama ve Dağıtım A.Ş. with their customers the Board decided that 1. Efes Pazarlama ve Dağıtım A.Ş.'s agreements titled Open Points of Sales Agreement (Standard Agreement-limited duration), Open Points of Sales Agreement (Standard Agreement-with quantity commitments) and Open Points of Sales Agreement (Hotel Agreement) should be granted certificates of negative clearance since these agreements did not include regulations falling under article 4, 6 and 7 of the Act no 4054; 2. The Open Points of Sales Agreement (for Customers signing a Central Agreement) was compliant with the provisions of the Board decision, dated 10.04.2008 and numbered 08-28/321-105 and therefore benefited from the exemption granted by this decision; 3. However, the provisions of articles 12 and 13 of the Open Points of Sales Agreement (Concept Point-limited duration) and Open Points of Sales Agreement (Concept Point-with quantity commitments) respectively were in violation of the Board decision dated 22.04.2005 and numbered 05-27/317-80; 4. Therefore, provided that these articles are revised in accordance with the Board decision 22.04.2005 and numbered 05-27/317-80 in a way that would not lead to de facto exclusivity, a certificate of negative clearance could be granted since they would not include any regulations which might fall under articles 4, 6 and 7 of the Act no 4054. (23.05.2012, 12-27/796-224)

- The Board, as a result of the examination conducted in response to the claim that the Act no 4054 and the Communiqué no 2002/2 were violated by Total Oil Türkiye A.Ş. its refusal to erase the usufruct rights established in its favor, decided that the vertical relationship established between Total Oil Türkiye A.Ş. and Şirvan Petrol Ür. San. Tic. Ltd. Şti. with the dealership contract dated 26.10.2000 and the grant of usufruct rights for 15 years on 03.11.2000 was not interrupted with the contracts dated 29.03.2010 and 12.05.2010, the aforementioned vertical agreement benefited from the block exemption under the Communiqué no 2002/2 until 18.09.2010, since it was concluded before 18.09.2005, therefore, under paragraph 3, article 9 of the Act no 4054, the Presidency should be charged with render-

ing opinion to the relevant undertakings, stating that they should terminate the vertical agreement existing between the parties within 60 (sixty) days following the notification of the decision, and that otherwise proceeding would be started under the Act no 4054. (06.06.2012; 12-30/877-261)

- The Board, as a result of the examination conducted in response to the claim that Turkcell İletişim Hizmetleri A.Ş. did not comply with the obligations introduced by the Board decision dated 06.06.2011 and numbered 11-34/742-230 and tried to make the Blue Point stores completely exclusive with the so-called Turkcell Communication Center-2 restructuring, to the request for the determination of whether the Act no 4054 would be violated with the planned increase in the number of the points of sales with which Turkcell İletişim Hizmetleri A.Ş. signed the "Turkcell Extra Agreement," which was granted exemption with the Board decision dated 09.07.2008 and numbered 08-44/603-230, to the claims that the increases in the wholesale prices of prepaid minutes implemented by GSM operators, lead among them Turkcell İletişim Hizmetleri A.Ş., lowered the profit margins of retailers and that prepaid cards could not be purchased from Turkcell Distribution Centers (TDMs) other than those specified by Turkcell İletişim Hizmetleri A.Ş., decided that regarding the claims comprising the subject of the application dated 22.11.2011 and numbered 7989, initiating proceedings concerning Turkcell İletişim Hizmetleri A.Ş. and the undertakings in the distribution network of Turkcell İletişim Hizmetleri A.Ş. was not necessary; regarding the claims comprising the subject of the application dated 24.01.2012 and numbered 709, in accordance with article 41 of the Act no 4054, the complaint should be rejected and an investigation should not be initiated concerning Turkcell İletişim Hizmetleri A.Ş. and the undertakings in the distribution network of Turkcell İletişim Hizmetleri A.Ş., there was no information, evidence or findings to suggest that Turkcell's addition of 505 final points of service/sales to the 1100 final points of service/sales with the TİM status constituted an abuse under article 6 of the Act no 4054 with the current conditions, that the "Turkcell Extra

Agreement" fulfilled the conditions listed in article 5 of the Act no 4054 in case Turkcell planned to add 505 final points of service/sales to the 1100 final points of service/sales with the TİM status. (14.06.2012; 12-33/922-281)

- As a result of the examination conducted in response to the request for the grant of an exemption to the pricing policy to be implemented by Shell&Turcas Petrol A.Ş. for its dealers on the basis of stations (regions), the Board decided that in consideration of the Act no 5015 and its secondary legislation, an assessment under articles 5 and 8 of the Act no 4054 was not necessary concerning the notified practice. (04.07.2012, 12-36/1070-335)
- As a result of the examination conducted in response to the claim that undertakings operating in the liquid fuel distribution sector violated article 4 of the Act no 4054 by engaging in parallel pricing and information exchange, the Board decided that the complaint should be rejected and an investigation should not be initiated. (04.07.2012, 12-36/1040-328)
- As a result of the examination conducted in response to the request for the grant of a certificate of negative clearance/exemption to the Paracard Program Sharing Agreement, signed on 29.12.2011 between Türkiye Garanti Bankası A.Ş. and Denizbank A.Ş., the Board decided that a certificate of negative clearance could not be issued under article 8 of the Act no 4054 for the Paracard Program Sharing Agreement, signed on 29.12.2011 between Türkiye Garanti Bankası A.Ş. and Denizbank A.Ş., since the undertakings parties to the Paracard Program Sharing Agreement were competing undertakings, the aforementioned agreement could not benefit from block exemption under the Block Exemption Communiqué on Vertical Agreements, no 2002/2, however, an individual exemption should be granted to the notified agreements since if fulfilled all of the conditions listed in article 5 of the Act no 4054. (18.07.2012, 12-38/1097-355)
- As a result of the examination conducted in response to the claim that individual pension insurance companies implement-

ed similar administrative expenses fees because of an agreement they signed, the Board decided that the complaint should be rejected and an investigation should not be initiated. (18.07.2012, 12-38/1099-356)

- As a result of the examination conducted in response to the claim that Çimsa Çimento San. ve Tic. A.Ş. and Adana Çimento San. T.A.Ş. fixed prices and increased the price of their products within a period of 4 days, the Board decided that the complaint should be rejected and an investigation should not be initiated. (18.07.2012, 12-38/1115-366)
- Communiqué on the Application Procedure Regarding Violation of Competition (No: 2012/2), entered into force through publication in the Official Gazette dated 23.08.2012 and numbered 28390.
- The Board concluded in its meeting dated 09.08.2012 that the findings collected within the investigation initiated in order to determine whether article 4 of the Act no 4054 was violated by Biletix Bilet Dagitim Basim ve Ticaret A.Ş. in "the market for intermediation services for the sales of tickets of football matches" and "the market for intermediation services for the sales of tickets of live music events" via exclusive agreements with longer than one-year durations and similar practices are significant and sufficient and decided to open an investigation under article 41 of the Act no 4054 on the Protection of Competition concerning Biletix Bilet Dagitim Basim ve Ticaret A.Ş.
- After examining the information, evidence and the findings gathered in the preliminary inquiry in its meeting of 09.08.2012, the Board concluded that the findings were significant and sufficient, and decided to open an investigation under article 41 of the Act no 4054 on the Protection of Competition concerning Linde Gaz A.Ş., - Yalizlar Sinai ve Tibbi Gazlar Teknik Hirdavat Makine Sanayi ve Ticaret A.Ş. And Orsez Sinai Tibbi Gazlar ve Kimyevi Maddeler Ticaret Sanayi Ltd. Şti. The investigation was initiated in order to determine whether the aforementioned three undertakings vio-

lated article 4 of the Act no 4054 in industrial gas sales by engaging in practices such as allocating customers, avoiding submitting competitive bids to customers and exchanging information concerning bids.

- After examining the information, evidence and the findings gathered in the preliminary inquiry initiated in order to determine whether TTNET A.Ş. and Türk Telekomünikasyon A.Ş. violated article 6 of the Act no 4054 in retail and wholesale fixed broadband internet access services markets via their pricing policies, the Board concluded in its meeting of 09.08.2012 that the findings were significant and sufficient, and with the decision numbered 12-41/1153-M (1), decided to open an investigation under articles 40 and 41 of the Act no 4054 on the Protection of Competition concerning the aforementioned undertakings.
- The Board re-evaluated the complaint dated 05.12.2007 which included the claim that Turkcell Iletişim Hizmetleri A.Ş. complicated the operations of Vodafone Telekomünikasyon A.Ş. when providing GPRS infrastructure service to businesses that offer vehicle tracking services, through the vertical agreements it signed with those undertakings and various other practices. The Board decided to initiate an investigation on Turkcell Iletişim Hizmetleri A.Ş. with the decision numbered 12-38/1110-M after discussing the information and documents included in the file in its meeting dated 18.07.2012. The investigation was initiated following the 13th Chamber of the Council of State's annulment of the Board decision dated 02.04.2008 and numbered 08-27/306-97, which was taken as a result of the preliminary inquiry conducted in response to the aforementioned complaint, and it aims to determine whether articles 4 and 6 of the Act no 4054 were violated.
- As a result of the examination conducted in response to the claim that Türkiye Halk Bankasi A.Ş. forced consumers to take out policies from its own insurance company in exchange for extending loans for housing constructed by the Housing Development Administration of Turkey, the Board decided that

the complaint should be rejected and an investigation should not be initiated. (09.08.2012,12-41/1187-397)

- As a result of the examination conducted in response to the claim that Metro Grosmarket, utilizing the buyer power it holds, exposed the applicants, which operate as suppliers to unpredictable commercial risks by demanding payments under various titles and by introducing a consignment sales condition, thereby causing material pecuniary losses for the applicants, the Board decided that the complaint should be rejected and an investigation should not be initiated. (09.08.2012, 12-41/1178-388)
- As a result of the re-evaluation of the relevant file following the annulment of the Board decision dated 25.02.2009 and numbered 09-08/158-M, which concerned the claim that Esgaz Eskişehir Şehir Içi Gaz Dagitim A.Ş. and Boru Hatlari ile Petrol Taşima A.Ş. abused their dominant positions by implementing excessive pricing with the natural gas transportation fees they collected from the free consumer Eskisehir Chamber of Industry Organized Industrial Site, by the 13th Chamber of the Council of State decision dated 06.04.2012 and numbered 2009/2951 E., 2012/601 K., the Board decided that the complaint should be rejected and an investigation should not be initiated. (09.08.2012, 12-41/1171-384)
- As a result of the re-evaluation of the relevant file following the annulment of the Board decision dated 16.10.2008 and numbered 08-58/921-368, which concerned the claim that Ankara Water and Sewerage Administration and Electricity-Gas-Bus General Directorate (Baskent Dogalgaz Dagitim A.Ş.) determined which meters could be used by consumers and did not provide alternatives on the subject to consumers, forcing them to purchase a specific product by the 13th Chamber of the Council of State decision dated 06.04.2012 and numbered 2009/701 E., 2012/603 K., the Board decided that the complaint should be rejected and an investigation should not be initiated. (09.08.2012, 12-41/1173-385)
- As a result of the re-evaluation of the relevant file following the annulment of the Board decision dated 03.07.2008 and num-

bered 08-43/587-220 which concerned the claim that Türksat Uydu Haberleşme Kablo TV ve Işletme A.Ş. did not meet the requests to allow use of cable TV network and violated that the Act numbered 4054 by the 13th Chamber of the Council of State decision the Board decided that the complaint should be rejected and an investigation should not be initiated. (28.08.2012, 12-42/1313-429)

- As a result of the examination conducted in response to the Automotive Manufacturers Association's request for the grant of a certificate of negative clearance or exemption to the decision of association of undertakings concerning the sharing of certain data on the production and sales of passenger vehicles, light and heavy commercial vehicles and tractors with its members and with the public, the Board decided that: 1. Among the information Automotive Manufacturers Association planned to share with its members and with the public, - Monthly import data for automobiles and light commercial vehicles on the basis of brands, - Vehicle sales data broken down on the basis of provinces, - Concerning the automobile and commercial vehicles market, predictions and market estimates for the future of the market which do not include brand-model breakdowns, were previously assessed in Board decisions taken and did not require a new decision on the same matter, 2. However, a certificate of negative clearance should be issued for - sharing of information concerning agricultural tractors market including forecasts of market size, - sharing of information concerning the main and subsidiary industries without specifying firms under certain breakdowns based on monthly numbers and values as well as sharing of information concerning monthly export numbers on the basis of brands, - in consideration of the Top 500 Industrial Enterprises report of the Istanbul Chamber of Industry, sharing of information concerning the net sales, total assets, period profits or losses, average number of wage-workers, equity capital, employment and added value for undertakings, - publication of automotive industry investment amounts annually and without specifying firms, and sharing of automotive industry employment data for each firm, Subsidiary

Industry Inventory, Raw Material Cost Index, ACEA and OICA reports, civilian consumption data for petroleum products, the length of road surface information and tax rates for motor vehicles published in the Official Gazette, - monthly sharing of capacities and capacity usage rates under the headings of light commercial vehicles, (automobiles, pick-ups and minibuses), trucks, motor coaches, midibuses and tractors, - sharing of factory sales and external sales numbers as well as production data that will be included in the News and Media Bulletin without specifying firms and models under the heading of light commercial vehicles, (automobiles, pick-ups and minibuses), trucks, motor coaches, midibuses and tractors. 3. On the other hand, information exchange among undertakings concerning monthly production numbers on the basis of each sub model, the payments made for raw materials and to subsidiary industries as well as concerning the taxes and wages may include information that could be classified as commercial secret and may lead to coordination between undertakings; therefore a certificate of negative clearance should not be granted for such exchanges under article 8 of the Act no 4054. 4. Since conditions listed in article 5 of the Act no 4054 were not fulfilled, an exemption should not be granted for a. the sharing of production data on the basis of firms and models, b. the sharing of the payments made by automotive industry firms to subsidiary industries and raw materials as well as of the taxes and wages paid on the basis of firms. (20.09.2012, 12-44/1350-455)

- The Board completed the investigation initiated in response to the application claiming that UN Ro-Ro İşletmeleri A.Ş. (UN Ro Ro) violated the Act no 4054 by engaging in exclusionary practices against UND Deniz Taşımacılığı A.Ş. (UND Deniz) in the ro-ro transportation services provided in the ro-ro lines between Turkey and Europe. The Board, as a result of the discussion of the file at the Board meeting of 01.10.2012, decided that UN Ro Ro's denial of UND Deniz's participation in the aforementioned ticket identification and service provision system did not constitute an abuse of dominant position under article 6 of the Act no 4054. However, the Board concluded that the

relevant undertaking foreclosed the market to its competitor by implementing predatory pricing in the Pendik-Marseilles ro-ro line and also complicated the operations of its competitor with certain practices in addition to pricing, that these constituted abuses of dominant position under article 6 of the Act no 4054; consequently an administrative fine of TL 841,199.70 imposed on UN Ro Ro. (01.10.2012; 12-47/1413-474)

- The Board, as a result of the examination conducted in response to the request for the renewal of the five-year individual exemption granted with the Board decision dated 17.04.2008 and numbered 08-29/352-113 to the "Exclusive Tender Warehouse Contract" signed between Roche Müstahzarları Sanayi A. Ş. and Sistem Sağlık Araç ve Gereçleri Ecza Deposu Tic. Paz. Ltd. Şti., decided that the "Exclusive Tender Warehouse Contract" signed between Roche Müstahzarları Sanayi A. Ş. and Sistem Sağlık Araç ve Gereçleri Ecza Deposu Tic. Paz. Ltd. Şti. could not benefit from the block exemption granted by the "Block Exemption Communiqué on Vertical Agreements, No: 2002/2," since the threshold specified in article 2 of the aforementioned Communiqué are exceeded, however, an individual exemption should be granted to the relevant contract since if fulfilled all of the conditions listed in article 5 of the Act no 4054. (17.10.2012; 12-51/1448-495)
- As a result of the examination conducted in response to the request for the grant of a certificate of negative clearance or exemption to the "THY Frequent Flyer Program Miles&Smiles Credit Card Cooperation Agreement," the Board decided that a certificate of negative clearance could not be granted since there were provisions in violation of Article 4 of the Act no. 4054 within the "THY Frequent Flyer Program Miles&Smiles Credit Card Cooperation Agreement" signed between Türk Havayolları A.O. and Türkiye Garanti Bankası A.Ş.; however, a 5-year individual exemption could be granted to the aforementioned agreement within the framework of Article 5 of the Act no. 4054. (01.11.2012,12-53/1511-529)

- The Board granted an individual exemption to the "Exclusive Tender Warehouse Contract," which was signed between GlaxoSmithKline İlaçları San. ve Tic. A.Ş. and Abay Ecza Deposu Tic.A.Ş., Akgün Ecza Deposu San. ve Tic. A.Ş., Aksel Ecza Deposu Tic. A.Ş., İmtaş Ecza Deposu ve Gereçleri San. ve Tic. Ltd. Şti., Yeni Dicle Ecza Deposu Medikal Tic. Ltd. Şti., and which conferred regional exclusivity for product distribution purposes to the aforementioned warehouse, since this agreement fulfilled all of the conditions listed in Article 5 of Act no 4054. (06.11.2012,12-54/1522-540)
- The Board authorized the provision of compulsory traffic insurance sales services by TÜVTURK Kuzey Taşıt Muayene İstasyonları Yapım ve İşletim A.Ş. and TÜVTURK Güney Taşıt Muayene İstasyonları Yapım ve İşletim A.Ş. (06.12.2012, 12-60/1616-593)
- As a result of the examination conducted in response to the request for the grant of a certificate of negative clearance to the Professional Classification Draft Recommendation and the Communiqué on the Structure and Work Principles and Procedures of the Fictitious Transaction Evaluation Committee, prepared by the Banks Association of Turkey and Participation Banks Association of Turkey in order to prevent fictitious transactions, the Board decided that no action was necessary under the Act no 4054. (13.12.2012, 12-64/1640-602)
- As a result of the examination conducted in response to the claim that the Act no 4054 and the Communiqué no 2002/2 were violated by Opet Petrolcülük A.Ş. through vertical agreements and various practices, the Board decided that; 1- The vertical relationship established with various contracts signed between Pendik Petrol Ürünleri İnşaat Turizm Gıda San. ve Tic. Ltd. Şti., Mustafa YILMAZ and Opet Petrolcülük A.Ş. benefited from the block exemption granted by the Communiqué no 2002/2 until 08.07.2012; and that it was out of the scope of the block exemption after that date; that the relationship did not fall under the exception provision in article 5/a of the same Communiqué; 2- However, due to the fact that under the rele-

vant vertical agreement a new gas station was established on a property over which there were previously no liquid fuel dealership business and the investment costs for the station were covered by Opet Petrolcülük A.Ş., the relevant vertical agreement should be granted an individual exemption for 10 years as of 07.08.2007, provided that the parties agree to allow the dealership to terminate the agreement by making a payment corresponding to any remaining duration of the relationship-specific investment covered by Opet Petrolcülük A.Ş. (19.12.2012, 12-65/1650-605)

- The Board authorized the information sharing of Toyota Pazarlama ve Satış A.Ş. with its authorized seller and services within the scope of "Dealer Management System". (27.12.2012,12-68/1695-629)

Important Legislation and Decisions regarding Mergers and Acquisitions

- In response to the request for the authorization of the transfer of the "industrial automotive mineral oils" business and its related assets owned by Opet Petrolcülük A.Ş. to Opet Fuchs Madeni Yağ Sanayi ve Ticaret A.Ş., which is a joint venture between Opet Petrolcülük A.Ş. ile Fuchs Petrolub Aktiengesellschaft, the Competition Board ("Board") decided that (a) the relevant transaction was subject to authorization under article 7 of the Act no 4054 as well as under the Communiqué no 2010/4 on Mergers and Acquisition Calling for the Authorization of the Competition Board which was issued under the aforementioned article, and the transaction should be authorized, since it would not result in the creation or strengthening of a dominant position as described under the same article of the Act, and thus in significant lessening of competition and (b) on the other hand, that an administrative fine was called for since the existence of the joint venture Opet Fuchs Madeni Yağ Sanayi ve Ticaret A.Ş., which was established by Opet Petrolcülük A.Ş. and Fuchs Petrolub Aktiengesellschaft through the Shareholders' Agreement signed in January 2005 in order to operate in he mineral oil market, came into the attention of the Board as a result of the notified transaction and was formed without the authorization of the Board; however, that imposing an administrative fine was not necessary since the relevant transaction fell under the scope of the limitations provisions in the abolished article 19.1(a) of the Act no 4054; also that the relevant joint venture did not result in the creation or strengthening of a dominant position, and thus in significant lessening of competition. (29.12.2011, 11-64/1663-593)
- The Board authorized the acquisition of 75% of Acıbadem Sağlık Yatırımları Holding A.Ş. (ASYH) by Integrated Healthcare Holdings Sdn. Bhd. (IHH) (60% of the shares) and by Khazanah Nasional Berhad (15% of the shares), and the acquisition of Aplus Hastane ve Otelcilik Hizmetleri A.Ş. ve Acıbadem Proje Yönetimi A.Ş. by ASYH. (29.12.2011, 11-64/1659-589)

- In response to the request for the authorization of the acquisition, by Alpha Bank A.E., of EFG Eurobank Ergasias S.A. together with all of its assets and liabilities, the resulting absorption of EFG Eurobank Ergasias S.A. by Alpha Bank A.E. and the consequent transfer of control over the subsidiaries of EFG Eurobank Ergasias S.A. in Turkey (Eurobank Tekfen A.Ş. and its subsidiaries) to the newly established Alpha Eurobank, the Board decided that the relevant transaction was subject to authorization under article 7 of the Act no 4054 as well as under the Communiqué no 2010/4 on Mergers and Acquisition Calling for the Authorization of the Competition Board which was issued under the aforementioned article, and that the transaction should be authorized, since it would not result in the creation or strengthening of a dominant position as described under the same article of the Act, and thus in significant lessening of competition. (29.12.2011, 11-64/1691-591)
- The Board authorized the acquisition, by Anadolu Efes Biracılık ve Malt Sanayi A.Ş., of 100% of the subsidiaries of SAB Miller Plc. in Russia and Ukraine and the acquisition, by SAB Miller Plc., of 24% of Anadolu Efes Biracılık ve Malt Sanayi A.Ş., to establish joint control over the latter undertaking. (29.12.2011, 11-64/1691-598)
- The Board authorized the acquisition of 66,6% of the shares in Coutinho & Ferrostaal GmbH & Co. KG and its unlimited partner Coutinho & Ferrostaal Verwaltungs GmbH held by the current shareholders MPC Munchmeyer Petersen & Co. GmbH and Fenostaal AG through Quistance Steel Beteiligungsgesellschaft mbH, to be newly established for this purpose, by Viga Internacional, S.A. de C.V., which is currently a shareholder with 33,3 of the shares, 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. 2010/4, and thus in significant lessening of competition. (12.01.2012, 12-01/13-9)
- The Board authorized the acquisition of 49.8% of the shares of Fabeks Dış Ticaret A.Ş. by Eastgate MENA Direct Equity L.P.,

which is under the control of National Commercial Bank, through share transfer and increase of capital, 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. 2010/4, and thus in significant lessening of competition. (12.01.2012, 12-01/14-10)

- The Board authorized the acquisition, by Sony Corporation, of full control over Sony Ericsson Mobile Communications which was under the joint control of Sony Corporation ve Telefonaktiebolaget LM Ericsson, 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. 2010/4, and thus in significant lessening of competition. (12.01.2012, 12-01/1-1).
- The Board authorized acquisition of the shares of İdeal Standart İşletmecilik ve Mümessillik San. ve Tic. A.Ş. by BİM Birleşik Mağazalar 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. 2010/4, and thus in significant lessening of competition. (19.01.2012, 12-02/68-14)
- The Board authorized the establishment of a joint venture through the acquisition, by Amazon.com Inc., of 18,72% of the shares of Çiçeksepeti İnternet Hizmetleri 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. 2010/4, and thus in significant lessening of competition. (19.01.2012, 12-02/67-13)
- As a result of the examination conducted based on the requests for the annulment/prevention of the Koçnet-Vodafone and Turkcell-Global acquisition transactions, the Board rejected the applications. (26.01.2012., 12-03/97-M)
- The Board authorized the acquisition of 94,9% of the shares of Ferrostaal AG by MPC Industries GmbH, 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. 2010/4, and thus in significant lessening of competition.. (26.01.2012, 12-03/85-24)

- The Board authorized the acquisition by Tesco Kipa Kitle Pazarlama ve Gıda San. A.Ş. of the tenancy rights of 21 stores which are located in Thrace region and operate under the brand "Ardaş" together with certain fixed assets from Ardaş Gıda Dağıtım San. ve Tic. 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. 2010/4, and thus in decreasing competition significantly. (09.02.2012; 12-06/185-47)
- The Board authorized the establishment of a full-function joint venture, which operates in health software field, by General Electric Company and Microsoft Corporation 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. 2010/4, and thus in decreasing competition significantly. (09.02.2012; 12-06/183-46)
- In response to the request for the authorization of the transfer, by Limak Yatırım Enerji Üretim İşletme Hizmetleri ve İnşaat A.Ş., of 20% of the 96% of shares it holds in Limak İskenderun Liman İşletmeciliği A.Ş. to the fund titled Inframinervois Holding S.A.R.L., the Board decided that the notified transaction was subject to authorization under article 7 of the Act no 4054 as well as under the Communiqué no 2010/4 on Mergers and Acquisition Calling for the Authorization of the Competition Board which was issued based on the aforementioned article, and the transaction should be authorized, since it would not result in the creation or strengthening of a dominant position as described under the same article of the Act, and thus in significant lessening of competition. (02.03.2012, 12-09/301-93)
- In response to the request for the authorization of the establishment of a joint venture, titled Hanjin Arkas Lojistik Ticaret A.Ş., within the transportation organization market in Turkey

by the Arkas Group, which operates in the container transportation and transportation organization fields in Turkey, and HJLK Corporation, which is based in Korea and operates in the field of container transportation, the Board decided that the notified transaction was subject to authorization under article 7 of the Act no 4054 as well as under the Communiqué no 2010/4 on Mergers and Acquisition Calling for the Authorization of the Competition Board which was issued based on the aforementioned article, and the transaction should be authorized, since it would not result in the creation or strengthening of a dominant position as described under the same article of the Act, and thus in significant lessening of competition. (02.03.2012, 12-09/291-92)

- The Board granted the request for the authorization of the establishment of a joint venture by Tosyalı Holding A.Ş. and Toyo Kohan Co. Ltd. to operate in the manufacturing and sales of flat steel products in Turkey, 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. 2010/4, and thus in significant lessening of competition. (14.03.2012, 12-11/367-102)
- The Board authorized the acquisition of EMI MP, which is owned by Citigroup Inc., by an investor consortium including Sony Corporation of America and Mubadala Development Company PJSC. (06.04.2012, 12-17/464-135)
- The Board authorized the acquisition of 49% and one of Karat Güç Sistemleri San. ve Tic. A.Ş.'s shares, which are held by natural persons from Tarablus Family by CRH Otomotiv Sanayi ve Ticaret Ltd. Şti., controlled by Johnson Controls, Inc. and Johnson Controls Hybrid and Recycling GmbH controlled by Johnson Controls, Inc., respectively, and therefore transfer of Karat Güç Sistemleri San. ve Tic. A.Ş. to the joint control of Tarablus Family and Johnson Controls, Inc. (12.04.2012, 12-20/515-151)
- The Board authorized the acquisition of 51% shares and the control of Afyon Çimento Türk A.Ş., controlled by Parcib

S.A.S., which is entirely owned by Ciments Français by Çimsa Çimento San. ve Tic. A.Ş. (12.04.2012, 12-20/503-142)

- The Board has authorized the acquisition of the 49% shares of TAV Yatırım Holding A.Ş. by Aeroports de Paris through its affiliate Aeroports de Paris Management from Tepe İnşaat ve Sanayi A.Ş., Tepe Savunma ve Güvenlik Sistemleri Sanayi A.Ş., Tepe Home Mobilya ve Dekorasyon Ürünleri Sanayi ve Ticaret A.Ş., Akfen Holding A.Ş., Akfen İnşaat Turizm ve Ticaret A.Ş and Sera Yapı Endüstrisi ve Ticaret A.Ş. (25.04.2012, 12-22/577-170)
- The Board has authorized the acquisition of the 38% shares of TAV Havalimanları Holding A.Ş. by Aeroports de Paris through its affiliate Aeroports de Paris Management from Tepe İnşaat ve Sanayi A.Ş., Akfen Holding A.Ş., and Sera Yapı Endüstrisi ve Ticaret A.Ş. (25.04.2012, 12-22/576-169)
- The Board authorized the acquision of the whole control of Antalya Gizli Bahçe Turizm Tesisi Ticari ve İktisadi Bütünlüğü by Yaylak Granit Turizm San. ve Tic. A.Ş. (25.04.2012, 12-22/575-168)
- The Board ("Board") authorized the establishment of Ankara Etlik Hastane Sağlık Hizmetleri İşletme Yatırım A.Ş. to be jointly-controlled by Astaldi S.p.A and Türkerler İnşaat Turizm Madencilik Enerji Üretim Ticaret ve Sanayi A.Ş. for the construction and operation of the Ankara Etlik Integrated health Campus. (03.05.2012, 12-24/664-186)
- The Board authorized the acquisition, from Delphi Italia Automotive Systems S.r.l., of all of the shares of Diavia S.r.l. by Webasto Comfort Italy Holding S.r.l., and 50% of the shares of Diavia S.A. by its affiliate. (03.05.2012, 12-24/672-193)
- The Board authorized the establishment of joint control over Euromedic International B.V. by Ares Life Science L.P. and Montagu III Fund L.P.. (09.05.2012, 12-25/715-201)
- The Board authorized the establishment of a joint venture by De Lage Landen International B.V. and AGCO International Holdings B.V. under the title AGCO Finance Finansal Danışmanlık Hizmetleri Ltd. Şti.. (09.05.2012, 12-25/724-206)

- The Board authorized the establishment of a joint venture by the parties in order to develop and construct joint healthcare projects in Kuwait and to offer bids in tenders related to this sector in that country. (16.05.2012, 12-26/759-213)
- The Board authorized the establishment of a joint venture by Tekfen Holding A.Ş. and Rönesans Gayrimenkul Yatırım A.Ş.. (16.05.2012, 12-26/760-214)
- The Board authorized the acquisition, by Fujifilm Europe GmbH, of sole control over Filmat Dış Ticaret A.Ş. through the acquisition of all of the shares of Filmat Dış Ticaret A.Ş. (23.05.2012, 12-27/809-233)
- The Board authorized acquisition of the shares in Eurobank Tekfen A.Ş. representing 99.26% of its capital by Burgan Bank S.A.K. (06.06.2012; 12-30/889-267)
- The Board authorized the acquisition of Pfizer Nutrition by Nestle S.A. (14.06.2012; 12-33/936-292)
- The Board authorized the joint venture to be established by Solvay SA and Air Liquide International SA or by their fully owned subsidiaries. (14.06.2012; 12-33/930-288)
- The Board authorized the acquisition, by De'Longhi S.p.A, of the license of the "Braun" branded domestic appliances business unit of the Procter & Gamble company as well as the "Braun" trade mark used in this area. (14.06.2012; 12-33/918-277)
- The Board authorized the acquisition of the shares in Enerji Yatırım Holding A.Ş. owned by Global Yatırım Holding A.Ş. and Mehmet KUTMAN, and the consequent acquisition of full control over Enerji Yatırım Holding A.Ş. by STFA Yatırım Holding A.Ş., which currently has joint control. (26.06.2012; 12-35/1031-322)
- The Board authorized the acquisition, by Toshiba TEC Corporation, of International Business Machines Corporation's retail store solutions business and the assets related to that business. (26.06.2012; 12-35/1003-314)

- The Board authorized the acquisition of joint control over Ihy İzmir Havayolları A.Ş. by the Air Berlin Group through the acquisition of 45.79% of the shares of Ihy İzmir Havayolları A.Ş. from Pegasus Hava Taşımacılığı A.Ş. (26.06.2012; 12-35/995-308)
- The Board authorized the acquisition, by Çelebi Hava Servis A.Ş., of certain machines and equipment currently owned by İstanbul Sabiha Gökçen Uluslararası Havalimanı Yer Hizmetleri A.Ş.. (18.07.2012, 12-38/1087-346)
- The Board authorized the acquisition of the shares constituting 40% of the capital of CMA CGM Deniz Acenteliği A.Ş. by CMA CGM Agencies Worldwide, which is one of the current shareholders. (18.07.2012, 12-38/1101-358)
- As a result of the examination conducted in response to the request for the assessment of the "Protocol Concerning the Delivery of Citibank A.Ş. Customs letters from Akbank T.A.Ş. Branches," signed between Akbank T.A.Ş. and Citibank A.Ş. in accordance with the Board decision dated 21.03.2012 and numbered 12-13/388-117, which required the notification of all new arrangements, the Board decided that the "Protocol Concerning the Delivery of Citibank A.Ş. Customs letters from Akbank T.A.Ş. Branches," was a cooperation Agreement concluded between Citibank A.Ş. and Akbank T.A.Ş., that the aforementioned protocol could be assessed under the exemption granted by the Board decision dated 21.03.2012 and numbered 12-13/388-117. (18.07.2012, 12-38/1098-M)
- The Board authorized the acquisition of the shares of Dexia Participation Belgique SA and Dexia NV/SA in Denizbank A.Ş. by Sberbank of Russia. (09.08.2012, 12-41/1183-393)
- The Board authorized the acquisition of the full control of Credit Agricole Yatirim Bankasi Türk A.S. by Standard Chartered Bank. (09.08.2012, 12-41/1180-390)
- The Board, within the framework of the fulfillment of the divestiture condition concerning the movie theaters in the Istanbul Carrefour Ümraniye, Antalya Laura and Izmir Park

Bornova shopping centers, which was among the commitments included in the Board decision dated 17.11.2011 and numbered 11-57/1473-539, authorized the acquisition of the aforementioned movie theater businesses by Sinemay Sinema ve Eglence Hizmetleri A.Ş. (09.08.2012, 12-41/1164-M)

- The Board, within the framework of the fulfillment of the divestiture condition concerning the movie theaters in the Akmerkez shopping center, which was among the commitments included in the Board decision dated 17.11.2011 and numbered 11-57/1473-539, authorized the acquisition of the aforementioned movie theater business by Akmerkez Gayrimenkul Yatirim Ortakligi A.Ş. and the subsequent lease of the same to the ordinary partnership composed of Sinerama Sinema Turizm Sanayi ve Ticaret Ltd. Şti. and Üçgen Bakim ve Yönetim Hizmetleri A.Ş. (09.08.2012, 12-41/1163-M)
- The Board authorized the acquisition of control over Yeni Karamürsel Giyim ve Ihtiyaç Mad. Tic. San. A.Ş. and YKM Yeni Karamürsel Giyim ve Ihtiyaç Maddeleri Pazarlama A.Ş. by Boyner Büyük Magazacilik A.Ş. (09.08.2012, 12-41/1162-378)
- The Board authorized the acquisition of the %50 shares of Benetton Giyim Sanayi ve Ticaret A.Ş by Benetton Group S.p.A from Boyner Holding A.Ş., Hasan Cem Boyner, Neylan Dinler, Lerzan Boyner, Latife Boyner, Zahide Leman Halulu. (28.08.2012, 12-42/1278-426)
- The Board authorized the acquisition of %51 shares of Finans Emeklilik ve Hayat A.Ş. held by Finansbank A.Ş. by Cigna Nederland Gamma BV. (28.08.2012, 12-42/1260-411)
- The Board authorized the acquisition by means of leasing, by Konya Çimento Sanayii A.Ş. of ready mixed concrete plant located in Aksu district of Antalya currently owned by Erdoğanlar İnşaat Malzemeleri Nakliye Pazarlama Sanayi ve Ticaret Ltd. Şti. (10.09.2012, 12-43/1330-436)

- The Board authorized the acquisition by Yves Rocher SA through Laboratoires de Biologie Vegetale Yves Rocher S.A. of 51% of the shares of Kosan Kozmetik Pazarlama ve Ticaret A.Ş. and Kosan Kozmetik Sanayi ve Ticaret A.Ş. (10.09.2012, 12-43/1330-438)
- The Board authorized the acquisition of control over Goodman Global Inc. by Daikin Industries Ltd. from private equity funds controlled by Hellman&Friedman LLC and from small-scale additional investors. (20.09.2012, 12-44/1332-439)
- The Board authorized the extension of the operations of the joint venture titled Yamal LNG, which is controlled by OAO Novatek and Total SA and which is not currently fully operational, and the consequent conversion of the aforementioned joint venture into a fully-operational one. (20.09.2012, 12-44/1333-440)
- The Board authorized the establishment of a joint venture by Verbund AG and Siemens Aktiengesellschaft aimed at providing infrastructure and peripheral services for electric vehicles. (20.09.2012, 12-44/1337-443)
- The Board authorized the acquisition, by TAV Havalimanları Holding A.Ş., of 35% of the shares of Havaalanları Yer Hizmetleri A.Ş., which is currently managed by TAV Havalimanları Holding A.Ş., İş Girişim Sermayesi Yatırım Ortaklığı A.Ş. and HSBC Investment Bank Holdings Plc. as a joint venture. (20.09.2012, 12-44/1343-448)
- The Board authorized the acquisition of full control over Infastech Limited by Stanley Black&Decker, Inc.. (27.09.2012, 12-46/1410-472)
- The Board authorized the acquisition of control over Ataman Ecza ve İtriyat Deposu San. Tic. A.Ş. and Ataman İlaç Kozmetik Kimya San. ve Tic. A.Ş. by Eczacıbaşı Girişim Pazarlama Tüketim Ürün. San. ve Tic. A.Ş. (10.10.2012; 12-49/1434-485)
- The Board authorized the acquisition of control, by Ralph Lauren Holding BV Türkiye, over two Ralph Lauren stores cur-

rently operated by Unitim Marka Mağazacılık A.Ş. (17.10.2012; 12-51/1478-507)

- The Board authorized the acquisition, by Retail Mena Holdings SARL, of 30% of the shares of Penca Tekstil Çorap San. ve Tic. Ltd. Şti., which is set to acquire all of the shares of Penti Çorap San. ve Tic. A.Ş., Penti Giyim Tic. A.Ş. and Penti World SARL, and the consequent transition of Penca Tekstil Çorap San. ve Tic. Ltd. Şti. from full control to joint control. (17.10.2012; 12-51/1477-506)
- The Board authorized the acquisition, by Çimsa Çimento San. ve Tic. A.Ş., of some assets owned by Yılmaz Beton San. ve Tic. A.Ş. and Yılmaz Madencilik San. ve Tic. A.Ş. (17.10.2012; 12-51/1476-505)
- The Board authorized the acquisition of control over Flagstone Reinsurance Holdings S.A. by Validus Holdings, Ltd. through the purchase of all of its issued and outstanding shares. (17.10.2012; 12-51/1465-502)
- The Board authorized the transfer of 51% of the shares of as well as control over Wilsonart International Holdings LLC, currently controlled by İllions Tool Works, to CD&R Wimbledon Holdings III, L.P., which is managed by Clayton Dubilier&Rice LLC. (17.10.2012; 12-51/1456-500)
- The Board authorized the acquisition of all of the issued and outstanding voting stocks of Kinetek Group Inc. by Nidec Corporation. (17.10.2012; 12-51/1453-498)
- The Board authorized the transformation of Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda Sanayi ve Ticaret A.Ş. into a joint venture through the acquisition of a portion of the shares of the aforementioned company by Global Ports Investments PLC. (17.10.2012; 12-51/1447-494)
- The Board authorized the establishment of a joint venture, which will be formed by the acquisition of Taleris Management, between GE Aviation Systems LLC, which is an indirectly controlled subsidiary of General Electric Co., and Accenture LLP, which is a subsidiary of Accenture Plc., LLC. (01.11.2012,12-53/1512-530)

- The Board authorized the acquisition of 54% of the shares of Nemtaş Nemrut Liman İşletmeleri Anonim Şirketi in Gemport Gemlik Liman ve Depolama İşletmeleri Anonim Şirketi by Yılport Holding Anonim Şirketi. (01.11.2012,12-53/1513-531)
- The Board authorized the acquisition of 43.73% of the shares in Olmuksa-International Paper Sabancı Ambalaj Sanayi ve Ticaret A.Ş., currently under the ownership of H.Ö. Sabancı Holding A.Ş., by International Paper Company via its fully-owned subsidiary I.P. Container Holdings S.L. (01.11.2012,12-53/1514-532)
- The Board authorized BP Gaz A.Ş.'s acquisition of the liquid petroleum filling and storage facility, as well as the relevant intangible assets, situated on the real estate in Balıkesir owned by İpragaz A.Ş. (15.11.2012,12-57/1535-548)
- The Board authorized the acquisition of all of the shares of Seament Holding S.A.L. in Rota Liman Hizmetleri Sanayi A.Ş. by Yılport Yarımca Yatırım ve Liman İşletmeciliği A.Ş. (15.11.2012,12-57/1542-554)
- The Board decided that, within the framework of the privatization of 100% of the shares of Akdeniz Elektrik Dağıtım A.Ş. via the block sales method, the acquisition of the aforementioned shares by any of the bidders Cengiz-Kolin-Limak Joint Venture Group or GENPA Telekomünikasyon ve İletişim Hizmetleri San. ve Tic. A.Ş. or Elsan-Tümaş-Karaçay Joint Venture Group could be authorized. (06.12.2012, 12-62/1632-597)
- The Board authorized Mayıs Gayrimenkul Taahhüt İnşaat Sanayi ve Ticaret Ltd. Şti.'s acquisition of 56.09% of the shares in Doğusan Boru Sanayi ve Ticaret A.Ş. currently owned by İller Bankası Genel Müdürlüğü (General Directorate of Provincial Bank). (06.12.2012, 12-62/1622-596)
- The Board authorized the establishment of a joint venture under the title KS EP Investments B.V. by MOL Hungarian Oil and Gas Plc and JSC KazMunaiGas Exploration Production. (06.12.2012, 12-62/1608-585)

- The Board authorized the share transfer transaction which would result in the transfer of EBC Eczacıbaşı-Beiersdorf Kozmetik Ürünler San. ve Tic. A.Ş. from the joint control of Beiersdorf AG and the Eczacıbaşı Corporate Group to the sole control of Beiersdorf AG. (06.12.2012, 12-62/1609-586)
- As a result of the examination conducted in response to the authorization of the acquisition of operation rights for a period of 25 years, within the scope of the privatization of motorways and bridges maintained, repaired and operated by the Directorate General for Highways, the Board decided that; 1- Acquisition by - Nurol Holding A.Ş.-MV Holding A.Ş.-Alsim Alarko San. Tes. ve Tic. A.Ş.- Kalyon İnş. San. ve Tic. A.Ş.- Fernas İnş. A.Ş. Joint Venture Group - Koç Holding A.Ş.-UEM Group Berhad-Gözde Gir. Ser. Yat. Ortaklığı A.Ş. Joint Venture Group, - Autostrade Per I'Italia S.P.A-Doğuş Holding A.Ş.- Makyol İnş. San. Tur. ve Tic. AŞ.-Akfen Holding A.Ş. Joint Venture Group was subject to authorization in accordance with article 7 of the Act no 4054 and the the Communiqué no 1998/4 titled "Communiqué 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;" 2- A potential acquisition by any of the aforementioned bidders would not lead to the creation or strengthening of a dominant position as prohibited by the same article of the Act and, consequently to a significant lessening of competition within the relevant market; thus the notified transactions should be authorized. (13.12.2012, 12-64/1639-601)
- The Board authorized the acquisition of 74.25% of the shares of Doors Holding A.Ş. by Nahita Restoran İşletmeciliği ve Yatırım A.Ş. and Garanti Turizm Yatırım ve İşletme A.Ş., Doğuş Holding A.Ş., Doğuş Turizm Sağlık Yatırımları ve İşletmeciliği San. ve Tic. A.Ş., Arena Giyim Sanayi Turizm ve Ticaret A.Ş.. (19.12.2012, 12-65/1653-608)
- In response to the request for the authorization of Eyyüpoğlu Mühendislik Elektrik Enerjisi Toptan Satış Ltd. Şti's acquisi-

tion of the operation rights of Bozüyük, Haraklı-Hendek and Pazarköy-Akyazı hydroelectric plants, which are among the group of Elektrik Üretim A.Ş.'s power plants to be privatized was authorized, the Board decided that; 1- Eyyüpoğlu Mühendislik Elektrik Enerjisi Toptan Satış Ltd. Şti.'s acquisition of Bozüyük, Haraklı-Hendek and Pazarköy-Akyazı hydroelectric plants, which are owned by Elektrik Üretim A.Ş., within the framework of their privatization via the transfer of operation rights was subject to authorization by the Board under the "Communiqué 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, No. 1998/4," 2- The acquisition would not result in the creation or strengthening of a dominant position, and thus in significant lessening of competition within the relevant market, therefore the relevant acquisition should be authorized in accordance with article 7 of the Act no 4054 as well as with the "Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Board" numbered 2010/4. (19.12.2012, 65/1651-606)

- The Board authorized the establisment of a joint venture company operating in venture capital investment services market in Turkey by Doğuş Holding A.Ş. and Solaris Partners Pte Ltd. (27.12.2012, 12-68/1692-627)
- The Board authorized the acquisition of all current common stocks of Eurobank Ergasias by National Bank of Greece S.A. (27.12.2012, 12-68/1691-626)
- The Board authorized the acquisition of ISE Holding L.P's shares in ISE Beteiligungs GmbH by Grupo Proeza S.A.P.I. de C.V. through Metalsa Germany GmbH. (27.12.2012, 12-68/1690-625)
- The Board authorized the establishment a joint-control over Medyamaks Maksimum Reklam İletişim Film Prod. Paz. Yay. Hiz. ve Tic. A.Ş. by Havas Management Espana, S.L. with Ayşe Fisun Medran and Başak Narin Erkıran Görenler. (27.12.2012, 12-68/1680-616)

- The Board authorized the acquisition of control of Abraaj Viking Management Limited, Viking Services Management Limited and Viking Services Investmeny L.P jointly by the XR Investment Holding, Abraaj Group and the Dalea Group through the acquisition of shares of 42.96% of the shares of Abraaj Viking Management Limited by XRC3 Limited. (27.12.2012, 12-68/1704-630)

Important Publications and Decisions regarding Privatization

- Decision of the Privatization Board dated 04.01.2012 and numbered 2012/01 regarding amendment on the master zoning plan of the Izmir Port was published in the Official Gazette dated 07.01.2012 and numbered 28166.
- Decision of the Privatization Board dated 09.01.2012 and numbered 2012/02 regarding privatization of Doğusan Boru Sanayii ve Ticaret A.Ş. was published in the Official Gazette dated 10.01.2012 and numbered 28169.
- The Board decided as a result of the assessment conducted in response to the request for the authorization of the privatization of Kastamonu, Çorum, Çarşamba, Kırşehir, Turhal and Yozgat sugar refineries (Portfolio C), owned by Türkiye Şeker Fabrikaları A.Ş., via the "asset sales" method as a whole that, (a) the acquisition, by the bidders Ak-Can Şeker San. ve Tic. A.Ş. or Safi Şeker Gıda San. ve Tic. A.Ş. or Kolin-Limak Ortak Girişim Grubu or Torunlar Gıda San. ve Tic. A.Ş., of the shares of the Kastamonu, Çorum, Çarşamba, Kırşehir, Turhal and Yozgat sugar refineries (Portfolio C), owned by Türkiye Şeker Fabrikaları A.Ş., under the scope of the privatization of the aforementioned refineries via the "asset sales" method as a whole was subject to authorization under article 7 of the Act no 4054 on the Protection of Competition as well as the "Communiqué 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 (b) a possible acquisition by any of the aforementioned bidders would not result in the creation or strengthening of a dominant position as described under the same article of the act and thus in significant lessening of competition within the relevant market; therefore the transaction in questions could be authorized. (19.01.2012, 12-02/70-16)
- The Board decided as a result of the assessment conducted in response to the request for the authorization of the privatization of Malatya, Erzincan, Elazığ and Elbistan sugar refineries

(Portföy B), owned by Türkiye Şeker Fabrikaları A.Ş., via the "asset sales" method as a whole, it was decided that (a) the acquisition, by the bidders Kolin-Limak Ortak Girişim Grubu or Siyahkalem Müh. İnş. San. ve Tic. Ltd. Şti., of the shares of the Malatya, Erzincan, Elazığ and Elbistan sugar refineries (Portföy B), owned by Türkiye Şeker Fabrikaları A.Ş., under the scope of the privatization of the aforementioned refineries via the "asset sales" method as a whole was subject to authorization under article 7 of the Act no 4054 on the Protection of Competition as well as the "Communiqué 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 (b) a possible acquisition by any of the aforementioned bidders would not result in the creation or strengthening of a dominant position as described under the same article of the act and thus in significant lessening of competition within the relevant market; therefore the transaction in questions could be authorized. (19.01.2012, 12-02/69-15)

- Tender notice related to the privatization of 10,32% of the shares of Petkim Petrokimya Holding A.Ş. was published on the website of the Supreme Council of Privatization on 06.02.2012. Last date for bidding for this privatization is determined as 20.03.2012.
- Tender notice related to the privatization of 28,2 % of the shares of Hidrojen Peroksit Sanayi ve Ticaret A.Ş. was published on the website of the Supreme Council of Privatization on 28.02.2012. Last date for bidding for this privatization is determined as 13.04.2012.
- The Decision dated 14.03.2012 and numbered 2012/36 of the Supreme Council of Privatization was published in the Official Gazette dated 16.03.2012 and numbered 28235. This decision is with regards to the inclusion within the scope of privatization of shares amounting to % 0,00000059 of the share capital of Yapı ve Kredi Bankası A.Ş., which owned by Undersecretariat of Treasury.

- Regarding the tender for privatization of the motorways and the bridges, the bid bond amount required in order to submit the bid is amended and raised from 200,000,000 (two hundred million) USD to 50,000,000 (fifty million) USD. The Final Date for Application of Preliminary Qualification is amended as Thursday 28.06.2012, 16:00, and the Final Bidding is amended as Thursday, 09.08.2012, 16:00.
- Decision of the Privatization Board dated 30.04.2012 and numbered 2012/57 regarding the privatization of a real estate, located at Beykoz Paşabahçe province registered in the name of Gayrimenkul A.Ş. was published in the Official Gazette dated 04.05.2012 and numbered 28282.
- Decision of the Privatization Board dated 30.04.2012 and numbered 2012/60 regarding the inclusion of Berdan and Hasanlar Hydroelectric Power Plants in the privatization program was published in the Official Gazette dated 04.05.2012 and numbered 28282.
- Decision of the Privatization Board dated 09.05.2012 and numbered 2012/61 regarding the privatization of 10.32% of the Shares of Petkim was published in the Official Gazette dated 10.05.2012 and numbered 28288.
- Decisions of the Privatization Board dated 09.05.2012 and numbered 2012/ÖİB-K-14 and 2012/ÖİB-K-15 regarding the privatization of certain real estates registered with the Treasury of the Finance was published in the Official Gazette dated 16.05.2012 and numbered 28294.
- Resolution of the privatization Board dated 06.08.2012 and numbered 2012/120 regarding privatization of 20% shares of Baskent Dogalgaz Dagitim A.S was published in the Official Gazette dated 07.08.2012 and numbered 28377.
- Resolution of the High Council of Privatization, dated 30.10.2012 and numbered 2012/161, on the privatization of Seyitömer Thermal Power Plant, owned by Elektrik Üretim A.Ş, was published in the Official Gazette dated 01.11.2012 and numbered 28454.

- Decisions of High Board of Privatization dated 19.12.2012 numbered 2012/184, 2012/185, 2012/186, 2012/187, 2012/188, 2012/189, 2012/190, 2012/191 and 2012/192 regarding the transfer of the operating rights of respectively Group 1- Engil, Erciş and Hoşap Hydroelectric Power Plants and Group 2- Koçköprü Hydroelectric Power Plant to Tahiroğulları Petrol Ürünleri Nakliyat İnşaat Otomotiv ve Taahhüt Sanayi ve Ticaret Ltd. Şti.; Group 3- Kısık Hydroelectric Power Plant to Kılıç Enerji Üretim A.Ş.; Group 4- Göksu Hydroelectric Power Plant to Nurol Enerji Üretim ve Pazarlama A.Ş.; Group 5- Bozkır and Ermenek Hydroelectric Power Plants to Özbey Hijyenik Ürünleri Sanayi ve Ticaret A.Ş.; Group 7- Hasanlar Hydroelectric Power Plant to Batıçim Enerji Elektrik Üretim A.Ş.; Group 8- Ladik-Büyükkızoğlu and Durucasu Hydroelectric Power Plants to Met Enerji Üretim İnşaat Taahhüt Turizm Sanayi ve Ticaret A.Ş., Group 9- Arpaçay-Telek and Kiti Hydroelectric Power Plants to Metaltek Metalurji Kimya Gıda Sanayi ve Ticaret Ltd. Şti., Group 1- Berdan Hydroelectric Power Plant to Tayfurlar Enerji Elektrik Üretim A.Ş. was published in the Official Gazette dated 20.12.2012 and numbered 28503.

Important Changes and Development regarding Energy Law

- Communiqué amending Communiqué on Connection to Transfer and Distribution Systems and the Usage of the System in the Electricity Market entered into force through publication in the Official Gazette dated 05.01.2012 and numbered 28164.
- Communiqué pertaining to the Technical Regulation of Fuel Oil Types (Fuel oil Serial No: 24) entered into force through publication in the Official Gazette dated 05.01.2012 and numbered 28164.
- Regulation amending Regulation pertaining to the Supervision and Auditing of the Activities within the scope of the Licenses of the Production and Distribution Companies within the Electricity Sector entered into force through publication in the Official Gazette dated 09.01.2012 and numbered 28168.
- Regulation amending the Electricity Market Customer Relations Regulation was published in the Official Gazette dated 28.01.2012 and numbered 28187. The regulation entered into force through publication, to be effective as of 01.01.2012.
- Sector Report on Oil Market of December 2011 was published on 10.02.2012 by Energy Market Regulatory Board.
- Regulation Pertaining to the Amendment of the Natural Gas Licensing Regulation was published in the Official Gazette dated 21.02.2012 and numbered 28211, and entered into force by being published.
- Regulation on the Amendment to the Electricity Market Balancing and Conciliation Regulation was published in the Official Gazette dated 03.03.2012 and numbered 28222, and entered into force effective from 01.02.2012.
- Regulation on the Amendment to the Regulation Pertaining to Electricity Production in the Electricity Market without License was published in the Official Gazette dated 10.03.2012 and numbered 28229, and entered into force by being published.
- Regulation on the Implementation of the Regulation Pertaining to Electricity Production in the Electricity Market without

License was published in the Official Gazette dated 10.03.2012 and numbered 28229.

- Regulation on the Amendment to the Regulation Pertaining to the National Market Application in the Petroleum Market was published in the Official Gazette dated 15.03.2012 and numbered 28234, and entered into force by being published.
- Communiqué on the Amendment to the Communiqué Pertaining to Electricity Market Retail Sale Contracts Guidelines was published in the Official Gazette dated 15.03.2012 and numbered 28234, and entered into force by being published.
- Communiqué on the Amendment to the Communiqué Pertaining to Setting Retail Sale Service Revenue and Retail Energy Sale Prices was published in the Official Gazette dated 20.03.2012 and numbered 28239, and entered into force by being published.
- Circular 2012/8 of the Prime Ministry Pertaining to Akkuyu Nuclear Power Plant Project was published in the Official Gazette dated 21.03.2012 and numbered 28240.
- Regulation on the Amendment to the Electricity Market Customer Services Regulation has entered into force through publication in the Official Gazette dated 03.04.2012 and numbered 28253.
- Regulation on the Amendment to the Electricity Market License Regulation has entered into force through publication in the Official Gazette dated 03.04.2012 and numbered 28253.
- Regulation on the Amendment to the Natural Gas Market Certificate Regulation has entered into force through publication in the Official Gazette dated 03.04.2012 and numbered 28253.
- Regulation on the Amendment to the Natural Gas Market License Regulation has entered into force through publication in the Official Gazette dated 03.04.2012 and numbered 28253.
- The announcements regarding administrative fines imposed on the legal and natural persons who violated the Petroleum

Market Law numbered 5015 are published in the Official Gazette dated 03.04.2012 and numbered 28253.

- Regulation on the Amendment to the Petroleum Market License Regulation has entered into force through publication in the Official Gazette dated 07.04.2012 and numbered 28257.
- Regulation on the Amendment to the Electricity Market Eligible Consumer Regulation has entered into force through publication in the Official Gazette dated 07.04.2012 and numbered 28257.
- Regulation regarding Fuel Oil Distribution and Customer Services entered into force through publication in the Official Gazette dated 03.05.2012 and numbered 28281.
- Sector Report on the Natural Gas Market for the year of 2011 was published on 06.06.2012 by Energy Market Regulatory Board.
- Sector Report on Oil Market of April 2012 was published on 07.06.2012 by Energy Market Regulatory Board.
- Sector Report on the Liquefied Petroleum Gases (LPG) Market of April 2012 was published on 28.06.2012 by Energy Market Regulatory Board.
- Communiqué on the Energy Efficiency Support (Serial Number: 2012/3) entered into force through publication in the Official Gazette dated 03.07.2012 and numbered 28342.
- Regulation amending the Regulation on the Procedures and Principles of the Signing the Water Use Right Agreement in order to Produce in the Electric Market entered into force through publication in the Official Gazette dated 04.07.2012 and numbered 28343.
- Communiqué on the Implementation of the Wind and Sun Measurements for the License Applications based on Wind and Sun Energy (Number: 2012/01) entered into force through publication in the Official Gazette dated 10.07.2012 and numbered 28349.

- Communiqué amending the Communiqué of the Technical Arrangement pertaining to the Fuel Oil Types (Fuel Oil Serial Number: 25) entered into force through publication in the Official Gazette dated 14.07.2012 and numbered 28353.
- Regulation on the Amendment of the Petroleum Market License Regulation was published in the Official Gazette dated 03.08.2012 and numbered 28373. Article 4 of the Regulation entered into force on 01.01.2013 while other articles entered into force through publication.
- Regulation Amending the Regulation Pertaining to the Electricity Market Customer Services was published in the Official Gazette dated 11.08.2012 and numbered 28408. Different dates of entry into force have been determined for the articles of the Regulation.
- Regulation Amending the Regulation Pertaining to the Electricity Market Distribution was published in the Official Gazette dated 11.08.2012 and numbered 28408. Different dates of entry into force have been determined for the articles of the Regulation.
- Communiqué on the Amendment of the Communiqué Pertaining to Regulation of the Distribution System Income entered into force through publication in the Official Gazette dated 14.08.2012 and numbered 28384.
- Regulation Amending the Regulation Pertaining to the Electricity Market Balancing and Reconciliation was published in the Official Gazette dated 18.08.2012 and numbered 28415. Different dates of entry into force have been determined for the articles of the Regulation.
- Amendment Communiqué on the Communiqué pertaining to Precious Metal Standards and Refineries (Serial No: 2006/1) entered into force through publication in the Official Gazette dated 26.09.2012 and numbered 28423.
- Communiqué (TS EN 589:2008+A1:2012 (EN)) (on Automotive Fuels – LPG – Qualifications and Test Methods Serial No: MSG - MS - 2012/34) entered into force through

publication in the Official Gazette dated 27.09.2012 and numbered 28424.

- Procedure and Principles Regarding Legal Separation of Distribution and Retail Activities in the Electricity Market entered into force through publication in the Official Gazette dated 27.09.2012 and numbered 28424.
- Sector Report on Oil Market of August 2012 was published on 15.10.2012 by Energy Market Regulatory Board.
- Amendment Communiqué (Serial No: 2012/6) on the Communiqué pertaining to Instruction and Certification Operations of Energy Efficiency (Serial No: 2012/5) entered into force through publication in the Official Gazette dated 10.11.2012 and numbered 28463.
- Regulation on the Amendment of the Electricity Market Tariffs Regulation entered into force through publication in the Official Gazette dated 14.11.2012 and numbered 28467.
- Regulation amending the Regulation Pertaining to the Pricing System of Oil Market entered into force through publication in the Official Gazette dated 30.11.2012 and numbered 28483.
- Regulation amending the Regulation on Natural Gas Market Tariffs entered into force through publication in the Official Gazette dated 13.12.2012 numbered 28496.
- Communiqué on Pecuniary Penalties to be Applicable in 2013 Pursuant to the Article 11 of the Electricity Market Law; the Communiqué on Pecuniary Penalties to be Applicable in 2013 Pursuant to Amendment in Article 9 of the Electricity Market Law and the Article 9 of the Law on Natural Gas Market; the Communiqué on Pecuniary Penalties to be Applicable in 2013 Pursuant to the Article 19 of the Petroleum Market Law; the Communiqué on Pecuniary Penalties to be Applicable in 2013 Pursuant to the Liquefied Petroleum Gas Market Law and the Amendment in article 16 of the Electricity Market Law were published in the Official Gazette dated 19.12.2012 and numbered 28502.

- Regulation on the Service Quality with respect to Electricity Distribution and Retail Sales entered into force through publication in the Official Gazette dated 21.12.2012 numbered 28504.
- Regulation amending the Regulation pertaining to National Marker Implementation in Oil Market entered into force through publication in the Official Gazette dated 29.12.2012 and numbered 28512.
- Regulation amending the Regulation pertaining to Electricity Market Distribution was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Electricity Market Balancing and Settlement was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Electricity Market Import and Export was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Electricity Market License was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Generating Electricity without a License in the Electricity Market was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Regulation amending the Regulation pertaining to Certification and Supporting of Renewable Energy Sources was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.

- Amendment Communiqué on the Communiqué pertaining to Drawing up a Retail Sales Agreement in Electricity Market was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Amendment Communiqué on the Communiqué pertaining to Regulating Revenue From Retail Sales Service and Retail Energy Sales Prices was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.
- Amendment Communiqué on the Communiqué pertaining to Applications of Generating Electricity Without a License in the Electricity Market Regulation was published in the 2. Reiterated Official Gazette dated 30.12.2012 and numbered 28513. The Regulation entered into force on 01.01.2013.

Important Case Law

- Judgment of the Constitutional Court dated 12.01.2012 and numbered E: 2010/90, K: 2012/1, pertaining to the stay of execution of the expression "consent of the creditor and…" in the last sentence of the second paragraph of article 88 of the Code of Execution and Bankruptcy numbered 2004 until the publication of the decision dated 12.01.2012, numbered E. 2010/90, K. 2012/4 which annulled this expression, in order to prevent situations and losses which may arise of the application of this expression which may difficult, or impossible, to remedy, was published in the Official Gazette dated 21.01.2012 and numbered 28180.
- Judgment of the Constitutional Court dated 22.01.2012 and numbered E: 2010/20, K: 2011/166, pertaining to the annulment of the expression "or to appoint to another higher education institution for trial purposes" in paragraph (l) of article 7 of the Higher Education Law numbered 2547, was published in the Official Gazette dated 25.01.2012 and numbered 28184.
- Judgment of the Constitutional Court numbered E: 2010/71, K: 2011/143, pertaining to the annulment of the expression "…it commences at the age of legal capacity of the child if there is no appointed trustee" in paragraph 2 of article 303 of the Turkish Civil Code was published in the Official Gazette dated 07.02.2012 and numbered 28197.
- Judgment of the Constitutional Court numbered E: 2010/10, K: 2011/110, pertaining to the rejection of the appeal on the annulment of the article 35 of Legal Profession Act amended with the article 329 of the Law Numbered 5728 with regard to the "joint stock companies" was published in the Official Gazette dated 18.02.2012 and numbered 28208.
- Judgment of the Constitutional Court numbered E: 2008/115, K: 2011/86 pertaining to dismissal of the unconstitutionality claim regarding some articles of the Law numbered 5809 on Electronic Communication was published in the Official Gazette dated 17.03.2012 and numbered 28236.

- Judgment of the Constitutional Court numbered E: 2010/115, K: 2011/154 pertaining to the annulment of some paragraphs of the Article 267 of the Turkish Penal Code numbered 5237 based on unconstitutionality was published in the Official Gazette dated 17.03.2012 and numbered 28236.
- Judgment of the Constitutional Court numbered E: 2010/73, K: 2011/176 pertaining to the annulment of the last paragraph of the Additional Article 2 of the Code of Intellectual and Artistic Works numbered 5846 based on unconstitutionality was published in the Official Gazette dated 17.03.2012 and numbered 28236.
- Judgment of the Constitutional Court dated 29.12.2012 and numbered 62/175 regarding the annulment of article 96, paragraph (b) of the Municipality Income Law numbered 2464 was published in the Official Gazette dated 19.05.2012 and numbered 28297.
- Judgment of the Constitutional Court dated 12.01.2012 and numbered 90/4 regarding the annulment of the phrase "… with the consent of the creditors and…" included to the end of article 88 second paragraph of Execution and Bankruptcy Code numbered 2004 with article 21 of the Law numbered 4949 dated 17.07.2003 was published in the Official Gazette dated 19.05.2012 and numbered 28297.
- Judgment of the Constitutional Court dated 06.02.2012 and numbered 35/23 regarding the annulment of article 3 of the Civil Procedure Code numbered 6100 was published in the Official Gazette dated 19.05.2012 and numbered 28297.
- Judgment of the Constitutional Court dated 12.01.2012 and numbered 90/4 regarding the annulment of the phrase "…the consent of the creditor and…" included to the end of the second paragraph of article 88 of the Execution and Bankruptcy Code numbered 2004 with article 21 of the Act dated 17.07.2003 and numbered 4949, was published in the Official Gazette dated 19.05.2012 and numbered 28297.

- Judgment of the Constitutional Court dated 19.01.2012 and numbered 79/9 regarding the annulment of paragraph 2 of article 90 of the Cooperatives Law numbered 1163 was published in the Official Gazette dated 29.05.2012 and numbered 28307.
- Judgments of the Constitutional Court numbered E: 2009/38, K: 2012/12 dated 11.08.2012 and E: 2010/51, K: 2012/13 dated 11.08.2012, pertaining to investigation of the final accounts of the Cumhuriyet Halk Partisi for the years 2008 and 2009 was published in the Official Gazette dated 20.08.2012 and numbered 28417.
- Judgment of the Court of Cassation Grand Chamber for the Unification of Jurisprudence stating that lack of justification shall not prevent the recognition and approval of final judgments of foreign courts and that this matter shall not constitute a clear violation of the public order under article 54/c of the Act numbered 5718 on International Private Law and Procedure Law was published in the Official Gazette dated 20.08.2012 and numbered 28417.
- Judgment of the Constitutional Court numbered E: 2011/27, K: 2012/101 pertaining to the cancellation of Article 4 of the Law on the Amendment of the Law on the Usage of the Renewable Energy Resources for the Production of Electrical Energy numbered 6094 and certain part of Article 6/C of the Law on the Usage of the Renewable Energy Resources for the Production of Electrical Energy was published in the Official Gazette dated 06.10.2012 numbered 28433.

Important Changes and Developments in the European Union

- Resolution of the Council of Ministers dated 28.11.2011 pertaining to the Ratification of Law dated 23.02.2011 and numbered 6135 on the ratification of the "Council of Europe Convention on the Prevention of Terrorism" that was signed in Strasbourg on 19.01.2006 was published in the Official Gazette dated 13.01.2012 and numbered 28172.
- Regulation pertaining to Amending Regulation on Type Approval of Motor Vehicles with respect to Emissions from Light Passenger and Commercial Vehicles (Euro 5 and Euro 6) and on Access to Vehicle Repair and Maintenance Information ((EC) 715/2007) entered into force through publication in the Official Gazette dated 05.01.2012 and numbered 28164.
- Resolution of the Council of Ministers dated 06.02.2012 on the Ratification of the Agreement Amending the Financing Agreement Pertaining to Operational Program of Development of Human Resources Aiming at Multiannual Collective Aid Provided from the Support Device under the Component of "Development of Human Resources" signed between the Government of the Republic of Turkey and European Commission was published in the Official Gazette dated 27.03.2012 and numbered 28246.
- Law pertaining to the Approval of the Governor's Board Decisions numbered 137 and 138 amending the European Bank for Reconstruction and Development (EBRD) Founding Agreement was published in the Official Gazette dated 31.05.2012 and numbered 28309.
- Resolution of the Council of Ministers dated 05.07.2012 pertaining to the ratification of the "Financing Agreement Annex number 3 between the Government of the Turkish Republic and the Commission of the European Communities oriented to the 2008 Turkish National Program in the context of the Transitional Period Assistance of Instrument for the Pre-accession Assistance and Institutional Structuring Component - Part

1" with the enclosed Memorandum signed on 13.10.2011 was published in the Official Gazette dated 31.07.2012 and numbered 28370.

INDEX

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F

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N

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P