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ISBN 978-605-61961-7-1

Prof. Dr. H. Ercüment Erdem

NEWSLETTER 2013

Prof. Dr. H. Ercüment Erdem
Editor

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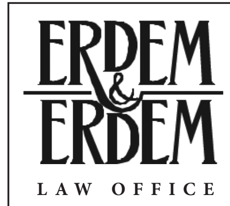
NEWSLETTER 2013



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ERDEM-ERDEM
Legal Series - 08

NEWSLETTER 2013
Editor: Prof. Dr. H. Ercüment Erdem

Book Design: Veysel Coşkun
Typesetting: Beta Basım A.Ş.

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Edition - Volume
Altan Basım San. ve Tic. Ltd. Şti.
Matbaacılar Sitesi No: 222
Bağcılar/Istanbul (Sertifika No. 11968)
(0-212) 629 03 74

1 st Edition – March 2014 – ISTANBUL

ISBN 978 - 605 - 61961 - 7 - 1

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PREFACE

We are very glad to share the *Newsletter 2013* book with you. The *Newsletter 2013* book is the result of the systematic gathering of articles published each month on our firm's website. Since 2010 these articles collected and published as a book have attracted considerable attention from our business partners, clients and other legal practitioners, which has obliged to further develop and expand our book.

In *Newsletter 2013*, we maintained the same systematic and approach as in previous years. 2013 was a year in which the practices related to amendments made to statute laws in 2013 started to crystallize; this also triggered many problems. Therefore, the Newsletter articles mainly focus on the obstacles and problems encountered in practice. Moreover, as the Capital Markets Law entered into force on the last day of 2012, its main effects were observed during 2013. *Newsletter 2013* assesses in detail the secondary legislation prepared in order to provide guidance on the application of both the Turkish Commercial Code and the Capital Markets Act. Therefore, works related to the Turkish Commercial Code and its secondary legislation constitutes a material part of the book. As is expected, Competition Law and Arbitration Law feature prominently in our publication 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 passed in 2013 and key jurisprudence. We believe that this section provides a broad overview of the year.

This book is the accomplishment of a team who is convinced on the purpose of this publication from the very beginning, who worked with an extraordinary devotion and dedication and who firmly believes in the importance of legal research and the guidance of scientific data. We are sincerely grateful to and truly appreciate each and every author of the articles, as well as our colleagues who have edited, proofread, checked translations and uploaded the articles to our website.

We are pleased to announce that for the first time, this year's book, as well as our previous publications, will be accessible on our web-site as e-books.

As a team who believes in constant development and progress, we welcome and value any feedback from our readers, which will constitute valuable insight. Therefore, please do not hesitate to provide us with feedback and comments.

We hope that the content of this publication will prove a useful resource for our clients and business partners, and we hope 2014 brings prosperity, joy and contentment to all.

Nisantasi, January 2014

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LIST OF ABBREVIATIONS*

Art.	: Article
BRSA	: Banking Regulation and Supervision Agency
CC	: Civil Chamber
CMB	: Capital Markets Board
E.	: File no.
EMRA	: Energy Market Regulatory Authority
etc.	: et cetera
et seq.	: et sequentes
fn.	: footnote
K.	: Decision
No.	: Number
p.	: page
s.	: sentence
TCC	: Turkish Code of Commerce
TCO	: Turkish Code of Obligations
TTRG	: Turkish Trade Registry Gazette
V.	: Volume

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

COMMERCIAL LAW

Trade Registry Regulation[*]

Prof. Dr. H. Ercument Erdem

Introduction

The Turkish Commercial Code No. 6102[1] ("TCC") includes general provisions on the trade registry and registration. Article 26 of the TCC, as promulgated, stipulates that the trade registry directorate, registry ledgers, realization of the registration and similar matters shall be regulated under by-laws. This provision, however, was amended by the Law on the Amendment of the Turkish Commercial Code and the Law on the Entry into Force and Application of the Turkish Commercial Code No. 6335[2] ("Law No. 6335") which was promulgated prior to the entry into force of the TCC. Pursuant to the amended Article 26, the principles and procedures governing trade registries and registration shall be regulated by a regulation prepared by the Ministry of Customs and Trade ("Ministry") and issued by the Council of Ministers.

Principles and procedures of the trade registry and registration compliant with the abrogated Turkish Commercial Code No. 6762 ("Abrogated TCC") was regulated under the Trade Registry By-Laws ("By-Laws"). As per Article 42 of the Law regarding the Entry into Force and Implementation of the Turkish Commercial Code[3] ("Implementation Law"), until the secondary legislation to be issued pursuant to the TCC is effective, the provisions of the secondary legislation prepared in line with the Abrogated TCC, which do not contravene with the TCC, shall be

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[*] ***Article of January 2013***

[1] Official Gazette ("OG"), 14 February 2011, no. 27846. The TCC entered into force on 1 July 2012.

[2] OG, 30 June 2012, No. 28339.

[3] OG, 14 February 2011, No. 27846.

applicable. The Trade Registry Regulation foreseen under both the TCC and the Implementation Law ("Regulation") entered into force through publication in the Official Gazette dated 27 January 2013 and numbered 28541. From a methodological perspective, the abrogation of by-laws by a regulation, which ranks lower than by-laws in the hierarchy of norms, is unacceptable. Nonetheless, bearing Article 42 of the Implementation Law in mind, it should be accepted that the By-Laws were abrogated with the entry into force of the Regulation. This article shall assess the material provisions of the Regulation.

Trade Registry Directorate

Pursuant to Article 24 of the TCC, the trade registry shall be kept by the trade registry directorate under the supervision and inspection of the Ministry. The establishment, management and organization of trade registry directorate, qualifications of directors, vice directors and other directorate personnel, personnel affairs and legislation applicable to personnel are regulated in detail under the Regulation. The By-Laws stipulated that the officers, vice officers and other personnel of the trade registry would be sanctioned as state officers with respect to crimes related to their duties. The Regulation on the other hand specifically regulates the sanctions to be imposed upon personnel and actions and situations triggering such sanctions.

Liability

The provision regulating the responsibility of the state for all damages incurred resulting from the keeping of the trade registry, which was deleted from the Abrogated TCC with the Statutory Decree No. 559, was reintroduced with the TCC. The Regulation similarly foresees that the state and the relevant chamber shall be jointly responsible for all losses incurred from the keeping of the trade registry.

MERSIS and Electronic Transactions

The TCC stipulates that the trade registry records will be kept electronically. In compliance with this provision, the Regulation introduces the Central Registry Record System (*Merkezi Sicil Kayıt Sistemi*,

"MERSIS"), established with the Ministry and the Union of Chambers and Commodity Exchanges of Turkey, where all registration actions will be carried out and the records, as well as the content of registration and publications will be stored. The detailed provisions of the By-Laws governing the registry ledgers to be kept in trade registry offices are not included under the Regulation. The Regulation states that all ledgers shall be kept under MERSIS. All commercial enterprises, equity companies and their branch offices shall be given a specific MERSIS number upon registration, which is not subject to change. All documentation and gazette extracts of announcements, which are required to be provided for registration, shall be kept for an undetermined term in the registry file to be opened under a MERSIS number and a file number.

The Regulation enables transactions to be conducted via electronic means with secure electronic signatures. The registry, and all bonds and documentation kept with the directorate, are accessible by everyone for examination both via electronic means and at the directorate. Thereby, a public information center is established with MERSIS.

Other matters, such as transactions made with electronic signatures, the time stamp and data protection, are regulated separately.

Registration

Pursuant to the Regulation, which has similar provisions to those of the By-Laws, in principle registration shall be made upon request. All records and documentation that require registration may be submitted via electronic means. The Regulation outlines in more detail the matters which may be registered and persons which may request registration, based on the type of the commercial enterprise, equity company or the matter to be registered, which were regulated under general provisions of the By-Laws.

The Regulation further stipulates that persons requesting the registration of any enterprise or trade name, legal entities as well as their signatories, shall provide a letter of undertaking. The signatories of the undertaking, which must include information such as the enterprise name, the capital and center of the enterprise, warrant that such information is true and that otherwise they shall be held liable.

The Regulation includes detailed provisions regarding all acts subject to registration, all necessary information and documentation related to such acts, the registry directorate which shall make the registration and the matters to be registered.

Informative (Positive) Function of the Registry

Both the TCC and the Regulation address the informative effects that registration and announcement shall have on third persons. Accordingly, the registry records shall bear effect on third persons as of the date of publication of the registration in the registry gazette. Third persons may not allege lack of knowledge of the registry records. However, the Regulation states that specific provisions are reserved under the law, such that certain matters registered shall commence bearing effect on third persons as of their registration, even prior to publication. It should be noted, however, that various articles of the TCC state that the registration and announcement of certain matters shall not suffice to prove the knowledge of third persons regarding the relevant matter.

Duty of Examination

Similar to the provisions of the By-Laws, pursuant to the Regulation the directors and vice directors are obliged to examine whether statutory requirements for registration are fulfilled. The scope of this duty is regulated in detail. Contrary to the provisions of the By-Laws, pursuant to the Regulation the directorate may grant a maximum thirty day cure period in the event a discrepancy is noticed, and may extend this period twice at most.

Trade Name

Provisions governing trade names are similar to the conditions stipulated under the TCC regarding trade names. The provision of the Abrogated TCC and the By-Laws specifying that the trade names of real persons shall only be protected within the same registry office has been abandoned. In compliance with the relevant provision introduced under the TCC, the Regulation states that a registered trade name, regardless of the registry office, shall be protected all across Turkey. In the event a

trade name needs to be distinguished from a previously registered trade name, affixes will be added to the trade name to be registered.

Provisions on Group Companies

The TCC regulates in detail group companies for the first time, and although it does not define the term “dominance”, which is the main determining factor in provisions related to group companies, it states in detail the means of dominance. The Regulation readdresses the definition of group companies in line with the TCC. However, the definition of the dominance agreement is made for the first time with the Regulation. The TCC only regulates the validity conditions of dominance agreements without providing any definition. The Regulation introduces specific provisions on whether facility or shareholder agreements constitute dominance agreements or not, issues much debated among scholars. A dominance agreement is an agreement which grants a party the authority to unconditionally control the managing organ of an equity company, also party to the agreement. For a dominance agreement to be valid, it must be registered with the trade registry in the region where the controlled company is headquartered.

Article 198 of the TCC lays down the obligation to notify to the registry all share acquisitions exceeding certain thresholds in equity companies. The Regulation stipulates how this notification shall be made. However, the Regulation narrows the scope of this obligation as put forth under the TCC. Pursuant to the Regulation, the relevant notification need only be made if the purchaser or the seller of the relevant shares is a member of a group company.

The Regulation further includes provisions governing the calculation methods for voting and shareholder equity, and cross shareholding. The term “undertaking” is not defined under the Regulation.

Merger, Spin-off and Conversion

The By-Laws only regulated mergers with regards to company restructuring transactions. In parallel with the new provisions introduced by the TCC, the Regulation includes more detailed provisions on mergers and regulates spin-off and conversion transactions. All necessary

documentation, the duties of the parties involved in the relevant transaction and the consequences of the transaction for each party is specifically regulated.

Other Material Novelties for Equity Companies

The TCC introduces novelties for equity companies not regulated under the Abrogated TCC. Consequently, the Regulation covers new transactions to be registered, which were not regulated under the By-Laws. The Regulation provides detailed provisions on the possibilities of joint stock and limited liability companies to consist of a unique shareholder, conditional capital increases, a registered capital system, additional liquidation and renouncing liquidation. Similarly, the election of the auditor and the election of the auditor by the parent company for group companies are subject to detailed regulations.

The Regulation clarifies certain matters whose practical application under the Abrogated TCC caused confusion. For instance, simultaneous capital decrease and increase is regulated for the first time.

Similar to the new provisions of the TCC, the documentation necessary for registration requests to be made to the registry directorates is increased. For instance, new documents for company incorporation such as the founders' declaration and agreements related to incorporation are required. Similarly, the persons applying for registration are required to submit a document specifying that assets allocated as capital in rem in a company are duly annotated at their relevant registries. The Regulation also provides that the directorate shall notify the relevant registries simultaneously with the registration to the trade registry so that the goods and rights subscribed as capital to a company are registered in the name of the company.

Material Novelties for Commercial Enterprises

The TCC introduces important novelties regarding commercial enterprises. Most significantly, the TCC regulates the possibility of the transfer of a commercial enterprise as a whole with a unique transaction, the merger and conversion of commercial enterprises and the conversion of a commercial company into a commercial enterprise. The

Regulation introduces detailed provisions regulating these innovations. The Regulation expressly lays down that the transfer of a commercial enterprise shall bear effect as of its registration.

Assessment and Conclusion

The Regulation clarifies the registry transactions required under the TCC and the structure and organization of registry directorates. The positive aspects of the Regulation include: clear provisions regarding matters which were unclearly regulated under various provisions of the By-Laws, and which therefore resulted in problems in practice; and determination of how the novelties introduced by the TCC shall be applied.

The Regulation includes detailed provisions to serve its purpose. However, it should be noted that certain matters whose registration is requested under the TCC are overlooked in the detailed provisions. For example, while the board of directors shall register the representatives of a joint stock company pursuant to Article 373 of the TCC, Article 22 of the Regulation, which lists the persons who may request registration and matters to be registered, regulates this matter within a limited scope.

Furthermore, certain provisions of the Regulation include repetitive regulations and definitions that are already present under the TCC. This is the case for group companies and dominance, for example. This approach results in conflicts between the Regulation and the TCC, and at times provisions of the Regulation are not compliant with the statutory provisions.

From a legal methodology perspective, the lack of an explicit provision stating that the provisions of the By-Laws are abrogated and accepting that the entry into force of the Regulation automatically abrogates the By-Laws, despite ranking lower in the hierarchy of norms, is inconvenient.

Group Companies under the Trade Registry Regulation*

Att. Berna Asik Zibel

Turkish Commercial Code No. 6102 ("TCC") regulates the principles regarding group companies under Articles 195 to 209 for the first time in Turkish law. These provisions set forth the definition of the group, impose registration, notification, reporting and auditing obligations to group companies, determine the liabilities and sanctions regarding the abuse of dominance and establish rules on some special situations.

The Trade Registry Regulation ("TRR"), published in the Official Gazette dated 27 January 2013 and numbered 28541, entered into force within the scope of secondary legislation regarding the TCC with respect to the trade registry. The TRR also sets forth regulations on group companies.

This article analyzes the regulations brought with Articles 105 to 108 of the TRR regarding group companies and their situation in relation to the provisions of the TCC.

Definition of Group and Other Basic Concepts

The TCC defines a group based on the terms "undertaking" and "dominance", but does not define these terms. Pursuant to Article 195/4-5, a group is composed of a parent company(ies), a subsidiary company(ies) and if any, an undertaking on top. In other words, for the formation of a group under the TCC, there should be at least two companies between which a dominance relationship exists[1]. Furthermore, the definition of group under the TCC does not refer solely to capital companies and the commercial enterprise on top, but rather uses the terms "company" and "undertaking"[2] in a broad sense. Further, the explanations in the preamble of the law hold that the term "undertaking" is interpreted in a way that covers both real persons and legal entities[3].

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* ***Article of February 2013***

1 **OKUTAN NILSSON, Gül**, Türk Ticaret Kanunu Tasarısı'na göre Şirketler Topluluğu Hukuku, 1. Baskı, İstanbul, 2009, p. 71.

2 Please see Justice Sub Committee Report, preamble of Article 195, 198.

3 **OKUTAN NILSSON**, p. 73.

The TRR describes the group through the presence of a company and at least two companies that are directly or indirectly dependent on this company. Accordingly, in order to be considered a "group" as per the TRR, there should be at least two companies dependent on a dominant company, or where there is a dominant undertaking, which is not a company, there should be more than two companies dependent to this undertaking. In other words, the presence of at least three companies is necessary in order to be considered a group under the TRR. The quantity requirement arising out of the "group" definition under Article 105 of the TRR goes beyond its purpose and displays a characteristic which is not set forth under TCC for group companies.

The TCC's provisions on group companies are centered on the concept of "dominance" with regard to the relationship between the dominant company and the subsidiary company. Yet, the TCC does not define "dominance". It merely sets forth the ways in which dominance can be manifest based on the degree of "control", but does not define the term "control" either. In this respect, the definition of basic concepts is left to the doctrine and judicial precedents. The concept of "dominance" is defined by the scholars as the power to determine and control the investment, operation and finance policies of a company[4]. Whereas "control" implies the possession of legal instruments (such as holding a majority of the votes and a majority in management) which enables the "controlling" company to affect and direct the decision-making mechanisms[5] of another company.

As in the TCC, the concepts of "control" and "dominance" are not defined in the TRR.

Dominance Agreement

The ways of dominance set forth in Article 195/1 of the TCC are classified under three headings as dominance through shareholding, dominance through agreement, and dominance through other ways. The TRR only mentions dominance agreements, does not regulate dominance

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4 **OKUTAN NILSSON**, p. 98.

5 With reference of **OKUTAN NILSSON**, p. 210, p. 211, **Grundmann**, European Company Law, Belgium 2007, p. 342.

through shareholding and does not set an example regarding dominance through other ways.

Art. 106 of the TRR defines the dominance agreement. Pursuant to this article, the dominance agreement is "*an agreement where a party is granted the unconditional authority to give instruction to the management body of the other party; in which the parties are not in a direct or indirect affiliate relationship, or in the event of a relationship as such, in a manner independent and isolated from the affiliate relationship.*" This definition considerably restricts the types of agreements that may be accepted as dominance agreements. As per this definition, the authority to give instruction contained in the agreement must be completely independent and isolated from the affiliate relationship and must be unconditional.

As stated above, the TCC aims to define the dominance relationship and group companies in very broad terms. Likewise, the TCC encapsulates all means of dominance within its scope by making reference to dominance through all other means. Notwithstanding, the TRR's restrictive definition of the dominance agreement, which is a means of dominance, may result in the exclusion of certain agreements executed for this purpose and the non-interpretation of such agreements as dominance agreements. For instance, in practice, in most situations where the dominance is established through agreements, the authority to give instructions may be conditioned upon the consent of the parties. In this situation, as per the TRR's definition, agreements comprising such conditions will not be assessed as dominance agreements.

The TRR contains an explicit provision stipulating that credit agreements containing an obligation "*to get the approval of the credit institution before a transaction can be conducted*" shall not be included in the definition of a dominance agreement. Furthermore, it explicitly holds that agreements such as shareholders agreements to which the company is not a party do not qualify as dominance agreements.

In accordance with TCC Article 198/3, the TRR requires approval by the general assembly of the subsidiary company and registration with the registry in order for the dominance agreement to be deemed valid. Accordingly, the dominance agreement must be registered with the registry of the dominant company or in the event that the dominant

company is abroad, with the registry where the headquarters of the subsidiary company is located. If the agreement is in a foreign language, a notarized Turkish translation must be submitted to the registry. Registries have the right to request other documents within this scope.

Obligations of Notification, Registration and Announcement

Pursuant to Article 198 of the TCC, in the event that an undertaking directly or indirectly holds 5, 10, 20, 25, 33, 50, 67 or 100 percent of the shares of a company, or its shares fall under such percentages, the undertaking should inform the said company and the relevant authorities of the situation within ten days as of the completion of the relevant transactions. The acquisition or disposal of shares at the percentages stated above should be indicated in the annual activity and audit reports under a separate title and should be announced on the company's web site. Additionally, there are specific obligations of provision of information set forth for the members of the board of directors and other executives of both the undertaking and the company. Pursuant to Article 198 of the TCC, all rights, including any voting rights arising from the acquisition of shares, shall be suspended unless and until the registration and announcement obligation is satisfied.

TRR Article 107/2 requires the obligation to notify only if the undertaking, or the company acquiring or disposing of the shares, is part of a group company. Such a provision highly restricts the notification requirement set forth under the TCC. When considering the limitation of the TRR's definition of group companies, the scope of this notification obligation provided by the law is further restricted. In other words, pursuant to the TCC, notification to the relevant registry is required for share transfer transactions exceeding the designated thresholds, whereas pursuant to the TRR, the presence of a group company (a structure comprising three companies) will be confirmed first and serving a notification shall be brought into the agenda accordingly.

Pursuant to the TRR, where there is an indirect affiliate relationship, notification with respect to all of the undertakings or companies exceeding the threshold or dropping below the threshold may be conducted by one of them. If the notification is not served, the rights arising out of the

aforementioned shares are considered as ceased as per the TCC. The TRR repeats this sanction as well.

Besides explanations with respect to the notification obligation, Article 107 of the TRR covers in great detail voting and share ratio thresholds and stipulates the issues, if any, that should be considered in cross-shareholding calculations and how the calculations should be conducted.

Audit of the Group

Pursuant to Article 108 of the TRR, the group auditor is appointed by the general assembly of the parent company. For each activity period, a general assembly resolution for the appointment of an auditor must be taken by the end of the fourth month of the activity period, and in any case before the end of the activity period during which he shall fulfill his duty. After the appointment, the board of directors shall register the auditor without any delay. In the event a group auditor has not been appointed by the general assembly of the parent company, the auditor of the parent company is registered as the group auditor.

Assessment

Although the TCC aims at broad implementation of the provisions regarding group companies, the TRR includes restrictive provisions that are contrary to this aim. In this regard, the provisions of the TRR that limit the scope of implementation are inconsistent with the aim of the lawmaker and the spirit of TCC, and deviates from its regulating purposes.

Affiliation Reports in a Corporate Group*

Prof. Dr. H. Ercument Erdem

Introduction

The Turkish Commercial Code No. 6102 ("TCC") introduces provisions on group companies on the basis of the concept of dominance between companies. Pursuant to these provisions, where a company directly or indirectly (a) holds the majority of voting rights in another company, (b) has a right in another company to appoint the number of members of its managing organ having the majority to adopt board resolutions, (c) owns the majority of voting rights in another company solely or together with other shareholders based on an agreement; or where a company controls another company through a dominance agreement or through other means, the first company is in a dominant position. The parent company and the subsidiaries under its control, which are party to a dominance relationship, constitute a group of companies (a corporate group). The Trade Registry Regulation[1] Art. 105/1 on the other hand stipulates that for a corporate group to exist pursuant to TCC Art. 195/4, there must be one parent company and at least two subsidiaries.

In order to prevent negative influences of the parent company over the subsidiaries as a result of the dominance, the TCC stipulates some obligations for both the parent company and the subsidiaries. The main obligation of the parent company is to not exercise control illegally. In the event the parent company exercises its control illegally over its subsidiary, resulting in the subsidiary facing losses, the parent company shall compensate the losses of the subsidiary. The purpose of such obligation is to prevent the shareholders and the creditors of the subsidiaries from incurring losses. In the event the parent company does not compensate the losses, the shareholders of the subsidiary may request compensation of damages and the creditors of the subsidiaries may request compensation of the losses to be paid to the company.

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* *Article of February 2013*

1 Official Gazette, 27.01.2013, No. 28541.

Affiliation Report

Article 199 of the TCC stipulates that the subsidiaries will annually prepare an “affiliation report” in order to both render the above explained mechanism effective and to ensure that the shareholders and creditors of the subsidiaries are informed of the relationship between the subsidiary and other group companies. This report shall assess the relationship between the subsidiary and other subsidiaries and the parent company of the corporate group, and the consequences arising therefrom.

Due to the nature of the information included therein, the affiliation report shall also constitute a basis for the exercise of certain rights granted to shareholders and creditors under the TCC. For instance, the issues determined in the affiliation report are of great importance with regards to the rights of the shareholders to information and to conduct examinations. Additionally, this information may also form the basis for compensation lawsuits to be filed in case the parent company does not make the necessary compensations where compensation shall be made under the law. For these reasons, TCC Art. 199/2 stipulates that the affiliation report shall be prepared in accordance with the true and fair view principle.

The Companies Obliged to Prepare an Affiliation Report

As mentioned above, all of the subsidiaries that are under control of a parent company are obliged to prepare affiliation reports. The fact that the subsidiary is a parent company of other affiliates or subsidiaries does not eliminate its obligation to prepare the affiliation report. The determining factor is whether the company is under the control of another company through any means. It is not necessary that the subsidiary be a joint stock company in order to prepare an affiliation report.

The Content of the Affiliation Report

Article 199 of the TCC which governs the preparation of the affiliation report also determines the information which shall be included therein. Pursuant to this article, in general, the relationship between the company and the parent company and other subsidiaries of that parent

company shall be stated in the affiliation report. Within that scope, (i) the obligations of the subsidiary and the counter obligations, (ii) the measures to prevent the losses of the subsidiaries which the parent company adopted or refrained from providing, together with the reasons of such measures and the interest and damages that the company may incur due to such measures and (iii) whether compensation was made where some losses were incurred and the information with regards to such compensation shall be included to the affiliation report.

In short, the matters to be mentioned in the affiliation report may be classified into three groups: the legal transactions with the other companies of the corporate group, the measures omitted or provided in favor of such companies, and the compensation made for the losses incurred.

The text of the article regarding measures to be provided and compensation is quite clear. However, the scope of the legal transactions to be included in the affiliation report must be carefully and diligently determined; as the wording of the article may result in differences of interpretation.

The wording of the article with regard to legal transactions is as follows: *"… the legal transactions made with the parent company or a subsidiary of the parent company, or made in favor of the parent company or one of its subsidiaries upon the direction of the parent company"*. As can be seen, the interpretation of the phrase *"upon the direction of the parent company"* is not sufficiently clear; neither does the justification of the article offer any explanation to that end.

In our opinion, all of the transactions made with the parent company and the subsidiaries shall be included in the affiliation report without being subject to any other condition. However, certain transactions that are not made with the parent company or one of its subsidiaries may also be included to the report provided that such transactions are made in favor of the parent company or one of its subsidiaries, and that the transactions have been made upon the direction of the parent company. Therefore, three groups of transactions shall be included in the report: (i) all of the transactions made with the parent company, (ii) all of the transactions made with the subsidiaries of the parent company and (iii)

the transactions made with third parties upon the direction of the parent company in favor of the parent company or one of its subsidiaries[2].

The types of the transactions to be mentioned in the affiliation report are not limited under the TCC. For instance, all sale, rental or service agreements etc. between the corporate group companies, or provision of securities in favor of the group companies may be cited as transactions to be mentioned in the affiliation report. Additionally, the cases stated in Art. 202, which result in liability of the companies, may be used to determine the matters which shall be included in the affiliation report.

It should also be determined whether the subsidiary, where it is the parent company of other companies, shall state the transactions conducted with its own subsidiaries. In fact, such an obligation is not stipulated for the affiliation report which shall be prepared in accordance with TCC Art. 199/1-3; and in practice, this shall not be necessary. The subsidiaries of a company that are also under the control of another parent company, and therefore in the position of a subsidiary, shall state those transactions in the affiliation reports that they will prepare. For instance, in the event joint stock company (A) is a parent company and joint stock companies (B), (C), and (D) are its subsidiaries, (B), (C) and (D) shall each prepare an affiliation report regarding their relations with (A). If (B) controls joint stock companies (V), (Y) and (Z), (B) shall not mention its relationship with (V), (Y), and (Z) in the affiliation report that it shall prepare. (V), (Y), and (Z) shall mention such relationships in the affiliation reports that they shall prepare.

The parent companies on the other hand are obliged to mention such information in the "control report" that they will prepare upon request, in accordance with TCC Art. 199/4. For the example above, (A) shall prepare a control report for its relationship with (B), (C) and (D); whereas (B) shall prepare a control report for its relations with (V), (Y), and (Z).

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2 It is also argued that, for the transactions that are not made with the parent company or its subsidiary to be included to the affiliation report, it is not necessary that the conditions of the transaction being in favor of the parent company or its subsidiaries and the transaction being made upon the direction of the parent company are cumulative. According to this opinion, the transactions in favor of the parent company or its subsidiaries and the transactions made upon the direction of the parent company shall be separately considered and included in the affiliation report.

The Relation between the Affiliation Report and the Activity Report

The purposes of the affiliation report and the activity report are similar with regards to informing the shareholders and the creditors of a company's activities. Aside from this similarity, they are quite different regarding their contents. Nevertheless, TCC Art. 199/3 stipulates that some of the information in the affiliation report must also be included in the activity report. The article reads as follows: *"At the end of the report, the board of directors shall explain whether or not the company, in the circumstances and conditions known to the board at the time the company conducted the legal transaction or took or refrained from taking the measure, undertook the appropriate counter measure in relation to each legal transaction and whether or not the company suffered losses due to taking or refraining from taking the measures. In the event the company incurred losses, the board of directors shall also specify whether or not the losses were compensated. This explanation shall only be included in the annual activity report."*

As seen, the article states that the affiliation report shall have a conclusion section and it also determines the content of this section. However, in line with the principle that the affiliation report shall not be disclosed to the shareholders in its entirety, all of the information in the affiliation report shall not be included in the activity report, and only its conclusion section shall be cited in the activity report[3].

In addition to the above explanations, another passage of the article, which may result in material controversies in practice, should also be mentioned. As seen above in the article, the board of directors shall evaluate the information *"in accordance with the circumstances and conditions known to the board"*. Therefore, it may be concluded that the cases that are not known, but should be known to the board of directors will not be taken as basis for such evaluation. However, the justification of the article states that, "*Whether or not the circumstances and conditions which should have been known to the board of directors*

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3 During the preparation of the TCC, the sub-commission discussed the disclosure of the affiliation report to the shareholders in its entirety and it was decided that it is not necessary. Accordingly, the word "only" is added to the article emphasizing that only the conclusion part of the affiliation report shall be included in the activity report.

shall be taken into consideration with regard to the liability of the board of directors necessitates determination to be made by academics and jurisprudence”. Therefore, the board of directors may be held liable for assessments it will make in preparation of the affiliation report regarding the circumstances and conditions it should have known in addition to those of which it had knowledge. Taking into consideration the practice of the Turkish Commercial Code No. 6762, it is highly probable that the phrase “known” shall be interpreted as “should have been known” by academics and the courts. Therefore, it will be prudent to make the evaluation in accordance with the circumstances and conditions that the board of directors should have known.

Conclusion

In conclusion, subsidiaries are obliged to prepare an affiliation report pursuant to Art. 199 of the TCC. In this report, the subsidiary shall cite all of the transactions made with the parent company and the subsidiaries of the same parent company, the transactions made with third parties upon the direction of the parent company in favor of the parent company or its subsidiaries, the measures taken and not taken in favor of those companies and the losses incurred resulting from the corporate group relationship and it compensation of those losses.

The conclusion section of the affiliation report shall be disclosed to the shareholders through citation in the activity report.

Parent companies shall prepare a control report pursuant to Art. 199/4 upon request with regard to their relationship with their subsidiaries.

Notification and Registration Obligations for Groups of Companies [*]

Att. Revan Sunol

As known, groups of companies were not regulated under the former Turkish Commercial Code numbered 6267. Regulations regarding the assurance of the independence of the subsidiary against the parent company, and transparency in the market regarding groups of companies have been included within the Turkish Commercial Code numbered 6102 ("TTC") so the law could regulate the necessities of commerce.

Art. 195 to 210 TCC and 105 to 107 of the Trade Registry Regulation ("TRR") constitute the body of legislation regarding groups of companies. These regulations define the notions of control and group of companies, as well as implementing certain obligations and responsibilities. It should be noted that TRR provisions are for the most part parallel to TCC provisions, but include certain provisions to which special attention must be paid.

Control

Basic notions regarding group companies are encompassed in TCC Art. 195. Pursuant to Art.195, control may be realized contractually or through capital contributions to a company. If a commercial company, directly or indirectly:

- Holds the majority of the voting rights in another commercial company;
- Has the right to appoint a number of directors, which form a majority allowing the adoption of a resolution of the managing body of another commercial company pursuant to the articles of incorporation (or other equivalent of such document);
- Holds the majority of the voting rights by means of an agreement on its own or together with other shareholders;

or,

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[*] ***Article of October 2013***

if a commercial company controls another commercial company contractually or by any other means, then the first company is the parent company and the second is the subsidiary.

Where control is attained via one or more affiliated companies this shall constitute indirect control.

Art. 195 also provides a legal presumption as to the existence of control, which may be proved false. According to said provision, the possession of the majority of a company's shares or an amount enabling the adoption of resolutions that implement the management of such company shall indicate control. There are no specifications as to what such resolutions which implement the management of a company may be.

Group of Companies

A group of companies consists of one commercial company and at least two commercial companies that are directly or indirectly controlled by it. Art. 195 TCC is not clear as to whether one parent company and one subsidiary company would be sufficient to constitute a group of companies. However, this is expressly regulated under TRR, which determines that a group of companies must contain one parent company and at least two other subsidiaries.

It must be noted that, pursuant to Art. 195 TCC and Art. 107 TRR, an enterprise which is not a commercial company with two or more direct or indirect subsidiaries shall also form a group of companies in which the parent shall be the enterprise.

Obligation of Notification and Registration

The TCC stipulates certain obligations in order to preserve the independence of the subsidiary vis-à-vis the parent company. One of these obligations is found in Art. 198 TCC which concerns obligations of notification and registration which arise in case of share transfers.

According to Art. 198 TCC, share transfers, which directly or indirectly result in the shares possessed in the capital of a company to exceed or drop below 5%, 10%, 20%, 25%, 33%, 50%, 67% and 100%,

must be notified to the competent authorities and to the company whose shares are acquired.

In the TCC's preamble, it is stated that criteria such as minority limits, cross participation limits, presumption of control etc. were used to determine the above-mentioned limits. Depending on the case, the competent authorities may be private institutions or governmental institutions such as the Capital Markets Board of Turkey, Banking Regulation and Supervision Agency, Turkish Competition Authority and the Undersecretariat of Treasury.

According to TRR Art. 107/5, a company or enterprise whose shares exceed or drop below the limits must notify in writing the company whose shares are subject to transfer, within 10 days as of the transfer. Companies which receive such notifications must have them registered with the relevant trade registry and published in the Trade Registry Gazette within 10 days from the date of receipt.

It must also be pointed out that share transfers in the above mentioned percentages must also be accounted for in annual reports and audit reports, and disclosed on the web site of the company.

A similar obligation of notification exists for directors of companies or undertakings: directors are obliged to notify the company where they are director for the transfer of such company's shares resulting in the amount of the shares owned being above or below the limits. This notification obligation shall also apply for the transfer of shares owned by their spouse, their children and companies wherein the director himself, his spouse, or his children own more than 20% of the shares.

In the case of a transfer below or over the limits, it must be remembered that the entire transaction shall be notified, not just the part exceeding the limit.

In practice, the company, whose shares have exceeded or dropped below the mentioned limits, notifies the company whose shares are transferred, and the latter notifies the relevant trade registry. This notification is then registered with the trade registry and published in the Trade Registry Gazette.

According to TRR Art. 107, in the presence of a notification for more than one indirect subsidiary, it is possible that only one of these companies make a single notification for all of the enterprises or companies that indirectly exceed or drop below the limits. For instance, if the control between the parent company and its subsidiary is realized through other subsidiary companies, and if there is a change in the shareholding of more than one company because of a single transaction, this may be notified by just one of the subsidiaries for the entire group.

Non-Fulfillment of the Obligation of Notification and Registration

Not applying to the trade registry within the prescribed time shall result in the shareholding rights arising from the relevant shares being suspended. This means voting rights cannot be used either. As a result, if such voting rights affect the quorum of a resolution that has been adopted without the necessary notification and registration, such resolution may be rendered invalid. However, the lapse of the prescribed period shall not nullify such shareholding rights, but merely suspend them. Thus, the fulfillment of the obligation of registration shall enable the usage of shareholding rights.

Conclusion

The obligation of notification is important as it promotes transparency in the market by disclosing the shareholding status, and is declaratory especially in consideration of potential liabilities. However, non-fulfillment of this obligation can even result in the invalidity of companies' decisions. In practice, it has been observed that problems occur with the registry procedure, for example the trade registry rejecting applications for registration on the grounds that the 10 day period has lapsed, therefore causing the suspension of shareholding rights for long periods of time. Consequently, the fulfillment of the obligation is important for the prevention of loss of rights, which may especially occur during this period of transition.

Action for Company Damages pursuant to Art. 202/1 of the Turkish Commercial Code No. 6102 [*]

Att. Selen Ozturk

In General

The Turkish Commercial Code No. 6102 ("TCC") adopts a different system from the old Turkish Commercial Code No. 6762 ("Old TCC") and regulates group companies. One of the most important regulations with respect to group companies is contained in the articles that regulate the liability of the controlling company. Paragraphs 1 and 2 of TCC Art. 202 set forth two different conditions which would constitute a contravention of the law. This paper will examine the conditions of contravention of the law regulated under paragraph 1 of TCC Art. 202 and the lawsuit that may be filed due to this contravention of the law.

The Contravention of Law as Regulated under TCC Art. 202/1

In accordance with Art. 202/1 TCC, a controlling company may not exercise its control in a way that would make the dependent company incur a loss. If the controlling company exercises its control in a way that causes losses to the dependent company, this would constitute a contravention of the law. Art. 202/1 provides examples of the acts and transactions that may create loss. Accordingly, the controlling company may not direct the dependent company to carry out legal transactions such as the transfer of business, assets, funds, staff, receivables and debt; to decrease or transfer its profits; to restrict its assets with real or personal rights; to undertake liabilities such as providing surety, guarantee and bill guarantee; to make payments; to adopt decisions or take measures which negatively affect the dependent company's efficiency and activity such as not renovating its facilities, limiting or stopping its investments without any reasonable grounds or refraining from taking measures that will ensure its development.

If a loss due to any of the aforementioned occurs, the controlling company will be obliged to compensate the dependent company.

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* ***Article of December 2013***

Where the controlling company fulfills its compensation obligation, the contravention of the law will be eliminated and the controlling company will be relieved of its liability. Pursuant to Art. 202/1, the compensation obligation may be fulfilled by compensating the loss within that activity year or a right to claim of equivalent value is granted to the dependent company at the latest by the end of that activity year by specifying how and when the loss will be compensated.

In the event that the compensation foreseen under Art. 202/1 TCC has not been paid/ performed, a contravention of the law will be deemed to exist and the shareholders of the dependent company may file suit for the damages incurred by the dependent company. The provisions of the lawsuit will be briefly examined below.

Cause of Action

In order to file a suit as regulated under Art. 202/1(b), certain factual elements must be met. The first element is the existence of a group. Moreover in order to file a suit for damages there must be a dependent company and a controlling company in compliance with Art. 195 TCC. This type of action seeks to compensate the damage caused to the dependent company for losses incurred due to abuse of control. Consequently, the presence of a controlling company and dependent company is essential. Furthermore, there must be a contravention of the law pursuant to Art. 202/1(a). A contravention of the law will arise where the dependent company incurs a loss due to use of control and such loss has not been compensated within the period prescribed by the law. In the presence of these factual elements, a suit for the dependent company's damages may be filed by the shareholders of the dependent company.

Parties

Pursuant to Art. 202/1 of the TCC, if compensation has not been paid/performed within the activity year in which the damage occurred or if a right of equivalent claim has not been granted within the due period, each shareholder of the dependent company may demand that the loss incurred be compensated by the controlling company and its board members who caused the loss. The plaintiff is set forth as the shareholder

of the dependent company, as the dependent company is not entitled to file a suit pursuant to said article. The preamble of the TCC explains the reasoning behind this regulation. In accordance with the preamble of the TCC, the dependent company may not carry out this lawsuit against the controlling company in good faith since it is affiliated with the controlling company.

In accordance with said article, the suit may be filed against the controlling company or its board members who caused the loss. The controlling company shall be liable for the entire loss. On the other hand, the lawsuit may also be filed against the board members who caused the loss. Pursuant to Article 202/1(e), Articles 553, 555 to 557, 560 and 561 shall apply to the action to be taken by shareholders, by analogy. The aforementioned articles regulate the liability of the board members of a joint stock company. Accordingly, the board members may only be held liable where they are at fault. The principles of differentiated succession shall apply to the liability of the board members.

Release from Liability

Article 202/1(d) TCC stipulates a special condition where the controlling company and its board members may be released from liability. Where it is proven that under the same or similar conditions, the board members of an independent company, who take care of company interests in good faith and act with the care of a prudent manager, would also have carried out or refrained from a transaction as a result of which loss occurs, compensation may not be awarded.

Claims

The plaintiff may demand that the controlling company compensate for the loss incurred by the dependent company. The amount of the claim shall be the difference between the current status of the company's assets and the would be position of its assets if the act or transaction realized due to the performance of control had not been realized. The facts which have a causal relation to the act that gave rise to the loss shall be taken into account while calculating the loss. The judge has sole discretion while determining the method of compensation.

The claimant may request the purchase of his shares by the controlling company instead of filing a compensation claim. However, in order to apply this solution, the request of compensation should not be possible. Furthermore, if it is justifiable; instead of compensation, the judge may decide that the plaintiff shareholders' shares must be acquired by the controlling company or decide on another solution, which is acceptable and appropriate to the situation. Accordingly, this provision is assumed as an important provision since the judge may use his discretionary power while deciding on the solution. The judge, without any request, by considering the circumstances of the relevant case, may rule for the purchase of the shares or for any other solution. Art. 202/2 shall be applied while determining the purchase price of the shares. In accordance with Art. 202, if possible, the shares shall be purchased at least at stock exchange value. If there is no such value or if the stock exchange value is not just, then they shall be purchased at actual values, or at a value to be determined in accordance with a method that is generally accepted.

Jurisdiction and Statute of Limitations

The competent court is the commercial court of first instance, pursuant to Art. 561 TCC. Said article sets forth that the lawsuit against the respondent shall be filed in the commercial court of first instance where the headquarters of company is situated. However, said article does not clarify whether "headquarters" refers to that of the controlling or the dependent company. Art. 202/1(e) stipulates that if the headquarters of the controlling undertaking is located abroad, the suit for compensation shall be filed in the commercial court of first instance at the location of the headquarters of the dependent company.

TCC Art. 560 shall be applied with respect to prescription period due to reference to art. 560. In accordance with this article, the compensation claims must be made within two years from the date on which the claimant became aware of the loss, and the person that is responsible of that loss and in any case, within five years from the occurrence date of the act which caused the loss.

Conclusion

TCC Art. 202/1 brings a new dimension to liability law and foresees the indemnification of a dependent company for the acts and transactions conducted by the dependent company upon the instruction of the controlling company. The suit for damages may be filed where there is a loss incurred by dependent company and where such loss has not been compensated within the period prescribed by the law. The lawsuit is filed by the shareholder of the dependent company and the respondent is the controlling company or its board members who caused the loss. TCC Art. 202/1 is an important provision since it regulates the liability of the controlling company within the framework of group companies.

New Lawsuits Regarding Mergers, Spin-offs and Conversions*

Prof. Dr. H. Ercument Erdem

Introduction

The Turkish Commercial Code No. 6102[1] ("TCC") introduces detailed provisions regarding merger transactions, regulates for the first time spin-off transactions and materially broadens the scope of conversion of type transactions. Both Swiss legislation and the *acquis communautaire* were taken into consideration in the drafting of these provisions.

The TCC introduces new concepts such as squeeze-out and sell-out rights, a consideration to be paid to the shareholder, and regulates new shareholder rights. The system of protection of creditors is amended and the old mechanism which prevented the realization of restructuring transactions is abandoned. A simplified procedure is envisaged based on the scale of the companies involved in the transaction. Thereby, the TCC addresses restructuring transactions in detail. Statutory provisions aim at facilitating these transactions.

Restructuring transactions may cause conflicts of interest between various stakeholders. For this reason, the TCC regulates new types of lawsuits in its aim to strike a balance between various interests while establishing the framework for restructuring transactions. The first lawsuit is in relation to preserving the continuity of the shares and rights of a shareholder. The second lawsuit is regarding the annulment of restructuring decisions. The third lawsuit is a special liability lawsuit for damages caused (due to negligence or fault) by persons participating in the restructuring transactions.

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* ***Article of October 2013***

1 Official Gazette, 14 February 2011, No. 27846.

Lawsuit Examining the Company Shares and Rights

In General

The TCC accepts the principle of continuity of a shareholder's shares and rights in merger, spin-off and conversion transactions. Articles 140, 161 and 183 TCC regulate the main principles in relation to preserving shareholders' rights depending on the specificities of each transaction. In principle, a shareholder's existing rights should remain in place, and should be adapted to the new merged, spun-off or converted company.

The lawsuit regulated under Art. 191 TCC serves to assess whether shareholders' rights are duly preserved, and the provisions of the TCC on preserving shares and rights are duly applied.

Parties to the Lawsuit, Subject Matter and Jurisdiction

Any shareholder who alleges a violation of their rights may initiate a lawsuit to examine their shares and rights. The code did not restrict the right to file this type of lawsuit to the shareholders of the acquired or spun-off company. It is argued that the shareholders of the acquired, spun-off or acquiring companies may all initiate this lawsuit. With this lawsuit, the claimant may allege that their rights to continue shareholding are violated, that their shares or rights in the company were not duly preserved or that the consideration paid was not adequate.

The defendant to the lawsuit will depend on the restructuring transaction. In a merger transaction, the acquiring or the newly established company shall be the defendant to such a lawsuit. In the event of a partial spin-off, a shareholder may file the lawsuit against the company that has acquired the assets allocated to said shareholder, and in the event of a full spin-off to one or all companies. The converted company will be the defendant in the event of conversion.

Art. 191 TCC regulates that the claimant may request an equalization (offset) payment. Nevertheless this is different from the offset payment made under Art. 141/2 TCC to shareholders in a merger transaction. An offset payment may be made to a shareholder, provided that it does not exceed 10% of the actual value of its shares, in order to avoid fractions while determining the exchange rate of the merger transaction. The offset

payment to be made under Art. 191 TCC on the other hand is a payment made on the grounds that the shares, rights or consideration given to the shareholder are not adequate.

The authorized jurisdiction for this lawsuit is the commercial court of first instance where the headquarters of one of the companies engaging in the restructuring transaction is located.

Prescription Period

The lawsuit should be initiated within two months following the publication of the relevant merger, spin-off or conversion decision in the Turkish Trade Registry Gazette ("TTRG").

It is regulated under the TCC that the merger and conversion decisions will be published on the TTRG (Art. 154 and 198/2 TCC), but the provisions governing the spin-off transaction only foresee a registration, and not a publication. Even though it is not explicitly regulated in the provisions governing spin-offs, pursuant to Art. 35/3 TCC, unless regulated otherwise, all matters which shall be registered are subject to publication; and accordingly it should be accepted that the spin-off decision will also be published in the TTRG.

Court Expenses

The TCC provides that the court expenses arising under such lawsuits shall be borne by the defendant company. The legislator has accepted the principle that a shareholder, whose rights have potentially been violated, should not bear the financial burden of the lawsuit.

The TCC also provides that under special circumstances that justify such a distribution, the claimant may be forced to partially or fully pay the court expenses. In the event it is apparent that shareholders have maliciously initiated a lawsuit or the lawsuit is denied, it is possible to charge the court expenses to the claimant shareholder.

The Effects of the Ruling

The ruling to be adopted at the end of the proceedings shall bear effect on all shareholders who are in the same situation with the claimant.

Nevertheless the code gives no explanation on how this ruling may be enforced regarding other shareholders, whether it is necessary to give notice of the lawsuit to other shareholders, and how separate lawsuits filed by different shareholders who are in the same situation will be heard.

Art. 191/4 TCC regulates that this lawsuit shall not affect the validity of the relevant merger, spin-off or conversion transaction. Nonetheless, it is argued by scholars that this lawsuit should be filed together with the annulment lawsuit. Pursuant to this opinion, Art. 191 TCC introduces an innovative lawsuit. In order for this lawsuit to give rise to its innovative effects, it should be filed together with an annulment lawsuit. Nonetheless, the decision in favor of merging, spinning-off or conversion need not be annulled for there to be a ruling for an offset payment under this lawsuit. In fact, in the event the relevant decision is annulled, as the annulment will retroactively apply, there will no longer be a violation of a right or consideration which needs to be offset. Therefore, I do not agree with this opinion.

I am of the opinion that the claimant shareholder is not obliged to cast a negative vote against the merger, spin-off or conversion decision, nor ensure that his opposition is recorded.

Annulment Lawsuit

In General

The annulment of joint stock companies' general assembly resolutions are regulated under Art. 445 et seq. TCC. These articles foresee three grounds for annulment: the contravention of law, articles of association and the good faith principle. Similar provisions may be found in Art. 622 for limited liability companies and Art. 53 of the Cooperatives Act for cooperative companies.

Nonetheless, Art. 192 TCC specifically regulates the annulment lawsuit when filed against restructuring transactions. Thereby, the contravention of provisions applicable to the restructuring process is subject to a separate and special annulment regime. Moreover, this special provision provides a legal remedy to collective and commandite companies in the event of transactions which contravene the law.

Furthermore, restructuring decisions do not always require a general assembly resolution, as is the case with a facilitated merger whereby the decision can be taken by the managing body and not the general assembly, and a special provision is therefore necessary in order for such decisions to be annulled in the event of contravention of the law.

The annulment lawsuit filed based on the contravention of provisions regulating restructuring transactions is regulated under a specific provision. It is disputed whether, regardless of this provision, annulment lawsuits may be filed based on general provisions in the event of contravention of Art. 134 to 190 TCC.

Parties to the Lawsuit and the Subject Matter

Art. 192 TCC regulates the annulment of the merger, spin-off or conversion decision.

The shareholder of a company engaging in the restructuring transaction, who did not vote in favor of the decision for which it seeks the annulment, and who recorded their objection in the minutes may file this lawsuit. Nevertheless, in the event the managing body adopts the restructuring decision, and not the general assembly, this prerequisite does not need to be met. Contrary to the general annulment lawsuit, shareholders that did not participate in the meeting, the board of directors and board members are not authorized to file a lawsuit based on these provisions.

The lawsuit must be filed against the company whose decision is to be annulled. In the event that said company is dissolved and deleted from the trade registry, as in the case of a complete spin-off or a merger, the lawsuit will be initiated against the acquiring company.

Prescription Period

The annulment lawsuit should be filed within two months of the publication of the relevant decision in the TTRG, as is the case for lawsuits regarding the protection of shares and rights of shareholders. Nevertheless, the prescription period for the general annulment lawsuit is three months, which therefore results in a lack of coherence between the two provisions.

Even though Art. 192 TCC states that if the announcement is not required the prescription period shall commence as of the registration, I am of the opinion that this provision is not necessary. The TCC explicitly states that merger and conversion decisions will be announced in the TTRG. As I stated above in relation to the lawsuit regarding the protection of shares and rights of shareholders, even though the provisions governing spin-offs do not have such an explicit requirement, the spin-off decision should also be announced, and therefore it should be accepted that the two-year period commences as of the announcement. Nonetheless, there are dissenting opinions on this issue among scholars.

A facilitated merger does not require a general assembly resolution, as the decision may be adopted by the managing body. However even in this case, pursuant to Art. 126/3, the decision of the managing body must also be registered and announced. Thus, the prescription period should commence as of the announcement.

The Effects of the Ruling

In the event the courts decide that the relevant merger, spin-off or conversion decision should be annulled, this decision will retroactively apply. Therefore, all consequences of the restructuring transaction will be removed as if the transaction were not realized at all. Given both the dissolution of companies and the continuation of the activities of the merged, spun-off or converted company for the duration of the lawsuit, it is apparent that the annulment will result in severe consequences. Therefore, the TCC sustains the principle of preserving the validity of the merger, spin-off and conversion transaction.

Pursuant to the TCC, if the contravention which forms the basis of the annulment claim is due to a deficiency in the restructuring transaction, the judge shall grant a cure period for the deficiency to be overcome. In the event the deficiency is not or cannot be overcome in this time period, then the judge may decide to annul the relevant decision. It is also stated in the code that the courts shall adapt the necessary precautions. These precautions shall serve to overcome the problems which may be caused by the retroactive effect of the annulment decision.

Liability Lawsuit

In General

Art. 193 TCC specifically regulates the liability arising from not executing restructuring transactions in accordance with the law. Pursuant to this provision, persons participating in the restructuring transaction in any way shall be liable to the companies, shareholders and creditors of the companies involved for the damages they cause due to negligence or fault.

Parties to the Lawsuit

Contrary to the first two lawsuits I assessed above in relation to restructuring transactions, not only the shareholders, but also the company itself or its creditors may initiate a liability lawsuit.

The defendants to this lawsuit are defined with a broad scope in the TCC. Accordingly, persons who participated in the merger, spin-off or conversion transactions in any manner may be the defendants to this lawsuit. In the event of a broad interpretation of this provision, in addition to the company managers who engaged in the transaction, all auditors, financial institutions as well as other consultants who engaged in the transaction may become defendants. Nevertheless, pursuant to the strict interpretation, which should prevail, the responsibility of the bodies should be enforced rather than the responsibility of the persons who provide consultation services under an agreement executed with the company. Accordingly, the board of directors, managers, liquidation officers and directors may be held liable and become the defendants to this lawsuit. I am of the opinion that shareholders who participated in the general assembly meeting should also be kept out of the scope of this lawsuit.

Subject Matter of the Lawsuit

The claimants may request compensation for direct damages caused (due to negligence or fault) by the persons who participated in the transaction. Nevertheless, the indirect damages suffered by shareholders are subject to the general liability regime. The company may file a liability

lawsuit based on Art. 193 TCC and be the claimant for its own damages incurred as a result of the restructuring transaction. However, in the event the company incurs damages, the shareholder may file a lawsuit based on Art. 555 TCC for its indirect damages, and request compensation to be paid to the company. In such a case, in the event the court expenses and proxy fees are not charged to the defendant, they will be distributed between the claimant and the company (Art. 555/2).

Art. 193 TCC does not eliminate the general liability regime. Art. 553 and 664 regarding the liability of founders, and provisions such as Art. 549 regarding liability arising from untrue documents or statements shall continue to apply. The liabilities related to abuse of control, regulated among the provisions governing group companies (Art. 202/2 TCC) are also preserved.

Conclusion

The TCC regulates new lawsuits aiming to protect the conflicting interests of various parties affected by merger, spin-off and conversion transactions.

The enacted provisions show that the TCC favors the realization of restructuring transactions. Nonetheless, damaged parties are protected through the right to file lawsuits. Accordingly, a balance is sought between the realization of the restructuring transaction and the protection of the stakeholders.

The Transfer of Commercial Enterprises pursuant to the Turkish Commercial Code*

Prof. Dr. H. Ercument Erdem

Introduction

Turkish Commercial Code No. 6102[1] ("TCC"), which entered into force on July 1, 2012, brings novelties on the transfer of a commercial enterprise. The Trade Registry Regulation[2] ("TRR"), a complementary regulation, which entered into force on January 27, 2013, clarifies some matters not regulated under the TCC. The transfer of a commercial enterprise, formerly regulated within the abrogated Code of Obligations No. 818 ("Former CO"), is now regulated in a more comprehensive and detailed manner within the TCC.

This article shall briefly refer to the provisions under the abrogated Turkish Commercial Code No. 6762 ("Former TCC") and the Former CO. Subsequently, the basic principles of the new amendments and the novelties therein shall be explained.

Provisions of the Former TCC and the Former CO

The former TCC does not include a provision regarding the transfer of a commercial enterprise. Due to this lack under the TCC, art. 179 of the Former CO entitled "*Acquisition of an Asset or Enterprise*" was applied to the transfer of commercial enterprises. This provision was contained in the provisions regarding the assumption of obligation and in general regulated the buyer's responsibility towards creditors in the event of the transfer of a commercial enterprise with all the assets and liabilities thereof. The notification of the transfer to the creditors and publication thereof was required for the transfer of the liabilities of the commercial enterprise to the transferee under the art. 179 Former CO. The law-maker, in order to protect the creditors, stipulated under art. 179 Former CO that

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* ***Article of July 2013***

1 Official Gazette, 14.02.2011, No. 27846.

2 Official Gazette, 27.01.2013, No.. 28541.

the transferor and the transferee shall be severally liable for the liabilities of the enterprise for two years.

New Provisions

As of July 1, 2012, the transfer of a commercial enterprise is regulated both under the TCC and the Turkish Code of Obligations No. 6098[3] ("TCO"), which entered into force on July 1, 2012. In addition, the TRR sets forth provisions regarding the elements included in the transfer agreement and the registry of this agreement with the trade registry and other related registries.

The Transfer Agreement

Art. 11/2 Former TCC, by stipulating the elements included in the commercial enterprise "*unless otherwise provided in the agreement*", was implicitly stating that the commercial enterprise may be subject to several agreements. On the other hand, art. 11/3 TCC explicitly refers to the transfer agreement and other agreements whose subject is the entire enterprise. Art. 11/3 TCC shall not only apply to transfer agreements but also to other agreements whose subject is the entire enterprise. Disposal acts such as pledge or usufructuary, promissory transactions such as loan or lease agreements, and innovative rights such as first option, pre-emption rights are some examples.

Written Form. The Former TCC and Former CO did not provide any requirements as to the form of the transfer agreement. Art. 11/3 TCC emphasizes the written form requirement by stipulating that: "*The transfer agreement and other agreements whose subject is the entire enterprise shall be in written form and shall be registered and published with the trade registry*" . Moreover, art. 133/2 TRR explicitly sets forth the written form requirement. However, the law-maker does not indicate whether the written form is a condition for validity or not. The prevailing view in the doctrine states that this written form is a condition for validity.

In accordance with the Former CO, the assets of the enterprise were not transferred to the transferee merely with the transfer agreement

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[3] Official Gazette, 04.02.2011, No. 27836.

or with a unique act of disposal. Each element included in the assets required a separate transfer transaction. On the other hand, art. 11/3 TCC provides a substantial change to the system explained above. Pursuant to the TCC, "*commercial enterprise may be transferred entirely, without the need to conclude each act of disposal required for the transfer of each asset separately*". In accordance with this amendment, the alienation of immovable properties from the title deed, transfer of possession of movable properties and registration of trademarks with the trademark registry will no longer be a required. A written transfer agreement shall be sufficient for the entire transfer of the commercial enterprise.

Registration and Publication. As per art. 11/3 TCC, the agreements whose subject is the entire commercial enterprise shall be registered and published with the trade registry. The nature of the registration and publication is regulated under art. 133 TRR entitled "[The] Transfer of Commercial Enterprise". Pursuant to art. 133/3 TRR, "*The transfer of a commercial enterprise shall bear effect with the registry of the entire transfer agreement.*" This provision highlights two important points: all transfer agreements must be registered and registration has an institutive effect. In accordance with the novelty introduced by the TRR, registration will be institutive, publication will be explanatory and the publication will prevent the bona fide acquisition by third persons. The transfer of a commercial enterprise will be easier with these developments. However, the article does not stipulate the person required to carry out the registration. Even though this issue may be regarded as a shortcoming, it may be inferred from art. 22/2 TRR that the owner of the commercial enterprise is entitled to request registration.

Pursuant to Art. 134/4 TRR "*Promises to transfer the commercial enterprise, transfers that shall bear effect after a certain time and conditional transfers may not be registered*." Thereby, it is regulated that a preliminary agreement shall not constitute a legal basis for the request of registration, and deferred and conditional registrations may not be concluded.

Notification to Other Registries. In accordance with Art. 135/5 TRR *"In the transfer of a commercial enterprise, in order to register the assets and rights registered with the land, ship and intellectual property and*

similar registries on behalf of the transferee without delay, the directorate shall notify the related registries simultaneously with the registration of the transfer of commercial enterprise." Thus, even though under the TRR, it is not obligatory to register with the related registries, the registration of assets that require registration with the related registries is simplified by the TRR. In compliance with the transfer of each asset without the necessity of registration with the related registries, the registration of the transfer with the related registries serves a publicity function. By notifying the land registry for immovable properties, the traffic registry for motor vehicles etc., which is executed simultaneously with the registration made by the trade registry, third persons deemed to have learnt of the transfer of these assets shall be protected more efficiently.

However, it is important to determine how the obligation to notify other registries, as stipulated under Art. 135/5 will be applied in practice. Two problems may arise within this framework.

The first problem is determining which registries to notify. Art. 133/2, b TRR, requires the indication of elements not included in the agreement, it does not require the delineation of elements included in the agreement. Therefore, it is impossible for the trade registrar to understand which registries to notify through examination of the transfer agreement.

The second problem is the issue of how the simultaneous notification will be served. The TRR stipulates that the trade registry records will be kept within the Central Registry Record System ("MERSİS"). Since notification to the other registries will be conducted simultaneously via electronic means, there will be no problem regarding publicity. However, since not all the registries have begun working with MERSİS, pursuant to Provisional art. 1 TRR, the records shall be kept in the books currently used in accordance with the Commercial Registry By-law in the registries which have not commenced working with MERSİS. In this case, where the notification by the Directorate is served in writing, the bona-fide third person may acquire ownership pursuant to art. 1023 of the Civil Code during the time elapsed.

Nature of the Transfer Agreement. The Former TCC did not regulate the transfer of the entire commercial enterprise with a unique transaction. While the Former TCC was in effect, the transfer agreement

was qualified as a promissory transaction. However, in accordance with art. 11/3 TCC, since the commercial enterprise will be transferred in its entirety, it is not necessary to conduct the legally required transactions for the transfer of each asset separately; therefore, it may be asserted that the transfer agreement constitutes an act of disposal. On the other hand, since the registration of the transfer agreement is obligatory and, pursuant to art. 133/3 TRR, registration has an institutive function and the transfer agreement shall bear its effect with registration, we cannot qualify the transfer agreement as an act of disposal. The un-registered transfer agreement alone is not enough to validate the transfer, and will not cause any change in the assets of the transferor. Consequently, in my opinion, the transfer agreement must be considered a promissory transaction and the registration as an act of disposal.

Notification Obligation in Compliance with Competition Law

The validity of the transfer agreement is, in certain situations, dependent on the authorization of the Competition Board. Pursuant to art. 7/2 of Act No. 4054 on the Protection of Competition[4], businesses exceeding the turnover thresholds foreseen in the Communiqué published by the Competition Board on the Mergers and Acquisitions which Require the Authorization of the Competition Board (Communiqué No: 2010/4) are obliged to obtain authorization with respect to the transfer of commercial enterprises in which they are a party[5].

Scope of the Transfer Agreement

The Assets Included in the Commercial Enterprise. Art. 11/3 TCC defines the elements that form the subject of the transfer agreement as '*the fixed assets, enterprise value, right of tenancy, trade name and other intellectual property rights and other assets that are permanently attached to the commercial enterprise*'. Apart from expressing the meaning of the

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4 Official Gazette, 13.12.1994, P. 22140.

5 The Communiqué on the Mergers and Acquisitions which Require the Authorization of the Competition Board (Communiqué No: 2010/4), http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fTebli%c4%9f%2f2012_3.pdf (accessed on 12.07.2013).

words in Turkish, the TCC does not bring any novelty regarding the assets of a commercial enterprise.

Art. 133/2 TRR stipulates the elements to be included in the agreement as a) the names, surnames, business names and notification addresses of parties, b) the elements of commercial enterprise excluded from the agreement, c) unconditional statement ensuring that the commercial enterprise has been transferred entirely and it is maintaining its continuity, and d) the purchase price and payment conditions of the commercial enterprise. As is seen, the provision requires the stipulation of elements excluded from the agreement; it does not require the stipulation of elements included in the agreement. Certainly these requirements indicate the minimum content. In practice, agreements are much more detailed.

As a rule, assets permanently attached to the commercial enterprise are transferred to the transferee. However, the transfer of every element is not compulsory. While art. 11/3, c.2 TCC uses the phrase "*…unless otherwise agreed…*" regarding some elements that may be excluded from the transfer, the TRR goes a step further. Art. 2, c TRR seeks "*an unconditional statement ensuring that the commercial enterprise has been transferred entirely and it is maintaining its continuity*" and thus sets forth two requirements for the exclusion of an element from the transfer: (1) the integrity of the commercial enterprise shall not be affected and (2) the continuity of the commercial enterprise shall not be damaged as a consequence of this exclusion. Some of the elements may be excluded provided that the enterprise preserves its "operating capacity". If a commercial enterprise is active in multiple areas, it is enough and required that the transferred elements achieve operating capacity in only one area. The excluded elements must be specified clearly in the agreement (Art. 133/2, b TRR)

The TCC provides the indispensable elements for the transfer of a commercial enterprise. For example, according to art. 49 TCC the trade name cannot be transferred separately. Nevertheless, art. 11/3 is an exception to this rule. The preamble of art. 11/3 TCC states that art. 49 does not require the transferor of a commercial enterprise to include the trade name in the transfer. The preamble argues in a more liberal approach

that that owner of an enterprise can use the trade name for an enterprise to be established later if the transfer agreement allows it and there is no non-compete clause. Art. 135/4 TRR sets forth a detailed regulation for registration in cases where the trade name is subject to the transfer or not subject to the transfer; so it supports this argument too.

Pursuant to art. 11/3 TTC, the enterprise value is included in the transfer agreement unless otherwise agreed. The enterprise value is defined in the preamble as a value exceeding the sum of the individual elements of the enterprise including the customer portfolio. Therefore, because the enterprise value is transferred to the transferee, it should be acknowledged that the transferor is obliged not to compete with the transferee, even if the parties have agreed on the non-compete clause.

The Problem with the Transfer of Liabilities. In accordance with the provision under the Former CO, the assets and liabilities of a commercial enterprise must be transferred together. Art. 202 TCO is a repetition of the abovementioned provision. Therefore, it may be assumed that the explanations given for the Former CO will also be valid for the TCO. The doctrine defends that a commercial enterprise demonstrates integrity and thus assets and liabilities must be transferred together; the law-maker thereby regards the assets as a natural guarantee of the debts of the enterprise and accordingly it brought an arrangement as such in order to protect the creditors. According to the dominant opinion, the entire transfer of assets and liabilities bears a mandatory nature. However, among the authors that defend the mandatory nature, there isn’t a consensus on the consequence of the transfer agreement where the agreement has been established merely for the transfer of assets.

Within the scope of the TCC, it may be stated that the discussion on the transfer of assets of a commercial enterprise without including the liabilities, will continue. Although Art. 133/2, b TRR requires the stipulation of the elements of the commercial enterprise excluded from the transfer agreement, these elements must be understood as part of the assets of the enterprise. For instance, some machines, trademarks or immovable property may be excluded from the transfer agreement. Therefore the non-stipulation of any provision regarding the exclusion of liabilities under the TCC and TRR is a significant deficiency..

Conclusion

The TCC introduces important novelties regarding the agreement for the transfer of a commercial enterprise. The provision within the TCO regulates only one side of the transfer of a commercial enterprise, which is the protection of creditors as a result of the transfer, however it does not regulate the transfer of the entire commercial enterprise. In this sense, the regulation set forth by the TCC is favorable.

It is favorable that Art. 11/3 TCC allows for the transfer of the entire commercial enterprise with one unique transaction. Through this provision, the law-maker provides convenience and rapidity with respect to the transfer of a commercial enterprise. The resolution of issues such as the legal nature of the registration, issues to be included in the transfer agreement and registration with other related registries under Articles 133 and 135 TRR and the prevention of confusion and inconvenience with the complementary regulations is important and beneficial. However, it should be noted that the TCC does not solve the problem regarding the limitation of the transfer of liabilities and the TRR does not provide a regulation with respect to this issue either; and there is no consensus in the doctrine on this issue.

Finally, it should be emphasized that regulation of the transfer of a commercial enterprise both under the TCO and TCC is not appropriate. In addition to the compliance problem between the codes, the transfer of a commercial enterprise is a subject that has to be better dealt with the TCC.

Ship Mortgages under the Commercial Enterprise Pledge*

Att. Suleyman Sevinc

Introduction

The commercial enterprise pledge, which is of great importance in business transactions as a type of security[1], is regulated under the Commercial Enterprise Pledge Act ("CEPA") No. 1447. In this article, pledges containing ships that are elements of a commercial enterprise regarding which a commercial enterprise pledge will be established will be examined considering the provisions regulating the commercial enterprise pledge and ship mortgages.

Commercial Enterprise Pledge

The commercial enterprise pledge agreement is defined in Art. 2 of CEPA. As per this article: *"The commercial enterprise pledge agreement is concluded by and between credit institutions having legal personalities and which are established as corporations, real persons or enterprises having legal personalities active in sale of goods on account and cooperatives on one side and real persons or legal entities owning a commercial enterprise on the other."* The scope of this agreement should detail, as specified in Art. 3 CEPA, the trade name and enterprise name, machinery, instruments, tools and motor transportation vehicles owned at the time of the registration of pledge and allocated to the activities of the commercial enterprise, intellectual property rights such as patents, trademarks, models, diagrams and licenses.

Some of these elements must be included in the scope of the commercial enterprise pledge; otherwise, the pledge agreement will be deemed invalid. Within that scope, the parties cannot exclude the trade name, company name and movable facilities of the enterprise from the

* ***Article of October 2013***

1 In the event the pledge is established on the commercial enterprise, the elements of the commercial enterprise are not obliged to deliver to the pledgee and the pledger may continue to use these elements which are already pledged to a third party, the pledgee.

scope of the agreement. However, intellectual property rights such as patents, trademarks, models, diagrams and licenses can be excluded from the commercial enterprise pledge by agreement of the parties.

Under Art. 4 CEPA, if there is no exclusion of any elements, as stated above, all the movable facilities of the enterprise must be included in the pledge agreement and a full list of the pledged elements representing their natures must be attached thereto[2].

The commercial enterprise pledge is a special regulation that establishes a pledge, which is a limited real right, on the whole of the movable facilities of the enterprise without the delivery of their possession.

Further studies must be carried out as to the legal question regarding ship mortgages listed amongst the movable property of a commercial enterprise. Where a ship registered in the ship registry is pledged under the commercial enterprise pledge, the Ship Registry authorities reject requests for registration. It would be convenient to study the provisions of the Turkish Commercial Code No. 6102 ("TCC") and CEPA together in order to clarify this issue.

The Ships under the Scope of the Commercial Enterprise Pledge

Art. 3 CEPA sets forth the elements falling within the scope of the commercial enterprise pledge agreement. Pursuant to this provision: "*machinery, instruments, tools and motor transportation vehicles possessed at the time of the registration of the pledge and allocated to the activities of the commercial enterprise*", which are also classified as the movable facilities of the enterprise are considered elements of the pledge, and their inclusion is mandatory according to Art. 4 CEPA.

Since Art. 936 TCC qualifies all vessels as movables, whether or not they are registered to the Ship Registry, the ships of an enterprise shall be

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[2] The academic scholars are of different opinions with regards to the impacts of omission of certain elements of the enterprise's movable facilities in the attached list on the enterprise pledge agreement. Pursuant to the generally accepted opinion, in case the parties have willfully excluded certain elements of the movable facilities of the enterprise from the pledge agreement, this agreement shall be void. However, in case parties forgot to add some elements to the list involuntarily, the agreement shall be accepted as valid in accordance with the good faith principle.

included in the movable facilities of the enterprise as well. As a result, it may be concluded that a ship may be pledged without the delivery of its possession under commercial enterprise pledge agreements.

Consequently, as a general rule, ships also have to be added to the list when concluding a commercial enterprise pledge agreement. Otherwise, if an enterprise forgets to include a ship (which is a motor transport vehicle) within the agreement, it would not be possible to claim that the agreement is valid on the basis of the good faith principle, due to the importance of ships in business transactions.

The Distinction between Registered and Non Registered Ships under the Scope of the Commercial Enterprise Pledge

The last sub-article of Art. 3 CEPA stipulates that the provisions regarding ship mortgages in the TCC are reserved. Consequently, the legal nature of registered and non-registered ships should be examined separately. Under Art. 1014 TCC, it is stipulated that an agreement can establish a pledge on a registered ship only through ship mortgage.

Considering the clear provisions of the TCC and CEPA, it may be derived that it is necessary to establish a ship mortgage as a separate pledge and not within the scope of the commercial enterprise pledge, as in real estate.

One can conclude that the purpose of the legislator is to regulate ship mortgages in more detail, and to make sure the parties establish limited real rights on ships, which have a high economic value, same as real estate. Otherwise, it could be suggested that the purpose of Art. 1014 TCC was disregarded, taking into account the number of ships owned by commercial enterprises and the importance of their economic value.

Due to the above-mentioned provisions, even if the parties agree to establish a pledge on a registered ship through a commercial enterprise pledge agreement, no limited real rights can be established on said ship. This is because registered ships cannot be shown as an element included in the pledge agreement.

On the other hand, a pledge can be established on non-registered ships via a commercial enterprise pledge agreement regardless of their

size and type. Furthermore, in the event the non-registered ships are not included within the scope of the pledge agreement, all commercial enterprise pledges may be deemed void. However, the fact that a pledge right is not established on registered ships shall not influence the validity of the commercial enterprise pledge agreement.

Conclusion

As a general rule, ships are considered as part of the movable facilities of an enterprise as a result of their nature as a movable property, and they can be subject to the commercial enterprise pledge. Nevertheless, the special provisions of the TCC and CEPA, which stipulate the provisions related to ship mortgages that are reserved, require making a distinction between registered and non-registered ships with respect to commercial enterprise pledge agreements. As a result of Art. 1014 TCC, which sets forth that a pledge can only be established on a registered ship via a ship mortgage, commercial enterprise pledge agreements cannot establish a pledge on registered ships. Where the parties agree to take out a security over the registered ships, they shall do so with a ship mortgage.

Conversion of the Commercial Enterprise[*]

Att. Leyla Orak

Introduction

Conversion of type is one of the corporate restructuring transactions. Conversion was regulated under a single article of the abrogated Turkish Commercial Code No. 6762, and a special provision was introduced with respect to the conversion of a joint stock company into a limited liability company without a liquidation procedure. Nonetheless, there were certain problems with regards to the conversion of limited liability companies to unlimited liability companies and vice versa, both under the Court of Cassation precedents and Trade Registry practices.

The new Turkish Commercial Code No. 6102[1] ("TCC") introduced detailed provisions and innovations governing conversion of type and clarified certain disputed matters. The principle of continuity of the converted company under the new type, which was accepted under the abrogated code, was preserved. A detailed explanation on conversion of type can be found in the relevant article of the Erdem&Erdem December 2011 Newsletter.

Provisions of the TCC governing conversion of type do not only regulate the conversion of type of commercial companies, but also the conversion of commercial enterprises that are not legal entities. The Trade Registry Regulation[2] also introduces special and detailed provisions on the conversion of commercial enterprises.

This month's article will assess the conversion of commercial companies into commercial enterprises and the conversion of commercial enterprises into commercial companies pursuant to the relevant provisions of the TCC and the Trade Registry Regulation.

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* ***Article of April 2013***

1 Published in the Official Gazette dated February 14, 2011 and numbered 27846.

2 Published in the Official Gazette dated January 27, 2013 and numbered 28541.

Conversion of Commercial Enterprises into Commercial Companies

The TCC defines a commercial enterprise as an enterprise that exceeds the scope of an artisanal enterprise, aims to generate profit and continuously and independently realizes its activities. Pursuant to TCC Art. 11/3, the commercial enterprise is deemed to own the assets which have been continuously allocated to its use (i.e. machinery constantly used and allocated to the activities of a factory). A commercial enterprise is an enterprise bearing the above qualifications and has no legal personality.

Pursuant to TCC Art. 194/2, a commercial enterprise may convert to a commercial company. Thus, a commercial enterprise that has no legal personality may convert to commercial company that has a legal personality. The TCC regulates that provisions governing the conversion of type by commercial companies (Articles 182 to 193) shall apply by analogy to this transaction.

Accordingly, the provisions governing the establishment of the company to which the enterprise will convert will be applicable. Therefore, the necessary documentation for the establishment of the relevant company will be prepared and relevant transactions will be executed. The provisions governing the preservation of rights, preparing a balance sheet, a conversion of type plan and report will also apply by analogy. However, as the commercial enterprise has neither a legal personality nor organs, such as a general assembly, no decision for conversion will be adopted, and the relevant provisions will not be applicable.

Similarly, the principle of continuity of the converted company under the new type will also be applicable (TCC Art. 180). Thus, the commercial company established by conversion will be considered a continuation of the former commercial enterprise.

The Trade Registry Regulation specifies that in the event a commercial enterprise is converted to a commercial company, an asset valuation report on the former must be prepared by a sworn financial auditor or independent accountant and financial auditor and submitted to the Trade Registry. Furthermore, in the event the assets of the commercial enterprise comprise certain rights or goods registered to the land registry, the registry of ships, the intellectual property registry or to other registries, a statement providing information on such rights and goods as well as on

the registries in which they are registered will also be submitted to the trade registry. The goal is that the commercial enterprise and its assets are transferred as a whole to the newly established commercial company and that its unity and continuity are ensured.

Conversion of Commercial Companies into Commercial Enterprises

The TCC also enables a commercial company, bearing a legal personality, to convert to a commercial enterprise not having a personality. The legal personality will cease to exist as a result of this conversion. Both the TCC and the Trade Registry Regulation provisions hold that the commercial enterprise to be registered as a result of the conversion shall be the continuity of the commercial company.

The TCC introduces a short provision regarding this transaction (Art. 194/3). It states that all shares of the commercial company should be owned by the person or persons who will operate the commercial enterprise, and the commercial enterprise to be registered will be registered to the trade registry and announced in the name of such person(s). Thus, the shareholders of the converted commercial enterprise will be registered as the owners of the commercial enterprise. The relevant provision also specifically regulates the obligations of collective and commandite companies which will convert.

The TCC does not foresee any provisions on the liquidation of the converted company, nor on how the legal personality will cease to exist. The derived conclusion is that a new dissolution without liquidation is therefore foreseen (such as merger and demerger transactions).

The lack of provisions on liquidation is of significance, especially with regards to the protection of the creditors' rights. As there is no provision stating otherwise, the acquirers of the commercial enterprise will be personally liable for the debts of the converted company. Pursuant to the conversion of types authorized by the TCC (Art. 181), a commercial company may in principle be converted to another commercial company or a cooperative, but not to an unlimited partnership company. Nonetheless pursuant to Art. 194, regardless of their liability regime, all commercial companies (including equity companies) may convert to a commercial enterprise.

In order to prevent possible problems, the Trade Registry Regulation introduces detailed provisions and additional obligations with respect to this type of conversion. The Regulation also lists the necessary documentation for the registration of this conversion.

Pursuant to the provisions of the Trade Registry Regulation, Articles 190 and 194/3 regarding the liability of the shareholders of the converted company and obligations arising from employment agreements shall apply. Thus, it is foreseen that provisions governing conversion of type in general regarding the liability of the shareholders, and governing the obligations of collective and commandite companies shall apply to the conversion of a company to an enterprise.

In order to prevent problems arising from the fact that the commercial enterprise will be registered in the name of the shareholders of the converted company and that such persons shall be personally responsible for the company's debts, the Trade Registry Regulation introduces an additional requirement not regulated under the TCC. Accordingly, joint stock and limited liability companies who suffer capital losses or whose capital is not sufficient to cover their debts may not convert to a commercial enterprise.

Conclusion

The conversion of a commercial enterprise to a commercial company, and the conversion of a commercial company to a commercial enterprise are among the innovations introduced with the TCC and are regulated for the first time under both the TCC and the Trade Registry Regulation. With these provisions, in addition to the transfer of a commercial enterprise (an asset transfer), a new mechanism is introduced within the scope of restructuring transactions governing the commercial enterprise. A company that has a legal personality may convert to a commercial enterprise and vice versa, and the company or the enterprise registered as a result of such conversion of type shall be deemed the continuity of the former organism.

In practice, problems related to dissolution without liquidation, protection of creditors and liability from debts may arise from the conversion of a commercial company to a commercial enterprise.

Branches and Liaison Offices*

Att. Naciye Yilmaz

Developing commercial relations and the need for access to new markets drives commercial enterprises to establish branches or liaison offices in different places. This newsletter article will assess the differences in the legal principles and procedures that govern the establishment of branches and liaison offices.

Branches

Definition and Elements. There is no definition of *branch* under Turkish Commercial Code No. 6102 ("TCC"). However, Article 9/2 of Law No. 5174 on the Union of Chambers and Commodity Exchanges of Turkey and Chambers and Commodity Exchanges ("Law No. 5174") stipulates that *"although connected to the registered office [headquarters], workplaces which have a separate equity and accounting or workplaces for which accounts are kept in a registered office and have no separate equity but perform commercial activities"* shall be considered as branches. Therefore, the essential elements of a branch are; *(i)* to be connected to the registered office, *(ii)* to be independent, *(iii)* to operate in a different place, *(iv)* to have separate accounting.

Regarding branch operations, it is mentioned that the branch's operations should be identical or similar to the registered office's operations. Nevertheless, branches independently perform commercial operations[1].

Consequences. The TCC regulates certain obligations for the branches of commercial enterprises. First, branches must be registered with the trade registry as per Art. 40/3 TCC and to the chamber pursuant to Law No. 5174. Therefore, branches of commercial enterprises having their registered offices in Turkey shall be registered to the trade registries of the place where they are situated. Paragraph 4 of the same article sets forth that branches of foreign-based commercial enterprises *"shall be*

* ***Article of August 2013***

1 **Poroy, Yasaman,** Ticari İşletme Hukuku *[Law of Commercial Enterprises]*, p. 49.

registered similarly to domestic commercial enterprises, but provisions pertaining to the trade name of their country of origin are reserved". For such branches, a commercial representative should be appointed with full authorization. Moreover, as per Article 9 of Law No. 5174, branches shall also be registered in chambers of the places where they are situated.

Second, pursuant to the Article 48 TCC, *"all branches should use the trade name of the registered office by mentioning the qualification of being a branch"*. Branches of foreign-based commercial enterprises should *"mention the locations of the registered office and the branch and the qualification of being a branch in their trade name"*.

In addition, since the branch is property of the commercial enterprise, pursuant to Art. 202 of the Turkish Code of Obligations ("CO") and Art. 11 TCC, in the event of the transfer of a commercial enterprise, the branch shall also be subject to the transfer unless otherwise stipulated in the transfer agreement.

It should be also mentioned that it is possible to file a lawsuit in the place where the branch is situated against the registered office pursuant to the Art. 14/1 of Civil Procedure Code No. 6100. However, this possibility of filing such a lawsuit is limited by the operations of the branch.

Opening a Branch. Commercial enterprises wiling to open a branch in Istanbul should file an application with the trade registry with necessary documentation and deposit a fee for this purpose. The related documentation is different for domestic and foreign-based commercial enterprises. However, there is no differentiation for the required documentation related to the type of the commercial enterprise (limited liability, joint stock companies etc.)[2].

Liaison Offices

Definition and Elements. Pursuant to the Article 6 of the Application Regulation of the Foreign Direct Investment Law ("Application Regulation"), the Ministry of Economy is competent to provide

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[2] Within this framework, a detailed list with explanations (in Turkish) may be found on the Istanbul Chamber of Commerce's website for branches to be opened in Istanbul: http://www.ito.org.tr.

authorization to commercial enterprises established under foreign laws that want to open a liaison office, under the condition that such liaison offices do not perform commercial operations. The Ministry of Economy is also authorized to extend this authorization. Article 8 of the Application Regulation stipulates fields of activity for liaison offices. Therefore, liaison offices may be defined as representation offices which are attached to the foreign-based commercial enterprise and which can provide services such as representation, hosting, securing Turkish suppliers as well as quality control and audit of these suppliers, communication and transfer of information, planning and researching without conducting commercial activities.

Thus, foreign-based commercial enterprises may open branches or liaison offices. It should be emphasized that liaison offices must not conduct commercial activities. Therefore, the expenses of a liaison office shall be entirely covered by the foreign-based commercial enterprise.

Opening a Liaison Office. Commercial enterprises that wish to open a liaison office in Turkey should apply to the Ministry of Economy with the necessary documentation. Pursuant to Article 8 of the Application Regulation, the Ministry of Economy shall provide authorization for 3 years at maximum. Therefore, it is necessary to apply to the General Directorate of Incentive Implementation and Foreign Investment before the expiration of the authorization in order to secure an extension.

Article 7 of the Application Regulation lists the required documentation for opening a liaison office. These documents are as follows:

1- Application form;

2- Declaration comprising the scope of activity of the liaison office and a declaration with a commitment stating that the liaison office shall not perform any commercial activity, and a document indicating the signature authorization for the person signing the document on behalf of the foreign-based commercial enterprise;

3- Certificate of activity which is duly authenticated with an Apostille;

4- Activity report or balance sheet and income statement of the foreign-based commercial enterprise;

5- Authorization certificate to be provided to the person/persons authorized to conduct the activities of the liaison office; and

6- Power of attorney in the event the establishment procedures shall be handled by a person other than authorized person/persons.

Conclusion

Foreign-based commercial enterprises have several possibilities for conducting business in Turkey. Two of these possibilities are opening a branch or a liaison office as detailed above. However, while evaluating these possibilities, determination of the scope of the company’s activity is important since the liaison offices must not perform commercial activities, but rather aims to represent the commercial enterprise within the market and to provide it information related to the market. Subsequent to the determination of the scope of activity, application and authorization procedures shall be followed before the relevant authorities.

Preliminary Companies Pursuant to Provisions of the TCC[*]

Att. Leyla Orak

Introduction

Turkish Commercial Code No. 6102[1] ("TCC") separately regulates the incorporation of a joint stock company and a company becoming a legal entity. A joint stock company shall be deemed established once its founders declare their will to incorporate a company in the articles of association and their signatures on the articles are notarized. Nonetheless, the company shall become a legal entity by registering with the trade registry. This points to the existence of a preliminary company (pre-company); the period preceding the moment when the company becomes a legal entity. This article will analyze the pre-company as regulated for the first time under the TCC.

The Regime under the Abrogated Code

The prevailing opinion while the abrogated Turkish Commercial Code No. 6762 ("aTCC") was in force was that a company's founders constituted an ordinary partnership prior to the joint stock company becoming a legal entity through registration. In fact, there was a distinction drawn between a pre-incorporation partnership established between the founders intending to establish a company by preparing the articles of association and signing them, and a pre-company in the form of an ordinary partnership (ordinary company) in the period between the signing of the articles of association and the registration of the company[2].

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* ***Article of July 2013***

1 Published in the Official Gazette dated February 14, 2011 and numbered 27846, and entered into force on July 1, 2012.

2 **Emrullah Kervankıran**, "Ön Şirket ve Hukuki Niteliği", *6102 sayılı Yeni Türk Ticaret Kanunu'nu Beklerken 10-11-12 Mayıs 2012, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi Özel Sayı*, V:18, No:2, Year: 2012 (**Kervankıran**), p. 350-352.

Applicable Provisions

Ordinary partnerships are not regulated in the general provisions governing commercial companies under the aTCC. The prevailing opinion was that the provisions related to the articles of association and statutory provisions of the aTCC regarding the company to be incorporated would apply to internal affairs and the provisions on ordinary partnerships under the abrogated Code of Obligations No. 818 would apply to the partnership's external affairs. Nonetheless, the lack of coherence between the two codes resulted in certain problems, such as the retroactive application of the aTCC provisions[3].

Effect of the Incorporation of the Company on the Partnership

Upon becoming a real entity, the joint stock company assumes all capital subscriptions made by the ordinary partnership. The founders may request a refund of their expenses, approved by the first general assembly.

The common purpose of the ordinary partnership (*affectio societatis*) is the incorporation of the joint stock company. If the joint stock company may not be incorporated for any reason (the inability to obtain ministry approval for incorporation, the inability to fulfill the capital subscription requirement in progressive incorporation (a gradual incorporation procedure foreseen under the aTCC and abandoned by the TCC, *tedrici kuruluş*)) the ordinary partnership shall be deemed to not have achieved its purpose. Consequently, it is accepted that the ordinary partnership shall be terminated and liquidated. In such an event, a company will not assume the capital subscriptions or expenses of the founders. The partners of the partnership will be personally and jointly responsible for the actions they undertook in the name of the company to be established[4].

Pre-Company under the TCC

The TCC introduces a provision which acknowledges the existence of a preliminary company for the first time. TCC Art. 335/1 reads as

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3 **Kervankıran**, s. 352; **Reha Poroy, Ünal Tekinalp, Ersin Çamoğlu**, *Ortaklıklar ve Kooperatif Hukuku*, Updated 9. Edition, Istanbul 2003 (**Poroy (Tekinalp/Çamoğlu)**, Ortaklıklar), par. 71.

4 **Poroy (Tekinalp/Çamoğlu)**, Ortaklıklar, par. 500-503.

follows: “The company shall be incorporated upon the founders’ declaration stating their will to incorporate a joint stock company in the articles of association prepared in accordance with the law and in which the founders unconditionally subscribed to pay the entire capital and on which their signatures are notarized.” As specified in the justification of the article (prepared together with the draft TCC), the pre-company has no legal personality; Article 335/1 clarifies the moment when the company is incorporated.

Although this provision is among the provisions governing joint stock companies, there is dispute on its scope. It is disputed whether this provision is applicable to all capital corporations (i.e. including limited liability companies) or to all corporations (including unlimited companies). Therefore, the wording “articles of association” hereinafter should be construed as articles of incorporation depending on the type of company to be incorporated.

Legal Characteristics

The justification of the article 355 of the TCC states that pursuant to the prevailing opinion, the pre-company is not an ordinary partnership or an association, but a special type of co-ownership. Nonetheless, the justification states that the qualities and legal attributions of the pre-company are left to be determined by scholars and jurisprudence.

The legal characteristics of pre-companies are disputed among the scholars. The justification of 355 of the TCC the article states that the pre-company is not an ordinary partnership. This shows the desire to adopt the prevailing opinion under German law[5]. The prevailing opinion in Germany is that the pre-company is a *sui generis* communion of persons, which is materially similar to the corporation to be established, independent from the founders, which has its own rights and obligations. Nonetheless, Tekinalp states that the pre-company is an ordinary partnership[6]. Pursuant

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5 **Kervankıran**, p. 366.

6 **Ünal Tekinalp**, *Yeni Anonim ve Limited Ortaklıklar Hukuku ile Tek Kişi Ortaklığının Esasları*, Revised and Expanded 2. Edition, Istanbul 2011 (**Tekinalp**, Ortaklıklar), par. 10-26.

to Art. 620/2 of the Turkish Code of Obligations No. 6098[7] ("TCO"), all partnerships that do not constitute a specific partnership as regulated under the law shall be considered as an ordinary partnership.

However, the dissenting opinion states that the TCO Art. 620, on which Tekinalp bases his argumentation, is adopted from Swiss law. Contrary to German law, Swiss law does not have detailed provisions governing pre-companies or the incorporation procedure. In fact, the fact that the prevailing opinion during the enforcement of the aTCC accepted that a preliminary partnership existed prior to the incorporation of the company shows that Swiss law principles were adopted. However, the justifications for TCC Art.335 reveal that the German law model and the prevailing opinion in Germany is adopted. Therefore the pre-company should be accepted as a joint stock company, which is in the process of establishment, having a corporative structure. Indeed, it is argued in Germany that having a corporative structure is not incoherent with the existence of a co-ownership company (*Gesamthandsgesellschaft*) with the legal authority to assume rights and obligations[8].

Characteristics of the Pre-Company

Where the prevailing opinion in German law is adopted, the pre-company is a legal being which has its own property, rights and obligations. It has the right to pursue lawsuits or be sued, it may have a bank account established in its name and even own trademarks[9].

The provisions of the articles of association of the company, and in the absence of any provision thereunder the statutory provisions regarding the company to be established, shall be applicable in internal affairs. The pre-company is accepted as having the same bodies of the company to be established (for example, the board of directors).

Pursuant to German Law, the pre-company is responsible for its debts and obligations, however its responsibility is limited with its properties.

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7 Published in the Official Gazette dated February 4, 2011 and numbered 27836, and entered into force on July 1, 2012.

8 **Kervankıran**, s. 366-367, 355; **Hasan Pulaşlı**, *Şirketler Hukuku Genel Esaslar*, Updated 2. Edition (**Pulaşlı**), p. 244.

9 **Kervankıran**, p. 356; **Pulaşlı**, p. 244.

The founders or third persons acting on behalf of the company may also be held responsible in relation to their actions at this stage. The founders are responsible for the difference, at the incorporation stage, between the nominal value of the capital and the total value of the assets of the company, and from indebting the company prior to its registration to the registry. Those acting on behalf of the company prior to its registration are further personally and jointly responsible for realizing transactions in the name of the company[10].

Where Swiss law principles are adopted, the pre-company should be deemed an ordinary partnership and provisions governing ordinary partnerships should be applicable.

The Necessity for Pre-Companies

A Pre-company is a legal institution adopted from German law. German law provides detailed provisions governing the phases of incorporation as a result of which the incorporation process may last for a period from six months up to a year. Certain transactions are mandatory and must be completed prior to registration and the formation of the legal entity, and it is of vital importance that such transactions are realized by an entity, namely the "pre-company"[11].

As promulgated by the national assembly, the TCC established a long incorporation procedure, as it included an audit by a transactional auditor. The transactional auditor was charged with verifying compliance with laws, whether the incorporation documentation was complete, accurate and fit for purpose, and whether the valuations reflected the reality[12]. Nonetheless, Law No. 6335[13] abrogated the transactional audit system. Therefore, incorporation procedures entail preparation of the articles of association and notarization of signatures thereon, the founders' declaration, payment of the minimum subscription fee, obtaining

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[10] **Kervankıran**, p. 356-362.

[11] **Kervankıran**, p. 353.

[12] **Tekinalp**, Ortaklıklar, par. 10-39.

[13] The Law Pertaining to the Amendment of the Turkish Code of Obligations and the Law on the Entry Into Force and Application of the Turkish Code of Obligations was published in the Official Gazette dated June 30, 2012 and numbered 28339.

approval for companies whose establishment requires the ministry's approval, registration and announcement. The procedure established takes no longer than that under the aTCC. Therefore it may be argued that a provision governing the pre-company was not necessary.

Where it is accepted that the pre-company is an ordinary partnership, the necessity of its existence is debatable. Nevertheless, Tekinalp is of the opinion that the pre-company is beneficial because it clarifies the point at which a company is established; and that although an ordinary partnership (a "company") is established, disputes between the founders will be resolved pursuant to the articles of association, and lacking a provision thereunder, under the statutory provisions governing ordinary partnerships; that once the legal entity is established the pre-company will be deemed liquidated and that the scope of the phrase "those acting on behalf of the company prior to registration" is now clarified by law[14].

Conclusion

A joint stock company is established through the notarization of the founders' signatures on the articles of association, in which the founders declare their intention to establish said company. Thus, the TCC regulates the incorporation of the company and the forming of the legal entity through registration as two separate phases. From now on, the existence of a pre-company prior to registration will be acknowledged. Nonetheless the legal regime applicable to such pre-company is highly disputed.

The provision governing pre-companies may be applicable to other companies regulated under the TCC by analogy; however there is debate as to whether or not unlimited liability companies may also benefit from this provision.

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[14] **Tekinalp**, Ortaklıklar, par. 10-28.

Convening the Ordinary General Assembly [*]

Att. Nilay Celebi

This article will briefly explain whether holding the ordinary general assembly within 3 months from the end of fiscal year under Art. 409(1) of the Turkish Commercial Code No. 6102 ("TCC No. 6102") is compulsory, the outcomes of its not being held and the disclosure of financial statements within the scope of the capital markets legislation.

Holding the Ordinary General Assembly

As per Art. 409(1) of the TCC No. 6102, ordinary general assembly meetings are held "*within three months as of the end of each activity period*". The same provision is stipulated under Article 7 of the Regulation on Procedures and Principles of General Assembly Meetings of Joint Stock Companies and Customs and Trade Ministry Representatives Attending Such Meetings, published in the Official Gazette dated 28.11.2012 and numbered 28481. Pursuant to said article: "*The ordinary general assembly meeting shall be held within three months as of the end of each activity period. Therefore, for the companies whose accounting period is based on the calendar year, meetings shall be held within the first three months of the year; for companies whose accounting period is based on a specific accounting period, meetings shall be held within the first three months following the last day of the accounting period*" .

There is no specific provision in the capital markets legislation related to when ordinary general assembly meetings should be held by public companies subject to the Capital Markets Law No. 6362 ("CML"). Therefore, public companies should also convene their ordinary general assembly meetings within 3 months as of the end of each activity period in accordance with the TCC No. 6102.

Nature of the Period

Art. 409 of the TCC No. 6102 is the same as Art. 364 of the Turkish Commercial Code No. 6762 ("TCC numbered 6762"). Academics accept

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* ***Article of May 2013***

this provision as regulatory and do not find holding ordinary general assembly meetings within a 3 month-period to be compulsory. Art. 409(1) of the TCC No. 6102 is a regulatory provision. Regulatory provisions do not have an impact on the nature of the transaction; such provisions may result in being deprived of another right or advantage or result in administrative/pecuniary fines.

There are some examples of decisions by the Supreme Court of Appeals stating that ordinary general assembly meetings that are not held within the 3-month timeframe shall not be regarded as annullable[1].

Sanctions for Disregarding the Period of Time

Art. 553(1) of the TCC No. 6102 regulates liabilities of the board of directors. As per said article, the board of directors' liabilities may arise if they breach the law and articles of association with negligence. In such a case, the board of directors shall be held responsible materially for the damages incurred by shareholders and creditors of the company. Therefore, the board of directors has a reimbursement liability. Reimbursement liability arises when there is damage and a causal connection between the damage and the negligent act.

If the general assembly is not held within 3 months as of the end of the activity period, the board of directors' members may be held liable only if they are in negligence. Also, damage must occur as a result of the faulty act of the board of directors.

Concept of Expressing the Financial Statements

Pursuant to the statement of the İstanbul Stock Exchange Chairmanship, consolidated financial statements as of December 31, 2012 should be announced to the public by April 12, 2013[2] at the latest. Announcement of financial statements to the public is an independent

1 Decision of the Commercial Chamber of the Supreme Court of Appeals dated 7.5.1968 and numbered E. 2237 / K. 2661; for the detailed information please see **ERİŞ**, s. 381. *"Art. 364 of the TCC does not foresee when the general assembly of the company is held. Also, resolutions of the general assemblies are not rendered invalid due to the fact that this regulation has not been adopted. However, the related people may be hold responsible accordingly."*.

2 General Letter numbered 3837.

issue from the ordinary general assembly meeting. Announcement of financial statements to the public is an announcement stemming from the transparency principle and should be considered independently from convening the general assembly and its approval.

Communiqué on the Principles of Financial Reporting in Capital Markets (Serial: XI, No: 29) and Communiqué on Principles and Rules Pertaining to the Financial Statements and Reports in Capital Markets (Serial: XI, No: 1):

Enterprises are entitled to regulate their financial statements as of the annual and quarterly periods and announce them to the public within certain periods of time pursuant to the communiqué numbered Serial: XI, No: 29.

As per Art. 15 of the related communiqué (Art. 49/1 of the communiqué numbered Serial: XI, No: 1 also has a similar provision):

"1) *Annual financial statements of enterprises prepared in compliance with this Communiqué must be published within 30 days following ordinary general assembly meetings in the Turkish Trade Registry Gazette. This announcement shall be made at the end of the 6th month, at the latest, following the end of the annual accounting period, notwithstanding the holding of the general assembly.*

(2) ***The enterprises who send their financial statements to the Board and the related stock exchange before their ordinary general assemblies shall make the necessary disclosures in the event there are discrepancies between statements already sent and financial statements discussed in the general assembly…***"

The abovementioned Communiqué specifies that financial statements must be announced to the public and ties this announcement to the condition of convening the general assembly meeting. If financial statements are sent before the general assembly convenes and if the general assembly does not approve those statements, this issue shall be expressed in the announcements and any discrepancies shall be clearly specified. Failure to make the necessary announcement may result in the board of directors being held liable. (Art. 9 of the Communiqué numbered Serial: XI, No: 29).

Nonetheless, this situation does not prevent public companies subject to the CML and who prepare consolidated financial statements from holding ordinary general assembly meetings within 3 months as of the end of their activity period, as per Art. 409(1) of the TCC.

Conclusion

Disclosing financial statements to the public is an independent issue from convening the ordinary general assembly. Even if the ordinary general assembly meeting is not held, financial statements should be published in compliance with the capital markets legislation and within the specified period of time.

Pursuant to Art. 409(1) of the TCC No. 6102, companies should hold their ordinary general assembly meetings within 3 months as of the end of their activity period. The doctrine holds that Art. 409(1) of the TCC No. 6102 is a regulatory provision and not holding the ordinary general assembly within 3 months as of the end of the activity period does not render the general assembly meeting which is held after said period to be invalid.

The board of directors may be held liable if the general assembly meeting is not held within 3 months after the end of the company activity period. However, for the board of directors to be held liable, a direct causal link between the board's negligence and damage incurred by the shareholders and/or company creditors must be proven.

Is it Obligatory to Appoint a Corporate Representative in the General Assemblies of Joint Stock Companies?[*]

Att. Tuna F. Colgar

The Turkish Commercial Code[1] ("TCC") Article 428, which governs the provision of maximum representation of shareholders in the general assembly of a joint stock company, stipulates new representative appointments that are not required in the former Turkish Commercial Code No. 6762.

Article 428/1 TCC regulates the appointment of the body representative and the independent representative. Pursuant to this article "*In case the company shall recommend a person, related to the company in any way, in order for the shareholders to appoint as their representatives to vote and carry out other related actions in the general assembly meeting in their name, it shall also recommend another person which is totally independent and neutral for the same position and shall announce these two persons pursuant to the articles of association and publish in the website of the company."* As understood from the article, if the company recommends a related person - body representative - to represent shareholders, it has to recommend another independent and neutral person - an independent representative - to the shareholders. In other words, the appointment of an independent representative is subject to the appointment of the body representative.

The corporate representative is regulated under paragraph two and the subsequent paragraphs of Article 428. This provision, which is intrinsic to Turkish law, aims to recommend persons who may organize the gathering of representative certificates with respect to shareholders which may arrive in large numbers, especially their encouragement with respect to this duty, their acting wholly independent from the company management and fill the gap[2]. Paragraph 2 of Art. 428 TCC stipulates as follows:

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* ***Article of August 2013***

1 Please see Law No. 6102 published in the Official Gazette dated 14.02.2011 and numbered 27846.

2 Please see. Justification of Art. 428 TCC.

"*Additionally, the board of directors shall invite the shareholders, by an announcement and publication of a message on the website at least forty five days prior to the publication in the Turkish Trade Registry Gazette and announcement on the website of the convocation announcement for the general assembly, to notify the identification, address and e-mail address and phone and telefax numbers of the corporate representative to the company latest within seven days. The persons willing to be corporate representatives shall also be invited to make an application to the company with the same message. The board of directors shall, within the convocation for the general assembly meeting, announce and publish on its website the notified persons, together with the persons referred to in the first paragraph, with their addresses and communication numbers. Proxies may not be collected for corporate representatives unless the procedures of this paragraph are fulfilled.*"

To summarize, the announcement of the corporate representative must be made at least forty-five days prior to the publication of the convocation of the general assembly meeting in the Turkish Trade Registry Gazette. As is known, pursuant to art. 414 TCC, the general assembly must be called to the meeting with a notice made at least 2 (two) weeks before the meeting, excluding the notice and meeting days. In this case, with a simple calculation, the announcement of the corporate representative must be made 60 (sixty) days before the general assembly meeting; this may create problems in circumstances that require the urgent convocation of the general assembly[3]. Further, in practice, most general assembly plans may not be made before 60 (sixty) days of the date planned for the general assembly. For this reason, the wording of the law constitutes a problem with respect to practice.

In order to relieve the practice, the Ministry of Customs and Trade, General Directorate of Domestic Trade in its opinion dated February 8, 2013, stipulated that the obligation to call a corporate representative, like the independent representative regulated under paragraph one of Art. 428, shall arise in the event a body representative is appointed. However, when the justification of the law and its text is analyzed carefully, it is understood

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[3] In the same direction, **Abuzer Kendigelen**, Yeni Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, İkinci Bası, İstanbul 2012, p. 329.

that this Opinion of the Ministry of Customs and Trade, General Directorate of Domestic Trade contradicts the spirit and wording of the Law.

Indeed, if the wording of the provision regarding corporate representation is analyzed, it is not possible to conclude that the appointment of a corporate representative is subject to the appointment of a body representative. The regulation of such an appointment in a separate article supports this opinion. Moreover, the paragraph starts with the expression "**In addition**"; thus it strengthens the thesis that appointing a new independent representative in addition to the representatives in the first paragraph is provided for in the article. Also, when the wording of the article is analyzed, with a focus on expressions such as **"calls", "requested"** and **"publishes",** which explain the duties of the board of directors, it is concluded that the board of directors does not have any discretion regarding this issue. The doctrine states that "… *all joint stock companies, without any difference, will be obliged to apply the provision with regards to the corporate representative before a certain period of their general assembly meetings.*"[4].

Moreover, explanations in the justification that underpins Art. 428 TCC stipulate that the regulation regarding corporate representation is independent from the first paragraph. For example: "*It is possible for the company to not stipulate a body representative in order for the company (management) to be released from the obligation to recommend an independent representative. However, even if the management applies this method, corporate representatives in the third paragraph of the article may come up and the obligation of proclamation may still occur.*"

Explanation of the justification of Art. 428 stipulates the consequences of non-compliance with the appointment procedure for a corporate representative as follows: "*The non-compliance with this proceeding is grounds for annulment of the general assembly resolutions. This conclusion is derived from Article 445.*" Art. 445 TCC, cited as the source from which the sanction of annulment is derived, is parallel to Art. 381 of the former TCC No. 6762 regarding reasons for annulment. However, Art. 446 TCC, which regulates the persons that may file a suit, establishes different requirements

4 **Kendigelen**, p. 329.

from the former provision. To summarize, Art. 446 TCC sets forth four separate inconsistencies as reasons for the annulment of the general assembly. These are, (i) The non-execution of the convocation according to the procedure, (ii) the non-announcement of the agenda as required, (iii) participation and voting of unauthorized persons or representatives to the general assembly and (iv) unjust prohibition of the right to join and vote in the general assembly. Neither the shareholder's presence at the general assembly nor negative voting has any bearing on the allegation of these inconsistencies. However, only the shareholders who allege that one of these four inconsistencies affected the general assembly resolution may file a suit for annulment. Within this context, if the announcement of the corporate representative is not made, the call/invitation shall be deemed irregular. In this case, the shareholders who allege that the call/invitation is not made in due form, pursuant to Art. 446/2 TCC, may file a suit for annulment in the event they prove that this situation affected the rendering of the general assembly resolution. This "affect condition" is predominantly interpreted as the effect on the quorum[5]. Moreover, it should be noted that even though the Ministry Opinion stated above provides convenience, it does not have a binding nature with respect to the courts.

Finally, it must be noted that the representative appointments foreseen by Art. 428 TCC are obligatory for the joint stock companies listed on the stock exchange and public companies whose shares are distributed to many shareholders. This provision is criticized since it brings additional costs to small joint stock companies[6]. On the other hand, Article 30 of the Capital Markets Law, regarding participation in the general assemblies of public joint stock companies and voting, states that the procedures and principles with respect to gathering representation and voting by proxy shall be determined by the Board. This provision explicitly sets forth that Article 428 TCC shall not be applied within the scope of this Capital Markets Law. The justification of the Capital Markets Law[7] ("CML") does not explain the grounds for this intervention[8].

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5 For example please see. **Ünal Tekinalp**, Sermaye Ortaklıklarının Yeni Hukuku, 3rd Edition, Istanbul 2013,p. 340, N. 15.05.

6 **Kendigelen**, p. 329.

7 The Law No. 6362 published in the Official Gazette dated 30.12.2012 and numbered 28513.

8 Please see. Capital Markets Law Justification of Article, 30.

However, as expressed above, since the institution of corporate representation causes several problems with respect to non-public companies, and since it would not be applied together with the new CML in terms of public companies, the interpretations in contradiction with the wording and spirit of the law, but which satisfy the need of the practice, are made and thus the ideal application is reached by actually getting around the current provision[9].

In light of the determinations and explanations provided above, it is obvious that the appointment of a corporate representative, introduced by Art. 428 TCC, causes substantial problems in practice and the general assemblies conducted by the companies face the risk of annulment due to non-compliance with the procedures stipulated under Art. 428 TCC. We are of the opinion that this situation which involves uncertainties and which may cause important disputes must be urgently resolved through the legal regulations to be made.

9 Dünya Gazette 14.03.2013 İstanbul University Law Faculty Assist. Prof. Dr. **Ali Paslı**.

Appointment of Member to the Board of Directors Pursuant to Article 363 of the TCC*

Att. Fatih Isik

Introduction

Pursuant to Article 408 of the Turkish Commercial Code No. 6102 ("TCC"), which entered into force on July 1, 2012, the members of a joint stock company's board of directors shall be appointed by the general assembly. This authority is one of the non-transferrable authorities and duties of the general assembly. However, Article 363 of the TCC is an exception to this provision and enables the board of directors to appoint a member to the board. As per this article, in the event any vacancy arises on the board of directors for any reason, the board of directors may appoint, temporarily, a member who meets the legal requirements and submit this member to the next general assembly for approval. The member appointed performs his duty until the general assembly to which he is submitted for approval convenes and completes his predecessor's tenure if he is approved.

However, Article 408 of the TCC should be considered while Article 363 of the TCC is implemented; changing the board of directors by appointing more than one member to the board, in the event more than one vacancy arises, may be interpreted as the transfer of the general assembly's authority to appoint members to the board.

The combined implementation of these two provisions was examined in the correspondence of the General Directorate of Domestic Trade of the Ministry of Customs and Trade dated 22.10.2012 and numbered 6799 ("Opinion of the Ministry")[1]. The appointment of a member to the board

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* ***Article of January 2013***

[1] For the said opinion, please see: http://www.ito.org.tr/wps/portal/tescil-ilan-kurulus?WCM_GLOBAL_CONTEXT=genelgeler. (Access date: 25.01.2013).

of directors pursuant to the Article 363 of the TCC shall be examined and the Opinion of the Ministry shall be evaluated.

The Opinion of the Ministry

In the Opinion of the Ministry, articles 363 and 408 of the TCC are evaluated as follows:

"*…it is understood that consecutive resolutions for the appointment of members replacing the resigning members of the board of directors are adopted at different times on the same day that members have resigned. It is also understood that newly appointed members participate in the resolution regarding the appointment of other members prior to the registration of the resolution by which they were appointed.*

In this respect, it is not appropriate to replace all members of the board of directors pursuant to article 363 of the TCC since the appointment of members to the board of directors is one of the non-transferrable authorities of general assembly; new members may be appointed pursuant to this article only in the event the quorum is present, despite the vacancies, and the new members may participate in the new resolutions following their registration."

The Opinion of the Ministry refers to a case in which the board of directors of a joint-stock company adopted sequential resolutions on the same day at different times. The new member appointed pursuant to the Article 363 in one of these resolutions participated in the appointment of another member without being approved by the general assembly and without being registered.

The Opinion of the Ministry has two outcomes: (i) changing all members of the board of directors as per Article 363 of the TCC is not possible by virtue of Article 408 of the TCC; (ii) the members appointed pursuant to Article 363 of the TCC may participate only in the new resolutions following their registration. However, it is not clear in the Opinion of the Ministry whether the phrase "new resolutions" are relevant only to the resolutions with respect to Article 363 of the TCC or to all resolutions to be adopted by the board of directors.

It may be argued that Article 408 of the TCC should not be rendered ineffective by virtue of Article 363 of the TCC. However, the Opinion of

the Ministry, which requires that new members of the board of directors need to be registered and announced in order to become a member and to be entitled to exercise the rights arising therefrom, namely participating in the implementation of Article 363 of the TCC, should be further evaluated.

When a Person Becomes a Member of Board of Directors and What is the Legal Nature of Registration?

Members of the board of directors appointed by the general assembly pursuant to Article 408 of the TCC shall become a member of the board of directors upon acceptance of the membership. Therefore, it is not necessary that a member of the board of directors be registered to the trade registry for their appointment as a member of board to be valid. However, as per Article 354/1(g) of the TCC, members of the board of directors shall be registered to the trade registry and announced in the trade registry gazette. Nevertheless, this registration is not constitutive (i.e. the registration does not affect the validity of the board member's appointment), but rather declaratory[2] (the registration and announcement declare that said person became a member of the board of directors). The function of registration and announcement is to inform third persons[3].

Even though the registration of new members of the board of directors does not have a constitutive nature, the changes on the issues which are already registered, such as the persons authorized to represent and bind the company, must be registered and announced to third parties in order to avoid problems arising from representation of the company. Here again,

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2 **Poroy, Reha/Tekinalp, Unal/Camoğlu, Ersin**; Ortaklıklar ve Kooperatif Hukuku, Istanbul 2005, no. 557; **Pulasli, Hasan**, Sirketler Hukuku Serhi, Ankara 2011, p. 898; **Akdag Guney, Necla**; Anonim Sirket Yönetim Kurulu, Istanbul 2012, p. 15.

3 However, Article 359 of the TCC obliges the legal entity member of the board of directors and its representative to be registered to the registry. The legal nature of such registration is controversial in the doctrine. Although no explicit expression is stated in the text of the article, the justification of the article expresses that the registration herein is constitutive. According to an opinion based on the justification, the registration made pursuant to article 359 is constitutive. Please see **Pulasli**, p. 898; **Kirca, Ismail**; Anonim Sirketlerde Tuzel Kisilerin Yonetim Kurulu Uyeligi, Batider 2012/2, p. 53. According to another opinion, for a constitutive registration, the constitutive nature must be explicitly stipulated in the article; therefore registration of the legal entity's representative is not constitutive. Please see **Akdag Guney**, p. 17.

registration serves to inform third parties. Therefore, a company which did not register and announce the new members of the board of directors may be bound by the transactions made by the former member with a third person, unless it is proved that the third person knew of the changes.

However, the Opinion of the Ministry indicates that members appointed to the board of directors pursuant to Article 363 must be registered in order to participate in new member appointments and grants a constitutive nature to the registration. This attitude is not in compliance with the law and the doctrinal opinions referred above which defends that the registration is not constitutive.

Another issue is whether a member of the board of directors, appointed pursuant to Article 363 of the TCC and approved by the general assembly, but not yet registered, could participate in resolutions with respect to new member appointments as per Article 363 of the TCC. A member approved by the general assembly must be considered as a member appointed by the general assembly. Although the Opinion of the Ministry is not clear in that regard, it would be consistent with its opinion to require registration in such a case, too.

Conclusion

As seen, the Opinion of the Ministry, which requires registration for participation in resolutions for the appointment of members to the board pursuant to Article 363 of the TCC, is not in compliance with the law and the doctrine referred above. In any case, Article 363 of the TCC should not be used for the purpose of disregarding the authority of the general assembly to appoint members to the board of directors.

Representation in Joint Stock Companies[*]

Att. Ozgur Kocabasoglu

Introduction

The Turkish Commercial Code No. 6102[1] ("TCC") preserves the rule that the board of directors shall represent and manage a joint stock company. The TCC regulates how the right to represent will be exercised, the registration and announcement of the persons authorized to represent the company and the transfer (and limitations to the transfer) of the representative authority. This newsletter article will assess the representative authority in a joint stock company, with a special emphasis on the transfer of this authority.

In General

Exercise of the Representative Authority

In principle, the board of directors shall represent the joint stock company before third persons (external representation). A joint stock company is a merchant and pursuant to Art. 39/1 TCC, merchants are obliged to realize transactions related to their commercial enterprise by using their trade names, and their signatures must be put beneath their trade names. The signature of a joint stock company shall mean the signature of its authorized representatives. Therefore, the representative authority of a joint stock company shall be exercised through the signatures of the authorized signatories of the company beneath the trade name of the company. This rule is repeated in Art. 372/2 TCC.

In principle, two of the authorized signatories of the company shall represent the company with their joint signatures. Nevertheless, Art. 370 TCC provides for two exceptions to this rule of "joint/double signature". The first exception is the possibility for the articles of association to foresee a different rule of representation. The second exception is the case where the board of directors consists of one director only.

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* ***Article of December 2013***

1 Official Gazette, 14 February 2011, No. 27846.

The board of directors shall appoint the authorized signatories who shall represent and bind the company with their signatures beneath the trade name. The board of directors will also determine whether the signatories shall represent and bind the company with their sole or joint signatures. Art. 373 TCC requires that the board of directors registers and announces the signatories and the representation method of the company.

Limitations to the Representative Authority

The representative authority of the signatories of a joint stock company may not be subject to limitations other than those specified in the TCC. This principle of unlimited representation serves to protect the confidence of third parties in their transactions with the company. Limiting the representative authority without respecting the statutory requirements and exceeding the limitation allowed under the TCC shall not be binding on *bona fide* third persons engaging in transactions with the company, even if such limitations are registered with the trade registry and announced. These excessive restrictions will bear effect only on persons who are aware of the restriction imposed on the representative authority of a signatory.

The TCC regulates two exceptions to the general rule of unlimited representative authority, which were both present in the abrogated legislation as well. Accordingly, the representation authority of signatories may be limited either by limiting the power to the transactions regarding the headquarters or branch offices of a company; or by requiring joint signatures of multiple signatories. For example, signatories may be grouped as Group A and Group B signatories and joint signatures of one signatory from each group may be required for representing and binding the company.

Different from the abrogated code, the TCC foresees that transactions which do not fall within the scope of activities of the joint stock company will bind the company. Accordingly, unless it is proven that third parties transacting with the company knew or were in a position to know that a given transaction fell outside of the field of activities of the company; such activities will bind the company. Therefore, the *ultra vires* rule, which results in the nullification of any transaction not included in the field of activities of the company, is abandoned.

Transactions which contravene the articles of association or the general assembly resolutions are subject to similar conditions. *Bona fide* third persons may hold a company accountable for (and request the performance of) transactions they concluded even if such transactions violate the articles of association or general assembly resolutions.

Transfer of the Representative Authority

In General

The TCC enables the board of directors to delegate both its representative and management powers. Thereby, it is possible for the board of directors to be a non-executive board.

Art. 367 TCC governing the delegation of management requires both a provision in the articles of association enabling such delegation of powers and an internal regulation governing how the powers are delegated. Even though Art. 370/2 TCC regarding the transfer of the representative powers does not explicitly regulate the same requirements, it is argued by scholars that these two provisions should be taken into account together, and accordingly the same requirement applies[2].

However, unlike in the transfer of management, the representative authority cannot be fully transferred to non-director third persons. Pursuant to Art. 370/2 TCC at least one director should continue to hold representative powers. It is argued by scholars that no limitation, such as the requirement of joint signatures, should be imposed on the sole director authorized to represent the company. In fact, for companies where the board consists of one director only, even in the event of a delegation contravening Art. 370/2, it is asserted that the sole director will have representative authority regardless of such delegation[3].

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2 Prof. Dr. **Ünal Tekinalp**, The New Joint Stock and Limited Liability Partnership Law and the Principles of One Man Companies (Yeni Anonim ve Limited Ortaklıklar Hukuku ile Tek Kişi Ortaklığının Esasları), Reviewed and Revised 2. Edition, Istanbul 2011, p. 141 N. 12-75.

3 **Kırca/Şehirali Çelik/Manavgat**, Joint Stock Company Law (Anonim Şirketler Hukuku), Volume 1, Fundamental Concepts and Principles, Incorporation and the Board of Directors (Temel Kavram ve İlkeler, Kuruluş Yönetim Kurulu), Ankara 2013, p. 628, 629.

Transfer of the Power to Appoint or Release Representatives

The non-transferable and inalienable powers of the board of directors are significant in determining the possibility to delegate the representative authority. Art. 375/1(d) TCC specified "*the appointment and dismissal of managers and persons performing the same function and authorized signatories*" as one of the non-transferable and inalienable powers of the board of directors.

When assessing the obligation to register and announce signatories under Art. 373 TCC together with the appointment and dismissal of signatories being a non-transferable and inalienable right, it is possible to reach the following conclusion: the legislator might have aimed for a structure whereby all signatories are appointed and are announced by the same body in order for these signatories to be publicly known.

Through analysis of the legislative justification of Art. 375 TCC, it could be concluded that the non-transferable and inalienable powers cannot be delegated to one or more directors or third persons. The wording of this article comprises the appointment and dismissal of all signatories, managers and persons performing the same function, and is not limited with the senior managers having the representative authority.

In practice, the board of directors regulates the representation powers of the top management through signature circulars. Nevertheless, the impossibility to delegate the power to appoint and dismiss each and every signatory may result in severe problems in practice. First and foremost, requiring a board resolution for the appointment and dismissal of every single signatory (for instance each person authorized to sign on behalf of one branch of a bank) will result in an immense workload for the board of directors. Additionally, especially in multinational companies, the board members are not in a position to convene and render decisions at any given time. Therefore, the obligation to appoint and dismiss each signatory will be a burden on the board of directors. Therefore, it is crucial to designate the scope and limits of the expression in the aforementioned article which reads: "*managers and persons performing the same function and authorized signatories*".

The scope of persons with representative authority is disputed among scholars. Pursuant to an opinion, commercial representatives and agents

fall within this scope[4]. Certain scholars state that all signatories fall within this scope, but that the provision should be construed in a limited manner excluding signatories within a company (internal representation) and signatories dealing with daily infrastructure related matters of the company such as signing electricity, water and gas subscriptions[5]. Pursuant to another opinion, the article should be read in compliance with its purpose, its legislative justification should be disregarded and accordingly the prohibition of delegation of the power to appoint or dismiss signatories should be comprised solely of top management[6].

Bearing in mind the possible problems which may arise in practice and the need to adopt pragmatic solutions, this provision could be construed accordingly. In fact, Art. 716a/4 of the Swiss Code of Obligations also specifies the delegation of management and representative powers among non-transferable powers of the board of directors. Nevertheless, the Swiss Federal Court states in several decisions that this provision should extend to the senior management only. In Turkish Law, the scholars and the jurisprudence could also declare that Art. 375/1(d) is limited with the senior management. Or, it could be accepted that this provision should only apply regarding signatories with permanent authority to represent and bind the company. Accordingly, it could be agreed that signatories, commercial agents and representatives authorized to execute or realize transactions on behalf of the company should be appointed by the board of directors, but that these persons could temporarily authorize third persons through proxies to realize specific actions. If this approach is adopted, the signatories authorized by the board may issue power of attorneys authorizing third persons for certain transactions.

Conclusion

The board of directors is authorized to represent and bind a joint stock company. The board of directors shall appoint, register and announce

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4 Prof. Dr. **Hasan Pulaşlı**, Commentary on Corporate Law Under the Turkish Commercial Code no. 6102 (6102 Sayılı Türk Ticaret Kanununa Göre Şirketler Hukuku Şerhi), Volume I, Ankara 2001, p. 958, par. 251.

5 **Tekinalp**, p. 130, par. 12-45.

6 Assoc. Prof. **Necla Akdağ Güney**, Board of Directors of Joint Stock Companies (Anonim Şirket Yönetim Kurulu), Istanbul 2012, p. 91.

persons authorized to represent the company, determine the means of representation and, if it wishes to do so, delegate representative powers. Nevertheless, at any time, at least one member of the board of directors is required to continue to bear representative powers.

The TCC abandoned the *ultra vires* principle. Accordingly, any transaction, including those which fall out of the scope of the field of activities of the company, executed by the signatories of the company will in principle be binding and exercisable upon the company.

The appointment and dismissal of signatories is among the non-transferable and inalienable duties and powers of the board of directors. Nevertheless, when assessing this requirement, it is important to determine the scope of this non-transferable and inalienable power. It is disputed whether signatories, other than the top management, also fall within the scope of persons the appointment and dismissal of whom cannot be delegated by the board of directors. This requirement, the scope of which shall be determined by scholars and by the jurisprudence, may be construed in a strict manner for practical reasons.

Independent Audit of Joint Stock Companies according to the TCC No. 6102*

Att. Revan Sunol

Introduction

As is known, the old Turkish Commercial Code No. 6762 set forth an internal auditing system in which an auditor would be appointed as an internal organ of a joint stock company and the company would be subject to “internal audit”. Within this context, the annual report of the internal auditor was one of the general assembly documents submitted to the examination of the Ministry of Customs and Trade (“Ministry”) representative and the shareholders of the company during the ordinary general assembly meeting held each year. With the entry into force of the Turkish Commercial Code No. 6102 (“TCC”)[1], a new system was adopted whereby joint stock companies possessing certain qualifications determined by the Ministry are audited by independent firms and institutions.

Art. 397 (4) of the TCC, by stating “*companies subject to independent audit shall be determined by the Council of Ministers*”, indicates that not all joint stock companies will be subject to independent audit.

Following the entry into force of the TCC, the Council of Ministers enacted the Resolution on the Determination of Companies Subject to Independent Audit (“Resolution”)[2].

In accordance with the Resolution, companies subject to independent audit shall be joint stock companies that are listed in the annex of the Resolution which are particularly associated with the financing or those fulfilling two of the three requirements below individually or with their affiliates and subsidiaries;

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* ***Article of April 2013***

[1] Turkish Commercial Code numbered 6102 has been published in the Official Gazette dated 14.02.2011 and numbered 27846.

[2] Resolution on the Determination of the Companies Subject to Independent Auditing has been published in the Official Gazette dated 23.01.2013 and numbered 28537.

- Assets totaling or above one hundred fifty million Turkish Liras.
- Annual net sales revenue totaling or above two hundred million Turkish Liras.
- Number of employees totaling or above five hundred people.

Pursuant to Article 4 of the Resolution, if a company fulfills at least two of these criteria for two consecutive fiscal years, it shall be subject to independent auditing as of the following fiscal year.

If a company does not fulfill at least two of these criteria for two consecutive fiscal years or if it is under the limit by a percentage of twenty or more for at least two of these criteria for one fiscal year, then it shall be excluded from independent audit.

The principles of auditing for joint stock companies subject to audit are determined by the Independent Audit Regulation[3] ("Audit Regulation").

In addition, auditing provisions may also be found in the Regulation on the Principles and Procedures of the General Assembly Meetings of Joint-Stock Companies and the Ministry of Customs and Trade Representatives Attending These Meetings[4] ("GA Regulation"). Pursuant to the GA Regulation, the presence of the auditor is required at the general assembly meetings of the companies subject to audit.

The manner in which the audit shall be conducted is regulated under the Decree Having the Force of Law on the Organization and Duties of Public Oversight, Accounting and Auditing Standards Authority[5] ("Decree").

Auditor

Only persons authorized by the Public Oversight, Accounting and Auditing Standards Authority and/or companies whose shareholders

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[3] The Independent Auditing Regulation was published in the Official Gazette dated 26.12.2012 and numbered 28509.

[4] The Regulation on the Principles and Procedures of the General Assembly Meetings of Joint-Stock Companies and the Ministry of Customs and Trade Representatives Attending These Meetings Anonim was published in the Official Gazette dated 28.11.2012 and numbered.

[5] The Decree Having the Force of Law on the Organization and Duties of Public Oversight, Accounting and Auditing Standards Authority was published in the Official Gazette dated 02.11.2011 and numbered 28103.

are such persons, and who hold the title of certified public accountant or independent financial adviser (YMM or SMMM) for the purpose of conducting independent audit, may be auditors.

In principle, auditors must be elected by the general assembly of the company until 31.03.2013 pursuant to Provisional Article 6 (2) of the TCC. The term of duty of internal auditors shall end automatically upon such election and at the latest on 31.03.2013.

In accordance with Art. 399/1 of the TCC, the board of directors shall have the appointed auditor registered with the trade registry and announced in the Turkish Trade Registry Gazette, as well as on the website of the company without delay.

Except tax consulting and tax auditing, an auditor may not provide consulting or other services to a company he audits. Nor can the auditor provide such services through a subsidiary.

The auditor may be released from his duty only if another auditor is appointed. Other than this, the auditor may be released from duty only by way of a court decision.

Moreover, if the certified public accountant, the independent financial adviser and/or the auditing company or one of its shareholders or persons working with its shareholders or person(s) with whom the aforementioned persons are working together, are a shareholder, director or employee in the company to be audited; a director, shareholder or one of blood and in-law relatives up to the third degree of the statutory representative or the director of the legal person connected with the company to be audited; has been active in or contributed to the bookkeeping or organizing of the financial statements of the company to be audited or bear similar characteristics which may prevent the auditor from realizing his duty independently as determined by the Auditing Regulation or if the auditor is employed by an auditor with such characteristics, he shall not be allowed to audit.

Similarly, an auditor appointed for seven years within ten years for the same company may not be appointed again before three years. For independent audit firms, the term spent as auditor under the old legislation shall be taken into account in the calculation of this period. In our opinion,

the term spent as auditor shall be included in the calculation of this period for independent audit firms appointed voluntarily by companies as well.

Audit Contract

The auditing contract concluded in writing between the audit firm or the auditor and the company must bear some minimum qualifications as per the Audit Regulation. The general assembly resolution constituting the basis of the auditing contract, the purpose, scope and term and, if any, the special reasons of the audit, the subject of the audit and its criteria, the responsibilities of the parties, the audit fee, the commencement and termination date of the audit and the delivery date of the report, the professional liability insurance may be stated as examples of these minimum qualifications.

The contract may not foresee the provision of any service other than audit; the payment of the audit fee may not be subject to any condition other than the provision of audit services.

The audit contract shall be concluded for the fiscal year in which the audit firm or the auditor has been elected in accordance with the TCC.

Scope of the Audit

The financial statements of companies, the consistency of the financial information in the annual activity report of the board of directors and the financial statements, as well as whether they are accurate, shall all be audited within the scope of independent audit.

Whether the financial statements and the activity report of the board of directors has been audited or not, and if so, the opinion of the auditor must be indicated in the title of the financial statement and the activity report.

The financial statements shall be audited as per Turkish Auditing Standards in compliance with International Auditing Standards.

The non-audited financial statements and annual activity report of the board of directors shall be deemed invalid if the company is subject to audit.

If the financial statements and the annual activity report of the board of directors have been amended after the submission of the audit report and if these amendments may affect the audit reports, the financial statements and the annual activity report of the board of directors shall be audited again. The re-audit and its result shall be explained separately in the report.

If there is a dispute about the report between the company and the auditor, this dispute shall be resolved by the commercial court of first instance located at the place of the headquarters of the company upon the request of the board of directors or the auditor.

Conclusion

The independent auditing system aims to realize auditing in compliance with the International Accounting Standards and the transparency in the accounts of joint stock companies.

The regulation that only joint stock companies possessing certain characteristics and that are over a certain size shall be subject to independent audit increased the functionality of the system.

Accordingly, the duty of the internal auditors of the joint stock companies subject to independent auditing shall automatically end on 31.03.2013 and the companies must elect an independent auditor as of this date.

The independent auditor shall be elected by the general assembly of the company (TCC Art. 399/1, Art. 408/2) and, as explained above, shall be appointed with the signing of an independent auditing contract.

The Regulation Amending the Regulation on the Working Procedure and Principles of Internal Auditors [*]

Att. Naciye Yilmaz

The Regulation on the Working Procedure and Principles of Internal Auditors ("Regulation") which entered into force by being published in the Official Gazette dated 12.07.2006 and numbered 26226 was amended by the Regulation Amending the Regulation on the Working Procedure and Principles of Internal Auditors ("Amendment Regulation") published in the Official Gazette dated 07.02.2013 and numbered 28552. The important amendments brought by this Regulation are the subject of this article.

Purpose and Scope

The purpose of the Regulation is stipulated as the determination of the working procedure, principles, qualifications and other related issues regarding internal auditors to be assigned to public authorities. The Internal auditors, the internal audit activities of local authorities and the authorities mentioned on lists (I), (II) and (III) annexed to Law No. 5018 on Public Financial Management and Control, the Banking Regulation and Supervision Agency and the Savings Deposit Insurance Fund fell within the scope of the Regulation. However, the Amendment Regulation excluded the Banking Regulation and Supervision Agency and the Savings Deposit Insurance Fund from its scope.

Internal Audit Activity

Pursuant to Article 5 of the Regulation, an internal audit activity aims *"to organize and manage the activities of public authorities pursuant to its purpose and policies, development and strategic plans and performance programs; to ensure that resources are used efficiently and economically; and to ensure data security, integrity and to provide this data in due time"*.

The scope of an internal audit activity is regulated under Article 6 of the Regulation. According to this article, the activities of public authorities

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* ***Article of February 2013***

are systematically subject to an internal audit within the framework of the risk based on audit plans and programs.

Pursuant to the Regulation, the auditing of public authorities consists of the following: an appropriateness audit, a performance audit, a financial audit, an information technologies audit and a systems audit.

Article 9 of the Regulation is also amended by the Amendment Regulation. According to this amendment, not only the internal auditors but also internal audit unit president shall comply with the audit standards and ethical principles.

Responsibility of the Manager

The responsibility of the manager is regulated in detail under the Regulation. The manager is, for example, obliged to take necessary precautions so that auditors can execute their duties independently. The Amendment Regulation amended paragraphs d, f and g of Article 12. Therefore, the manager: (d) takes precautions to ensure that resources are used efficiently and economically and to ensure that the problems are cured subsequently according to the information and suggestions provided by the internal audit activity; (f) sends the internal audit reports and operations effectuated pursuant to these reports to the Internal Audit Coordination Board; (g) surveys the quality of the internal audit and ensures that corrective precautions are taken with regard to the results of the external audit.

Responsibilities, Duties and Obligations of Internal Auditors

The duties of internal auditors are set forth under Articles 13 et seq. The duties of internal auditors consist of evaluating the management and control mechanisms of public authorities, making audits and suggesting how to use the resources more efficiently, auditing the legal appropriateness of expenses. The Amendment Regulation also regulates the duties and authorities of the internal audit unit president. According to the amendments, the internal audit unit president, for instance, must manage the internal audit unit pursuant to the audit reports and standards, control the internal audit reports, follow the results of the audits and take corrective precautions pertaining to the external audit results.

Moreover, Article 14 of the Regulation is entirely amended and is entitled as *"audit survey activity"*.

Independence, Objectiveness and Assurance of Internal Auditors

Pursuant to their duties, the independence and objectiveness of internal auditors are very important issues. Therefore, these issues are regulated under the Regulation, along with the issue of their assurance.

Internal auditors execute their duties independently and act objectively, and they cannot be appointed to perform any duty which is not mentioned under this Regulation or under the related directives.

It can be said that the Amendment Regulation does not bring any important modifications to Part Five of the Regulation which governs internal auditors' independence, objectiveness and assurance.

Planning, Conducting and Reporting the Internal Audit

Pursuant to the Regulation, an internal audit plan is prepared for three years in accordance with the internal audit strategic plan prepared by the Internal Audit Coordination Board. Moreover, an internal audit program which shall not exceed a period of one year shall also be set.

It should be noted that the Amendment Regulation amends Article 44, which governs the filing of reports, in its entirety.

Conclusion

The Amendment Regulation excluded the Banking Regulation and Supervision Agency and the Savings Deposit Insurance Fund from the scope of the Regulation, detailed certain articles of the Regulation, determined clearly duties and authorities of internal auditors and managers. Moreover, certain additions to definitions in the Amendment Regulation make the Regulation easier to understand and follow.

Corporations’ Obligation to Build a Website pursuant to the Turkish Commercial Code [*]

Att. Revan Sunol

As part of the innovations brought by the Turkish Commercial Code No. 6102 (“TCC”), regulations on corporate transparency are increased. TCC Article 1524 has made it obligatory for corporations to set up a website and make announcements as put forth in the relevant legislation on such web site. This obligation is regulated under the Regulation on Websites to be Set Up by Corporations (“Regulation”) published in the Official Gazette dated 31.05.2012 and numbered 28663.

Corporations with the Obligation to Build a Website

According to Article 124 of the TCC and Article 2 of the Regulation, companies that fall within the scope of the Regulation shall be determined pursuant to Article 397 of the TCC. In line with this, companies that are subject to independent auditing pursuant to the Decision on the Determination of the Companies to be Subject to Independent Auditing are also obliged to build a website and make the announcements as set out in the Regulation within such website. Companies that fall within this scope are those which have net assets with a value equal to or above TRL 150,000,000, annual net sales revenue equal to or above TRL 200,000,000, and 500 or more employees by themselves or cumulatively with their affiliates and subsidiaries; as well as the finance, asset management and rating companies that are active in finance as stipulated within the Annex of the Decision.

Obligation to the Build a Website

Companies incorporated after the entry into force of the Regulation must build a website within three months of registering with the trade registry, and companies incorporated before such time must build a website within a period of three months as of 01.07.2013, that is to say by 01.10.2013 at the latest. Companies that meet the above mentioned

[*] ***Article of June 2013***

criteria after the entry into force of the Regulation must build a website within three months. Companies shall allocate a section of their website to announcements that must be made pursuant to the law.

The issues to be announced on the website must be posted on the website within the period of time set out in the relevant legislation. If no such specific period of announcement has been set forth, then announcement shall be made within five days following either the realization of the relevant event, the registration with the trade registry or the announcement in cases where registration and announcement are required in order for the relevant transaction to become valid. Previously known information and issues must be included within the website immediately.

Companies may use central database service providers, who are private law entities operating under the official authorization of the Ministry of Custom and Trade, to organize their website and keep the content (to which access must be allowed via secure mediums) available for the company to access and archive. However, this is not an obligation. Pursuant to the Capital Markets Law, such services shall be provided by the Central Registry Agency for companies with shares registered with them.

Content of the Website

The content which may be included within the website is not limited. The provisions aim to increase transparency and there are no restrictions with respect to the documents, reports, calls for meetings, tables and other information which may be published. However, there are certain issues which are required to be announced according to the Regulation.

Permanent Content

The content to be included within the website has been categorized with respect to the amount of time it must remain on the website. Information regarding the company's title, address, paid and unpaid capital and the members of the management body (that is to say members of the board of directors for joint stock companies and managers for limited liability companies), as well as the auditor must be kept available for access at all times.

If a legal entity is appointed as a member of the board of directors or as manager in a joint stock company or a limited liability company, then the information for such legal entity as well as its proxy must be made available on the website at all times.

The amendments on such information shall also be published on the web site as of the date of the relevant amendment.

Content to be Included for a Minimum Period of Six Months

Content that must be made available for a minimum period of six months includes the following:

For companies participating in a merger or demerger, announcements to be made to creditors and the documents subject to the right of inspection within the scope of the relevant legislation;

If a lawsuit for the dissolution of the company has been filed, declaration with respect to the suit filed and the final court order issued with respect to the dissolution;

The resolution for the convocation of the general assembly, if the general assembly meeting is postponed due to the postponement of negotiations regarding the financial statements and related issues;

The Minutes of the general assembly meeting and the privileged shareholders' general assembly;

The resolution to represent and bind adopted by the board of directors of joint stock companies and managing board of limited liability companies;

Internal directives including the working procedures and principles of the general assembly in joint stock companies;

Announcements with respect to the representative of a company body, an independent representative and a company representative;

Resolutions of the general assembly regarding the amendment of the articles of association;

For companies that are in the registered capital system, information related to registered capital regulations;

Board of directors' resolutions which regulate the rules for the acquisition of newly issued shares;

Board of directors' report explaining restrictions to or removal of the pre-emption rights of shareholders on new shares, issuing new shares with or without a premium and explaining the calculation method of the premium;

The Report of the managing body in the event of a decrease in capital, announcement to convene the general assembly, announcement for decreasing principal capital;

The Announcement to convene the managing body for payment of share amounts, invitation and notification to shareholders in default and resolution regarding cancellation of share certificates of the shareholders in default;

Board of Directors resolution with respect to the issuance of bearer share certificates;

Trade Registry Gazette announcement to inform creditors in the event the company is dissolved;

The Acquisition of the company shares by a company from within the same group company within the threshold levels stated under Article 198 of the TTC or selling them out;

The removal of a ship from the ship registry within the framework of article 996 of the TCC;

The disclosures of members of the board of directors, directors of undertakings and corporations, their relatives as determined within the relevant legislation and the companies in which such directors and their relatives hold at least 20% of the shares with respect to the shares that they hold in group companies;

The dominance agreements executed between companies;

An announcement that the number of shareholders in the company has decreased to one or that the company has been incorporated by a sole shareholder, and information related to that sole shareholder;

The agreement regarding the acquisition or lease of an enterprise or a real property for an amount exceeding one tenth of the capital, within 2 years following the registration of the company; and

Where the board of directors, managers board or general assembly meeting has been held electronically, the technical report proving that the electronic tools used by such persons are suitable for active attendance.

The above-mentioned content shall be made available on the website for at least six months, otherwise it shall be deemed to not have been posted on the website.

Non-Compliance with the Website Obligations

Non-compliance with the obligation to build a website and not to make the required announcements via that website as detailed above, shall constitute a cause for the annulment of the related decisions. Also, the managers and the members of the board of directors who are at fault for such negligence shall be held liable.

Conclusion

As stipulated in the grounds of the TCC articles, the regulations regarding the company's website are open to evolvement. With the provisions brought by the TCC, various types of basic information regarding the company will become available publicly. As non-compliance with the obligation to build a website and the realization of the announcements may cause the nullity of the relevant company decisions, the requirements and periods brought by the Regulation must be taken into due consideration.

Regulation Regarding Websites Created by Corporations [*]

Att. Nilay Celebi

The Regulation Regarding Websites Created by Corporations ("Regulation") was published in the Official Gazette dated 31 May 2013 and numbered 28663. This Regulation sets forth the duties of Corporations to create a website in accordance with Article 1524 of the Turkish Commercial Code No. 6102. This Regulation entered into force on 1 July 2013. This Regulation was amended with the Regulation on the Amendment of the Regulation Concerning Websites created by Corporations published in the Official Gazette dated 21 September 2013 numbered 28772.

Companies Subject to the Regulation

Equity companies subject to auditing, as determined by the Council of Ministers pursuant to Article 397 of the Turkish Commercial Code, must set up a website under this Regulation and allocate a certain section thereof to the necessary announcements as stipulated by law. Equity companies subject to independent auditing are defined by the Decision of the Council of Ministers, published in the Official Gazette dated 23 January 2013 and numbered 28537. Under this decision, three criteria have been set: Having a total amount of assets worth at least TRL 150 million, having net sales revenue of at least TRL 200 million and having at least 500 employees. Equity companies that comply with at least any two of these criteria for two consecutive years are subject to independent auditing.

Companies that are not subject to independent auditing pursuant to this Decision do not have to set up a website in accordance with the Regulation.

Companies that are members of group companies, but not subject to independent auditing, do not have to set up a website.

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[*] ***Article of September 2013***

Obligation to Create and Register a Website, and the Procurement of Support Services

According to Article 5 of the Regulation, companies that are established after the entry into force of this Regulation, which is 1 July 2013, shall have a website and must reserve a certain part of this website for necessary announcements, as set forth by the law, within three months of registering their establishment with the trade registry. Companies that were already established before 1 July 2013, as expressed in Provisional Article 1, must set up a website and allocate a certain section of this web site to necessary announcements, as set forth by the law, within 3 months after the entry into force of this Regulation (by 1 October 2013 at the latest).

Companies may fulfill their website obligations directly by themselves or through the procurement of support services from the Central Data Base Service Provider ("MTHS").

Content of the Website

Article 6 of the Regulation determines the content that shall be published on the website. According to this provision, there are two groups of content, which shall be permanently published and for a 6-month period. A longer period may be determined by the laws or other administrative regulations. Please find below examples of some subjects that must be published on a company website (not exhaustive):

1- Content That Shall be Permanently Published on the Website

According to Article 6/1 of the Regulation, the following information must be present on the company website;

- the Company's Central Registry Recording System's ("MERSIS") number, commercial name, head office, subscribed capital, paid capital; names and surnames of the president and members of the board of directors of the joint stock companies, of the directors of the limited partnership;
- the explanation regarding the registration of the representative of the legal entity serving as a board of directors member, the

MERSIS number of such legal entity director, commercial name, head office and the name and surname of the real person registered with the legal person

- the name and surname/title, residence/head office and registered offices, if any, of the selected auditor.

In case of a change in the content, the information on the website of the company shall be updated accordingly on the date which the change occurs.

2- Content That Shall be Published for at least 6 Months on the Website

According to Article 6/3 of the Regulation;

- Companies participating in a merger shall publish on their website, thirty days before the general assembly resolution, the merger agreement, merger report, year-end annual financial statements, annual reports and interim balance sheets for the last three years;
- The dividing companies shall publish on their website(s), within two months after the decision to split, information about the right to inspect the division agreement or division plan, division report, financial statements and annual reports of the last three years and interim balance sheets, if any; as well as the location of the aforementioned documents - ready for inspection;
- If a company acquires shares or its shares fall under the percentages set forth in Article 198 of the Turkish Commercial Code, a related announcement shall be published on the website;
- If an action for dissolution has been filed against the company, a relevant announcement shall be published within fifteen days after its publication in the Turkish Trade Registry Gazette;
- The final court order regarding the action for dissolution shall be placed on the company's website within five days as of its publication in the Turkish Trade Registry Gazette.
- Dominance agreements concluded between companies shall be placed on the company's website at latest within five days after its publication in the Turkish Trade Registry Gazette;

- Contracts regarding the acquisition or lease of a business or non-monetary assets of an amount exceeding one tenth of the capital, made within two years of the registration of the company to the commercial register, shall be placed on the company's website.
- The call for the general assembly meeting shall be placed on the company's website the day it was published in the Turkish Trade Registry Gazette.
- Where the discussions of the financial statements and related issues are postponed for a month, the notification of adjournment sent to the shareholders of the company shall be placed on the company's website within five days of the postponement decision.
- The minutes of the company's general assembly and the minutes of the privileged shareholders assembly shall be placed on the company's website within five days from the day on which the general assembly meeting took place.
- The general assembly decision on the amendment of the articles of association shall be placed on the company's website at latest within five days from its publication in the Turkish Trade Registry Gazette.
- In the authorized capital system, the decision of the board of directors to increase the capital, the amended provision of the articles of association regarding the issued capital, nominal values, numbers and types of shares and whether they are optional or preferred, whether the pre-emptive right is restricted or not, the terms and conditions for the exercise of these rights, registrations related to premiums and the rules on their application shall be placed on the company's website within five days from the notification duly done according to the articles of association.
- The decision of the board of directors or the managers regarding the appointment of the representatives and the scope of representation shall be placed on the company's website within five days from the publication of this decision in the Turkish Trade Registry Gazette.

Penalties

With respect to paragraph 12 of Article 562 of the Turkish Commercial Code, the members of the administrative body of the companies failing to allocate a section for the aforementioned issues on the company website in accordance with Article 1524 shall be punished by an administrative fine equivalent to a period between one hundred to three hundred days; or failing to post the required content shall be punished by an administrative fine equivalent to a period of up to one hundred days.

Important Changes in the Regulation

The most important change brought by the Regulation is with regards to the companies that are a member of a holding. The corporations which are a member of a holding and which are not directly within the scope of independent auditing shall not be obliged to open web-sites.

The obligation of the companies that are a member of a holding with regards to the web-sites may be fulfilled by a company of the group even though it does not have the MTHS authority. Thereby, the group company obtaining such service shall be considered as it has opened its website. In case the company leaves the group, it must have the MTHS authority in the date of separation in order to carry on such service.

Conclusion

The Regulation sets forth obligations and terms for announcing certain information which may be deemed as important and necessary for equity companies that are subject to independent auditing. The aim of the Regulation is to apply the principles of public disclosure and transparency to non-public companies.

Shareholder Agreements*

Att. Ezgi Babur

Based on their wide usage, shareholders' agreements ("SHAs") are of great importance in the sphere of corporate law practice. Their popularity is based on the elasticity they grant to shareholders in order to regulate their relations among each other and with a company. Considering this importance, we shall first analyze the legal relationship formed under SHAs and their effects at the corporate level. Finally, we shall look at the consequences of breaching SHAs.

In General

SHAs are agreements executed by the shareholders of a company, or those aiming to hold shares in a company, whose purpose is to regulate their relationship with each other, the company, and especially the structural and procedural order to be applied within the company. In terms of their usage in legal practice, SHAs provide a level of elasticity that cannot be obtained via the articles of association, and assure confidentiality among shareholders.

SHAs are binding and subject to the freedom of contract under the law of obligations. They impose on shareholders an obligation to exercise their rights arising out of shareholding status in conformity with the realization of the objectives set forth under the SHA[1].

The Legal Relationship Formed under SHAs between the Parties

As is known, one of the principal elements in partnerships is the *affectio societatis* element[2]. This element implies working in solidarity while associating over an equal foundation in order to reach a common purpose. It is stated that *affectio societatis* is stronger and more visible in real person partnerships ("*kişi ortaklıkları*") and is weakened in equity

* *Article of November 2013*

1 **Gül Okutan Nilsson**, Anonim Ortaklıklarda Paysahipleri Sözleşmeleri, İstanbul 2004, p. 4.

2 **Reha Poroy/Ünal Tekinalp/Ersin Çamoğlu**, Ortaklıklar ve Kooperatif Hukuku, Güncelleştirilmiş 9. Basıdan 10. Tıpkı Basım, İstanbul 2005, p. 26-27.

companies; however, it should be emphasized that it does not completely disappear[3].

In view of the above-mentioned issue, the execution of a SHA may be decisive in practice. Under Turkish doctrine, it is stated that SHAs give rise to the emergence of a simple partnership relationship between the parties thereto[4]. Accordingly, when a SHA is concluded in order to regulate the relations within a joint stock company, its execution gives rise to a dual contractual relationship, which is formed by the joint stock company on one side, and a simple partnership on the other side[5].

With regard to simple partnerships, the element of *common purpose* is stated among the basic elements of simple partnerships. This *common purpose* element requires that the participants in the simple partnership gather around a common goal to be established through this relationship. This element requires that every shareholder considers the common purpose as his own purpose in the establishment of the partnership, and that the pursuit of the common purpose is a means in the realization of his personal purpose[6].

Consequently, the parties are under a duty to participate in the activities geared towards the realization of the common purpose, to cooperate with other shareholders and to make efforts to achieve the purpose.

Effects of SHAs at Corporate Level

Since they regulate the relations between the shareholders and the exercise of their shareholding rights, SHAs do not have corporative nature. The obligations arising out of agreements not having a corporative nature, such as SHAs, are not within the scope of the sole obligation

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[3] **H. Ercüment Erdem**, "Les rapports entre la société et le contrat en droit turc", le Contrat, Travaux de l'Association Henri Capitant – Des Amis de la Culture Juridique Française, Tome LV, 2005, p. 218.

[4] Please see **Poroy/Tekinalp/Çamoğlu**, p. 91; **Okutan Nilsson**, p. 80; **Anlam Altay**, Anonim Ortaklıklar Hukuku'nda Sermayeye Katılmalı Ortak Girişimler [Equity Joint Ventures], İstanbul 2009, p. 244. It should also be noted that some authors in the doctrine do not support this view. Please see **İsmail Esin/Tunç Lokmanhekim**, Uygulamada Birleşme ve Devralmalar, İstanbul 2004, p. 67.

[5] **Poroy/Tekinalp/Çamoğlu**, p. 586-587.

[6] **Nami Barlas**, Adi Ortaklık Temeline Dayalı Sözleşme İlişkileri, 2. Bası, İstanbul 2008, p. 25.

principle, which is a valid principle in joint stock companies. The sole obligation principle limits obligations tied to shareholder status, and does not prevent shareholders from assuming binding obligations. Therefore, shareholders may assume obligations subject to the law of obligations, which would be binding among the shareholders.

Shareholders' agreements are valid and enforceable among the parties thereto, and do not impose obligations or give rise to rights to third parties or the company itself. The company is in the position of a third party with regard to legal implications of the agreement; therefore, the agreement is outside of the scope of a joint stock company, and may not be asserted against the company or the organs of the company[7].

Claims concerning the performance of the agreement depend on the fact that the provisions of the agreement may not be asserted against the company or its organs. Concerning the performance of the SHA, in some cases, the subject matter of a provision may be within the scope of the authority of corporate organs. In such a case, corporate organs that are in the position of a third party may not be held accountable for the performance of the relevant provision.

Consequences of the Breach of SHAs

Based on its specific nature and its close proximity with the corporate level, the consequences for breaching an SHA shall be analyzed.

The first issue to consider is whether the sanctions set forth under the Turkish Commercial Code No. 6102 may be imposed on the breaching party for breach of the SHA. It is argued by Turkish scholars that, since the sanctions have been regulated for the circumstances as set forth under the law, they are only valid for said circumstances and therefore, may not be imposed on the breaching shareholder in case of breach of the SHA[8].

In light of this determination, the sanctions that may be imposed in case of breach of the SHA are sanctions set forth under the law of

7 **Okutan Nilsson**, p. 278. On the other hand, it should be noted that recently, opinions criticizing this strict classification emerged in the doctrine, and the interaction between the company law and law of obligations of this legal relationship is emphasized.

8 **Okutan Nilsson**, p. 344.

obligations. These sanctions may be listed as specific performance, compensation, rescission of the agreement for synallagmatic agreements and termination on just grounds in cases where the agreement is of corporative nature. It should be noted that the preference between these possibilities is based on the nature of the breach.

Based on the compensation principles of the law of obligations, in case the performance of the obligation is still possible, the specific performance is considered as the principal remedy. However, in case the specific performance is not possible anymore, the remedies are based on Articles 112 et seq. of the Turkish Code of Obligations No. 6098 that set forth the infringement of contractual obligations.

It should be emphasized that specific performance and the possibility to request specific performance are of great importance here, since SHAs are closely related to the corporative sphere as well, and whether this performance is possible or not is based on these effects on the corporative sphere[9].

Conclusion

The wide usage of SHAs in practice is based on the need to form a structure that better suits shareholders' needs. Shareholders may provide detailed provisions with regard to their rights and obligations within the scope of their shareholding status in the SHA. On the other hand, SHAs' close proximity with the corporate sphere may give rise to some level of complexity and a variety of disputes. In conclusion, with the need to regulate the relationship between shareholders, SHAs do not seem to lose their popularity in practice.

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[9] **Okutan Nilsson**, p. 346.

Squeeze-Out, Sell-out and Exit Rights in Joint Stock Companies*

Att. Leyla Orak

Introduction

The partnership between a joint stock company and its shareholder will cease, in principle, upon the transfer of shares by the shareholder. A holder of joint stock company shares may cease its partnership relationship voluntarily by transferring its shares to a third party.

Nevertheless, voluntary share transfer may not always be the answer to the specific needs. From the company's perspective, it may be necessary to sever its partnership with a shareholder causing perturbation in the company, even in the absence of the shareholder's will, by resorting to other means. For these reasons, a company's right to squeeze-out shareholders is significant. Similarly, a non-controlling shareholder in a company may not want to be bound by the consequences of decisions in which they did not participate and may want to end the partnership, even in the absence of a prospective purchaser for its shares. For these reasons, the sell-out right of shareholders to sell their shares to another shareholder, and the exit right requiring the company to purchase their shares are very important.

In this article, the statutory provisions regarding squeeze-out, sell-out and exit rights will be analyzed.

Provisions of the TCC

The Turkish Commercial Code No. 6102[1] ("TCC") regulates the squeeze-out of shareholders from a joint stock company for the first time. The TCC further regulates the sell-out right granted to shareholders who do not have control over companies that are members of group companies, under certain circumstances.

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* *Article of February 2013*

1 Official Gazette, 14 February 2011, No. 27846. TCC entered into force on 1 July 2012.

Squeeze-Out Right of the Company

Abrogated Turkish Commercial Code No. 6762 foresaw the annulment of shares in the event shareholders failed to fulfill the obligation to fully pay up the share capital subscription. This is preserved under the TCC. However, through this mechanism, the shareholder shall be deprived only of shares whose subscription he failed to fully pay. For instance, a shareholder who fully paid the subscription value of its then-current shares, who subscribed for newly issued shares but defaulted on their payment may only be deprived of the newly issued shares as a result of the capital increase. Annulment, therefore, does not always result in the cessation of partnership with a shareholder.

The squeeze-out of shareholders from joint stock companies is therefore an important innovation introduced under the TCC. Pursuant to the TCC, squeeze-out is granted under three circumstances.

The first is that companies party to a merger transaction may, under the merger agreement, grant shareholders the right to acquire shares or to just receive consideration without obtaining any shares. The TCC allows merger agreements to only grant consideration to shareholders, accordingly such persons may not acquire any shares in the merged (or acquiring) company. However, pursuant to TCC Art. 141, in the event the merger agreement only contains a provision of consideration and not shareholding for the existing shareholders, this agreement must be approved by the transferor/acquired company with an affirmative 90% of the total votes in that company.

The second circumstance whereby squeeze-out is allowed is specific to group companies. The mother company in a group, which owns at least ninety percent of the shares of its subsidiary, may squeeze-out the remaining minority, if such minority violates the good faith principle, causes trouble or acts recklessly, by purchasing its shares in the company. The squeeze-out right provided for here may only be exercised in the presence of just cause. The legislative justification of TCC Art. 208 regulating the squeeze-out under these circumstances states that it serves to end the disturbing actions of shareholders who continuously object to the decision making of the company for various reasons and to ensure peace within the company.

The third circumstance where squeeze-out is possible is regulated along with the right of shareholders to request dissolution of the company due to just cause under TCC Art. 531. The minority shareholder may initiate a lawsuit for the dissolution of the company where there is just cause (such as constant violation of minority rights, right to information or similar rights). The judge of the civil court of first instance may decide on the squeeze-out of the shareholder from the company by paying the plaintiff shareholder the share price, instead of deciding to dissolve the company. However, it should be noted that this article does not provide a squeeze-out right for the company. Pursuant to this article, the shareholder may only be squeezed out if a lawsuit for the dissolution of a company is filed and upon a court decision.

Sell-out Right of the Shareholder in Group Companies

The TCC foresees certain consequences of unfair exercise of dominance under its provisions governing group companies. Certain provisions grant shareholders of subsidiary companies the right to sell-out under certain conditions.

Pursuant to the TCC, the controlling company may not exercise dominance over its subsidiary which results in loss in the subsidiary, unless such loss is counterbalanced in the given activity year or without specifying the timeframe within which counterbalance will take place. Pursuant to TCC Art. 202/1/b, in the event the company fails to counterbalance the loss, the shareholders of the subsidiary may request the controlling company to compensate the damages incurred by the subsidiary. In such an event, the judge may decide on compensation, on the purchase of the shares of the plaintiff shareholder by the controlling company or on another convenient measure. However, the abovementioned provision also grants the shareholder the right to request from the court that the controlling shareholder purchase his shares. Therefore, the shareholders are granted a right to request to sell-out.

In the event the subsidiary company engages in transactions such as merger, spin-off, type conversion, issuance of securities and amendments to its articles of associations, and if such transaction is made only as a result of dominance, without an apparent justification from the subsidiaries point of view, another sell-out right may arise. Pursuant to TCC Art.

202/2, shareholders voting against a general assembly resolution, who record their objections in the minutes, or who object in writing to board resolutions governing such material transactions may, within two years as of the date of the relevant decision, request from the courts that the controlling undertaking purchases its shares with a minimum value equivalent to the market price, actual price or the price to be determined by a generally accepted calculation method.

Provisions of the CML

Capital Markets Law No. 6362[2] ("CML") regulates the mandatory share purchase bid (mandatory bid/appel), which was regulated with communiqués by the Capital Markets Board ("CMB") issued pursuant to a general provision of the Abrogated Capital Markets Law No. 2499. However, in addition to this provision, the CML further regulates the squeeze-out, sell-out and exit rights in public joint stock companies. Thus, in addition to the provisions of the TCC, which were briefly addressed above, the CML provides new possibilities to public companies and their shareholders. Below, the squeeze-out, sell-out and exit rights granted under the CML will be assessed.

Squeeze-Out and Sell-Out Rights

Pursuant to Art. 27 of the CML, either as a result of a mandatory offer, or through other means such as acting together, in the event the total number of shares held exceeds the percentage to be determined by the CMB, the persons holding such shares shall have a right to squeeze-out/sell-out the shares of the minority shareholders. From the wording of the article, it is understood that the term minority will not be construed as the technically defined term under the TCC, but as the shareholders who form the minority in comparison with the persons holding shares exceeding the percentage to be determined by the CMB. Currently, there are no regulations specifying this percentage.

Shareholders who have a squeeze-out right may, within the timeframes to be determined by the CMB, request that the company nullify shares held by minority shareholders, to issue new shares representing the capital

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2 Official Gazette, 30 December 2012, No. 28513. CML entered into force on its publication date.

held by such minority and to purchase such shares. Reference is made to Art. 24 of the CML, with regards to the share price. The article regulating the exit right, which is analyzed below, states that the share price shall be specified in the agenda of the relevant general assembly meeting. The CMB shall regulate the principles and procedures with regards to the determination of shares not listed on the stock exchange.

This article governing the squeeze-out right states that, in cases where the squeeze-out/buy-out right arises based on the percentages determined by the CMB, the minority shareholder shall also have a sell-out right. Pursuant to this provision, the minority shareholders may, within the timeframes to be determined by the CMB, request the shareholders holding shares exceeding the percentage to be determined by the CMB to purchase their shares in exchange for a fair value. Thus, the sell-out right of shareholders holding a specified percentage of the shares and the sell-out right of minority shareholders is regulated as a whole.

This article expressly holds that Art. 208 of the TCC, which is among the provisions governing group companies, shall not be applicable to public companies. Said article, analyzed hereinabove, governs the squeeze-out of the minority causing trouble in a subsidiary of a group. The legislative justification provided by the CML states that the two provisions regulate similar matters, and given a specific provision is present in the CML, an exception to TCC Art. 208 is foreseen.

The Exit Right

Pursuant to the provisions of the TCC governing group companies, the shareholder exercises its right to leave the company by requiring the controlling company, or the controlling undertaking, to purchase its shares. CML Art. 27 discussed above also grants the shareholder the right to sell its shares to other shareholders whose shares exceed a specific percentage. These rights are referred to as the sell-out rights of the shareholders. However, the CML further provides for the right of the shareholder to sell its shares directly to the public company to which it is a shareholder. This right granted under the CML is referred to as the “exit right”.

The exit right is granted to shareholders in the event a public company makes important decisions. Pursuant to CML Art. 23 merger, demerger

transactions, type conversions, decisions to dissolve, transfer of all or a material portion of its assets, establishing of a right *in rem* over or leasing all or a material portion of its assets, materially or completely amending the scope of activities, granting privileges and amending the scope of existing privileges and delisting decisions are considered among the important decisions of a public company. Exit rights may also emerge for companies which became *ipso jure* public due to the number of their shareholders, however, which do not want to be subject to the CML. Pursuant to CML Art. 33, companies deemed public for having over five hundred shareholders may opt out from the scope of the CML through a general assembly resolution to be adopted with the votes of at least two thirds of the total number of shareholders, and which may not be less than three fourth of all votes in the company in the event the company does not want its shares to be traded on a stock exchange.

Shareholders participating in the general assembly resolutions where the abovementioned transactions are discussed, who cast negative votes and who record their objection in the meeting minutes may exit the company by selling their shares to the public company. In the event a shareholder is unjustly deprived of the right to participate in the general assembly meeting or if the invitation or announcement of the agenda is not duly made, the prerequisites of casting a negative vote and recording the objection shall not be applicable in order to grant the exercise of the exit right.

It is disputed whether the share buy-back limits of companies regulated under the TCC shall apply in the event of an exit right. The principles and procedures of the exit right shall be determined by the CMB.

Conclusion

The squeeze-out right of a company is a right introduced with the TCC, which also is subject to specific provisions under the CML. Additionally, these recently adopted codes grant the shareholder sell-out and exit rights which may be used to sever partnership with a company. These rights serve to fulfill needs that arise in practice.

The procedures and principles regarding the squeeze-out, sell-out and exit rights regulated under the CML shall be clarified in the secondary legislation to be issued by the CMB.

Squeeze-Out in Group Companies*

Att. Leyla Orak

Introduction

The Turkish Commercial Code No. 6102[1] ("TCC") enables squeeze-out and exit rights of shareholders from joint stock companies in certain circumstances.

These rights are important in ensuring a balance of interest within the company. The legislative policy aims on the one hand to audit and control competition, and to control companies in a given market, but on the other hand encourages strong companies with a strong presence in the international arena (for example facilitated mergers and acquisition processes and tax incentives)[2]. The right to squeeze-out a minority with a material dissent of opinion also serves to establish a peaceful environment within a corporation and serves to establish a strong, concentrated company.

The TCC regulates the right to squeeze-out in company mergers and within group companies. Moreover, in the event the minority requests dissolution of a company for just cause, the TCC enables the courts to rule on squeezing out the claimant minority. One of the squeeze-out rights regulated under the TCC is specific to group companies. This newsletter article is in relation to the squeeze-out right regulated under Art. 208 granted to controlling companies.

In General

Apart from the annulment of shares in the event shareholders failed to fulfill the obligation to fully pay up the share capital subscription, the

* ***Article of November 2013***

1 Official Gazette, 14 February 2011, No. 27846. TCC entered into force on 1 July 2012.

2 Assit. Prof. **Akın**, TTK m. 208 Kapsamında Anonim Şirketlerde Azlığın Ortaklıktan Çıkarılması (Squeeze-Out of Minority from Joint Stock Companies under TTK Art.. 208), Gazi Üniversitesi Hukuk Fakültesi Dergisi (Gazi University Journal of the Faculty of Law) V. XVII, Year 2013, No. 1-2, p. 2.

TCC regulates for the first time the right to squeeze-out a shareholder from a joint stock company.

TCC Art. 208 grants a squeeze-out right specific to group companies. A controlling (dominant, parent) company in a group, which directly or indirectly owns at least ninety percent of the shares and of the voting rights of its subsidiary, may squeeze-out the remaining minority if such minority violates the good faith principle, causes trouble and acts recklessly, by purchasing its shares in the company.

This squeeze-out right may be exercised only if there is just cause. The legislative justification of the article states that it serves to end the disturbing actions of shareholders who continuously block the decision making of the company for various reasons, and to ensure peace within the company.

Relevance with Full Dominance

The right of the dominant company to squeeze-out the minority is regulated among provisions governing group companies right after those related to full dominance.

Full dominance is directly or indirectly owning all shares and voting rights in a company. In principle, in a group of companies the dominant company may not exercise its dominance over its subsidiary in such a manner that results in a loss incurred by the subsidiary; otherwise, any such loss must be compensated. Nevertheless, in the event there is full dominance, the dominant company may give instructions to its subsidiary even if such instructions may result in losses[3]. The legislative justification for TCC Art. 203 emphasizes that as a precondition of this article being applied, the dominant company must own one-hundred percent of the shares and rights of its subsidiary, and the justification further states that the squeeze-out right granted under Art. 208 completes this provision.

Indeed, Art. 208 grants the dominant company, which directly or indirectly owns ninety percent of the shares and voting rights of its

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3 Pursuant to TCC Art. 203 and Art. 204, the instruction should be compatible with the determined and concrete policies of the company group and it should not manifestly exceed the payment capacity of the subsidiary, endangering its existence or resulting in the loss of material assets.

subsidiary, the right to buy out the minority shares and thereby achieve full dominance. The TCC enables companies to achieve the freedom of management granted under Art. 208[4].

Conditions

TCC Art. 208 requires the fulfillment of certain pre-conditions in order to exercise squeeze-out rights.

– Only commercial corporations may exercise squeeze-out rights.

The article does not mention dominant undertakings along with dominant companies. Therefore, a squeeze-out right is granted to a dominant *company,* which owns ninety percent of the shares and voting rights in a subsidiary.

– The dominant company should directly or indirectly hold ninety percent of the shares and voting rights in its subsidiary.

Indirectly owned shares and voting rights should be construed as shares and voting rights held by the dominant company through its subsidiaries.

– There should be a just cause for squeezing-out the minority.

TCC Art. 208 considers reasons such as the minority preventing the operation of the company, acting against the good faith principle, causing substantial difficulties and acting recklessly as just causes for squeeze-out. Examples may be given such as abusing shareholding and minority rights, and harassing company managers. Nevertheless, it is very difficult to conclude when the exercise of rights, such as initiating annulment lawsuits against corporate body decisions and resolutions, casting negative votes regarding matters necessitating unanimity, postponing negotiations on the balance sheets and similar rights are to be construed as an abuse of such rights which violate the good faith principle[5].

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4 (Assist.) Assoc. Prof. **Okutan Nilsson**, Türk Ticaret Kanunu Tasarısın Göre Şirketler Topluluğu Hukuku (Law of Group Companies Pursuant to the Draft Turkish Commercial Code), Levha Yayınları, Istanbul 2009, p. 437.

5 **Akın**, ibid, p. 14.

The Characteristics and Means of Exercise of this Right

The TCC foresees the squeeze-out right as an innovative right. The dominant company, through exercise of this right, may purchase the minority shares without obtaining the minority's consent or approval.

It is not explicit and clear from the wording of the article whether this right may be exercised through a unilateral declaration or whether it necessitates the issuance of a court order. The legislative justification of the article states that the decision is left to the courts in order to prevent any misuse; nevertheless the wording of the article is different than that of the draft commercial code of 2005, the year when its legislative justification was drafted. Nonetheless, Art. 208 refers to Art. 202/2 regarding how the purchase price should be determined, and the sell-out right regulated under Art. 202/2 may be exercised through a court order. Hence, the squeeze-out right granted under Art. 208 is an innovative lawsuit. The court should especially determine whether there is a just cause, as well as the share purchase price[6].

The purchase price of the shares is the market price, in the absence of which the value should be determined in accordance with Art. 202/2. Pursuant to Art. 202/2, in the absence of a market share or if the market share is not equitable, the shares will be purchased based on their actual value or their value should be determined in accordance with a generally accepted valuation method.

Conclusion

TCC Art. 208 regulates the right of a dominant company within a group of companies to purchase minority shares and squeeze-out the minority, in order to achieve peace within the company. As specified in the legislative justification of the article, this provision aims to establish peace within the company and enables squeezing-out a problematic minority from the company. Simultaneously, dominant companies are granted an opportunity to obtain full control over their subsidiaries through this right.

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[6] **Okutan Nilsson**, ibid. p. 442-444.

Establishment of a Limited Liability Company under Law No. 6102 [*]

Att. Naciye Yilmaz

Turkish Commercial Code No. 6102 ("TCC") brings important changes to the establishment of a limited liability company. Within the framework of this article, I will treat the novelties for the establishment of a limited liability company (or "company") as per the TCC, as well as the establishment process.

Number and Qualities of the Shareholders

Pursuant to Article 573 of the TCC, limited liability companies may be established with one or more shareholders; and pursuant to Article 574, the number of shareholders may not exceed fifty. Therefore, a sole shareholder limited liability company may be established as per the TCC.

Moreover, shareholders may be real persons or legal entities. A legal entity shareholder may at the same time be a director of the company, even within sole shareholder limited liability companies. In this case, a real person shall be appointed to represent the legal entity director. It should be emphasized that in the event a legal entity director shall be entitled to represent and bind the company, authorities related to the representation of the company should be clearly attributed to this legal entity director in the articles of association.

Minimum Capital Amount

The initial minimum capital of a limited liability company must be at least TRY 10.000, as per Article 580 of the TCC. The nominal value of the shares in the capital should be at least TRY 25 and multiples of 25.

It is also possible to contribute assets as capital in kind. Assets, including intellectual property rights, virtual environments and domains, which are marketable, transferable and free of any encumbrance, attachment or lien, may be contributed as capital in kind. However,

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* ***Article of April 2013***

services, personal labor, goodwill and undue receivables may not be contributed as capital.

Where the capital of the company shall entirely or partially be undertaken in cash, 1/4 of the nominal value of the shares to be contributed should be paid before the registration, while the remaining amount shall be paid within 24 months subsequent to the registration. In other words, in a limited liability company that shall be established with the minimum capital amount, and where this capital is undertaken in cash, at least TRY 2.500 should be deposited to the bank account to be opened in the name of the limited liability company to be established.

Trade Name

As per Article 39 of the TCC, each merchant should perform its commercial activity under a trade name and use its trade name when signing any deed related to its commercial enterprise.

The registered trade name should be written in a legible manner and placed in plain sight within its workplace. Also, the documents used in relation to the commercial enterprise should specify the trade registry number, trade name, head office, and if required its registered internet address.

Furthermore, the trade name of the company should contain the words limited liability and refer to the company's activities.

Articles of Association

Pursuant to Article 575 of the TCC, the articles of association of the company should be in written form, and notary public should approve the founders' signatures. Within this framework, the following shall be clearly stated in the articles of association:

- Company's trade name and location of its head office;
- Scope of company business with main points defined and specified;
- Nominal value of the capital, number of shares in the capital, their nominal values, privileges attached thereto, if any, and groups of shares in the capital;

- Names, surnames, titles and nationalities of the managing directors;
- Form of notices to be made by the company

Also, the TCC includes provisions that shall be binding if they are stipulated in the articles of association:

- Regulations diverging from the statutory provisions regarding restrictions on the transfer of shares;
- Granting to the shareholders or the company the right of pre-emption, right of first refusal and option to purchase regarding the shares in the capital;
- Imposing additional payment obligations, and the form and scope thereof;
- Imposing ancillary performance obligations, and the form and scope thereof;
- Provisions granting veto rights to designated shareholders or superior voting rights to certain shareholders in the event of a tie on a general assembly resolution;
- Penalty provisions that may be applied when the liabilities set forth in the TCC or in the articles of association are not fulfilled at all or in due time;
- Provisions pertaining to non-compete obligations diverging from the legal provisions;
- Provisions granting privileged rights as to the convocation to a general assembly meeting;
- Provisions diverging from the legal provisions regarding the decision making at general assembly meetings, voting rights and the calculation of voting rights;
- Provisions authorizing the assignment of company's management to a third party;
- Provisions diverging from the legal provisions regarding the disposal of balance sheet profits;
- Granting the right to withdraw and terms of its exercise, and the type and the amount of cash payment to be made in such cases;

- Provisions determining special cases regarding the dismissal of a shareholder from the company;
- Provisions governing dissolution on grounds other than those specified under the TCC

It should also be noted that the *ultra vires* principle would no longer be applied to the purpose and scope of company activities. Therefore, the company is in principle not limited to the work and operations specified in the articles of association.

Required Documentation

As per Article 586 of the TCC, the following documents must be attached to the application:

- A notarized copy of the articles of association of the company;
- Founder's declaration with its annexes; and
- The document indicating the persons authorized to represent the company together with their addresses and the appointed auditor

Further, the following information shall be provided in the application:

- Names and surnames or titles, addresses and nationalities of the shareholders;
- Shares in the capital subscribed by each shareholder and total amount that they have undertaken;
- Names and surnames or titles of each managing director, whether they are a shareholder or a third party;
- Representation method of the company

We would like to emphasize that even though the TCC provides a general framework for the required documentation, the content and form of the documents should be checked with the related trade registry[1].

[1] Within this framework, a detailed list with explanations (in Turkish) may be found on the Istanbul Chamber of Commerce's website for companies to be established in Istanbul: http://www.ito.org.tr/wps/portal/tescil-ilan-kurulus?WCM_GLOBAL_CONTEXT=limited_sirketler.

Conclusion

The establishment of a limited liability company is now easier and more efficient under the TCC since it is possible to incorporate a sole shareholder limited liability company and the necessary minimum capital has been lowered. Subsequent to the crystallization of the trade name, consensus on the articles of association of the company and determination of the capital and structure of the company, the required documentation may be prepared. These documents shall be delivered to the relevant trade registry where they will be scrutinized. If no changes or additional documentation is required, the company shall be registered and therefore established.

Managers in Limited Liability Companies under the Turkish Commercial Code No. 6102 *

Att. Revan Sunol

Introduction

The managers of limited liability companies are regulated under articles 623 to 630 of the Turkish Commercial Code No. 6102 ('TCC'), within the scope of the management and representation of the company.

With the TCC, the natural organ principal, whereby all of the shareholders of the company are per se managers, has been abandoned and the elected organ principal has been adopted. The title of Manager may be appointed with the articles of incorporation during the incorporation of the company or afterwards by way of a shareholders' general assembly resolution.

Therefore, the management and representation of the company may be left to shareholder or non-shareholder persons that have been elected. However, the management and representation of the company cannot be left entirely to third parties, at least one of the shareholders must possess the right to management and representation of the company.

Management Board

With the TCC, an execution understanding similar to that of joint stock companies has been introduced with the determination that, if there is more than one director, then they will form a board.

Pursuant to Article 624 of the TCC, if there is more than one manager of the company, one of these managers shall be elected as the president of the management board by the general assembly. The management board adopts resolutions with the vote of the majority and in the case of a deadlock, the president shall have a casting vote.

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* ***Article of January 2013***

The president manager also has other functions such as convening the general assembly, carrying out general assembly meetings and making declarations and announcements, unless agreed otherwise.

With the new regulation, it is now possible for legal entities to also be appointed as manager. This way, an association, a joint stock, a limited liability or an unlimited liability company may be appointed as manager to the company.

Pursuant to Article 632/2 of the TCC, "*where one of the managers of the company is a legal entity, such legal entity shall determine a real person to carry out its duties on its behalf*".

Therefore, although the manager title belongs to the legal entity, the real person representative appointed by the legal entity shall perform the management duties.

Duties and Authorities of the Managers

Managers are responsible and authorized for all matters that are not within the responsibility and authority of the general assembly according to the law and the articles of incorporation. Compared to the Turkish Commercial Code No. 6762, the TCC regulates the loyalty and diligence duties of managers in a more detailed manner.

Managers and other persons that are responsible for the management of the company are obliged to perform their duties with utmost diligence and to protect the interests of the company within the framework of the principal of good faith.

The managers are under the obligation of equal treatment to shareholders. Within this scope, managers must realize equal actions for shareholders under equal conditions. However, if some of the shareholders possess preferential rights on pre-emptive rights, then as there are no longer equal conditions, the managers shall not be under the obligation of equal treatment.

The non-compete obligation of managers is regulated under Article 626/2 of the TCC. Within this scope, managers and other persons that are responsible for the management of the company shall not engage in activities that are in competition with the company. This provision

is not mandatory and it may be otherwise agreed within the articles of incorporation, or an approval stating otherwise may be obtained from the shareholders.

The managers have the duty to notify and give notice of bankruptcy in the event the company loses its capital or is in debt.

In accordance with the principle of separation of functions, Article 625 of the TCC lays down the non-transferrable duties and authorities of the manager or the management board. All of the non-transferrable and inalienable duties and authorities relate to the execution and formation of the organization and the management units of the company in a general sense.

Although the law does not explicitly regulate the transfer of the management and representation authority, under Article 577/1/i, authority provisions with respect to transfer of the company management to third parties shall be binding if provided under the articles of incorporation. Under Article 625 of the TCC, "the supervision of whether the persons to whom certain aspects of company management has been assigned are acting in compliance with the laws, articles of incorporation, by-laws and instructions" is one of the non-transferrable and inalienable duties and authorities of the managers. As understood, management and representation authority may be transferred in limited liability companies.

Liability of the Managers

As per Article 644 of the TCC, Article 549 regarding the unlawfulness of documents and declarations, Article 550 regarding inaccurate declarations with respect to the capital and the knowledge of insufficiency to pay, Article 551 regarding corruption in pricing, and Article 553 regulating the liability of incorporators, board of directors, managers and liquidation officers, shall be applied to the liability of the managers of limited liability companies.

Accordingly, persons violating Articles 549 to 551 are subject to the penalties set forth under Article 562 paragraphs 8 to 10. Furthermore, managers are, along with the shareholders and the limited liability company itself as a legal entity, personally liable for public debts. This

liability is applied pursuant to the Social Security and General Health Code No, 5510, Tax Procedure Code ("TPC") and Code of Procedure of Collection of Public Receivables ("CPCPR").

Pursuant to the TPC, Article 10, in order for tax and other debts belonging to a limited liability company to be collected from the assets of managers, the tax office must have been unable to collect the tax due to the managers not performing their duties related to the tax. Pursuant to repetitive Article 35 of the CPCPR, which constitutes another provision governing the personal liability of statutory representatives for tax liability of limited liability companies, if public receivables may not be fully or partially collected, or if such receivables appear to be uncollectible from the assets of the legal entity, they shall be collected from the personal assets of the statutory representatives of the legal entity. The repetitive Article 35 does not require the fulfilment of a condition regarding whether the statutory representatives have performed their duties or not for collecting the debt from their assets.

Conclusion

As can be seen, an understanding similar to that of joint stock companies is put forth in the TCC for limited liability companies with the adoption of new concepts such as the management board and legal entity managers. However, it should be kept in mind that the managers are personally liable for the public debts of the company.

Exit Right and Squeeze-Out from Limited Liability Companies*

Att. Suleyman Sevinc

Introduction

There are mainly three methods for exiting a limited liability company: transfer of shares, an exit right and squeeze-out. Unless the articles of association forbid the transfer of shares, the shareholders of a limited liability company may exit the company by transferring their shares. Nonetheless, exiting the partnership on the basis of an exit right and squeeze-out are subject to regulations different from those governing the exit of a shareholder from the company through share transfer.

In this article, the provisions relating to exit and squeeze-out in limited liability companies, as regulated in Articles 638 through 640 of the Turkish Commercial Code No. 6102 ("TCC"), will be assessed[1].

The Right to Exit a Limited Liability Company

A shareholder has the right to exit a limited liability company mainly in two ways: where the company articles of association provide for an exit right and where there is a just cause. Furthermore, a shareholder, in the face of the aforementioned, may accede to another shareholder's request to exit.

Exit Right due to a Cause Provided by the Articles of Association

Pursuant to Art. 638/1 of the TCC, the right to exit a limited liability company may be regulated by the articles of association. The execution of an exit right may be held subject to certain conditions or terms. However, a provision granting exit rights to only a certain group of shareholders would not be permitted, as it would violate the equal treatment principle as put forth in Art. 357 of the TCC.

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* ***Article of July 2013***

[1] Art. 636/3 of the TCC regulating the exit of a shareholder that requested the dissolution of the limited liability company on the basis of just cause is out of scope of this article.

When the terms and conditions of an exit right arising from the articles of association are met (or whenever the shareholder wishes - where no such conditions are stipulated in the articles of association), the shareholder declares to the company his will to exit. This declaration is effective upon reception by the company and in general, is not bound by any form requirement; although, the articles of association may also stipulate form requirements.

An Exit Right due to a Just Cause

The right to exit in the presence of a just cause is stipulated in Art. 638/2 of the TCC. The invocation of this right does not rely upon the existence of a provision in the company articles of association.

In general, a "just cause" is a situation that renders the relationship of partnership unbearable. This may originate from the activity of the partnership or the personal relationships between the shareholders. Whether the shareholder exercising the right is negligent in the occurrence of the situation does not affect his ability to exercise the exit right.

Although the TCC does not define "just cause" per se, certain situations have been cited as just cause. For instance, the "disloyalty of a shareholder at management or accounting" or "failure of a shareholder to perform the essential duties and obligations" and situations similar to these qualify as just causes in Art. 245 of the TCC. These cases are of exemplary nature; the presence of a just cause will be determined separately in each case, taking into account the facts of the case, the particularities of the shareholder and the structure of the partnership.

Art. 638/2 stipulates that an exit right may be enforced as a request before the court. However, Turkish doctrine indicates that the shareholder may simply declare his will to exit to the company prior to a request before the court. The shareholder shall take this request before the court, if and when the company denies it.

The second phrase of Article 638/2 of the TCC was not a part of the former Turkish Commercial Code No. 6762, and it has been integrated into the TCC from Swiss law. According to this phrase, the court may decide to either freeze all or some of the rights and obligations of the

claimant shareholder arising from the partnership or take the necessary precautions to secure them.

Accession to Exit

The right to accede to exit stipulated in Art. 639 of the TCC ensures the respect of the principle of equal treatment. According to this provision, when a shareholder requests to exit, before the court or directly from the company, the managers of the company shall notify the fact to other shareholders. Any of the shareholders of the company who may individually rely on one of the causes explained above may demand to accede to the exit request within a month.

The TCC does not address whether or not the cause upon which the acceding shareholder will rely has to be the same as the cause expressed by the prior request of the first shareholder, or if the acceding shareholder may rely on a different cause or causes. The legislative justification of the TCC indicates that discussions and responses on this topic are purposefully reserved for the jurisprudence and the doctrine. However, the court must rule on the validity of each shareholder's cause separately.

Squeeze-Out from a Limited Liability Company

There are two methods of squeezing-out a shareholder from a limited liability company. The first of these is squeeze-out via a general assembly resolution under circumstances stipulated in the articles of association; the other squeeze-out via a court decision on the basis of a just cause.

Squeeze-Out via General Assembly Resolution

Pursuant to Art. 640 of the TCC, shareholders may stipulate in the articles of association the causes for squeeze-out. However, these causes must be objectively acceptable and in accordance with the equal treatment principle. Upon the occurrence of any of these causes, the concerned shareholder may be squeezed-out from the company via a general assembly resolution. As per Art. 621 of the TCC, the quorum for this resolution is two thirds of the votes and a majority of the capital possessing the right to vote.

Within 3 months following the notification of the general assembly resolution through the public notary, the squeezed-out shareholder may request the annulment of this decision before the court. Upon this request, the Court analyzes mainly if the stipulated cause has occurred or not; it cannot examine whether the cause is important or not. Since the cause is presumed to be important due to its presence in the articles of association, the court abstains from a separate analysis on its justness. The validity of this cause, on the other hand, is analyzed in terms of violation of the protection of personality and public morality. If the cause does not derogate from the protection of personality and public morality, and if it has occurred in the case at hand, the request for annulment of the decision will be rejected.

Squeeze-Out via Court Decision

Similar to the exit right in the presence of a just cause, the right to squeeze-out a shareholder with a just cause does not require the existence of a specific provision in the articles of association. Art. 640/3 of the TCC stipulates that the company may invoke this right in the form of a request before the court. The company files suit against the shareholder and where the court opines that just cause exists, it decides in favor of the squeeze-out of the shareholder.

Conclusion

In the presence of a just cause, the right to exit a limited liability company or to squeeze-out a shareholder therefrom may always be invoked. However, as explained above, relying on causes stipulated in the articles of association provides a fast solution through a general assembly resolution, especially in squeeze-out cases. Furthermore, such provisions may be freely written into the articles of association, so long as they do not derogate from the equal treatment principle.

General Communiqué on Electronic Books *

Att. Ecem Susoy

Introduction

In order to keep up with the technological and economic developments, responsibility of the taxpayers for keeping commercial books has been changed significantly. Then the facility of keeping commercial books in the electronic environment has been provided. Therefore, the need to formulate regulations in this area have arisen.

The General Communiqué on Electronic Books (Serial No:1), which sets forth the principles and procedures for keeping electronic books was published in the Official Gazette dated 13.12.2011 and numbered 28141. The communiqué was amended by the General Communiqué on Electronic Books (Serial No: 2) on the Amendment to the General Communiqué on Electronic Books (Serial No:1) ("General Communiqué on Electronic Books (Serial No: 2)") which was published in the Official Gazette dated 24.12.2013 and numbered 28861.

Under this newsletter article, the electronic books in practice and amendments related to the General Communiqué on Electronic Books (Serial No: 2) are examined.

Application for the Implementation of Electronic Books

As per the relevant articles of the Tax Procedure Code No. 213 and Turkish Commercial Code No. 6102, electronic books include electronic records carrying necessary information in the commercial books which must be kept obligatorily.

The real and legal person taxpayers who request to make use of electronic books should fulfill some conditions. These conditions were amended by the General Communiqué on Electronic Books (Serial No: 2).

Pursuant to such conditions, the real person taxpayers should obtain a qualified electronic certificate produced within the framework of the

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* ***Article of December 2013***

Electronic Signature Law or a financial seal within the framework of the General Communiqué on the Tax Procedural Code Serial No. 397. Legal person taxpayers should obtain the above mentioned financial seal.

Before the above stated amendment, only legal person taxpayers could obtain the financial seal, but after the amendment real person taxpayers can also obtain the financial seal and approve the electronic books with it.

Also, the software used in keeping, recording and submission of electronic books should obtain compliance approval.

When applying to implement the use of electronic books, the taxpayers who meet the above stated conditions should apply in accordance with the application guide published on the official website of the electronic books portal[1].

Making Electronic Books

In order to make electronic books, the forms and standards published on the official website of the electronic books portal[2] should be followed. Electronic books can be made and kept monthly in compliance with such forms and standards.

In line with the amendment brought with Article 3 of the General Communiqué on Electronic Books (Serial No: 2), electronic books should be signed with a secured electronic signature or approved with financial seal by the real persons and approved with financial seal by the legal persons up to the last day of the third month following the related month. Before the amendment, electronic books were signed with a secured electronic signature or approved with financial seal up to the last day of the month following the related month.

After the above mentioned steps followed by real and legal persons, electronic files certified by the Revenue Adminstration must be received for the electronic books and these electronic files must be preserved until they are submitted.

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1 Please see. www.edefter.gov.tr (Date of access: 30.12.2013).

2 Please see. fn. 1.

Preservation and Submission of Electronic Books

As per Article 4 of the General Communiqué on Electronic Books (Serial No: 1), electronic books must be preserved to be submitted with the electronic files when it is required.

In order to prevent the occurance of some hazards such as breakdown, damage and deletion in records, the taxpayers keeping electronic books are required to take certain precautions. In case of a hazardous or extraordinary situation, the Revenue Administration must be informed within fifteen days as per the General Communiqué on Electronic Books (Serial No: 1).

Conclusion

The rules and regulations for keeping electronic books have been made clearer and less burdensome through the General Communiqué on Electronic Books (Serial No: 2) for real and legal person taxpayers.

COMPETITION LAW

The Exchange of Information as Addressed in Competition Board Decisions*

Prof. Dr. H. Ercument Erdem

The exchange of information between competitors is not regulated under Turkish law. This subject was recently handled within the Guidelines Project on the Application of Articles 4 and 5 of the Act No. 4054 on the Protection of Competition in Horizontal Cooperation Agreements ("Guidelines")[1]. However, the Guidelines have not been published yet.

In the absence of a legal framework, Competition Board ("Board") decisions should be taken into account concerning information exchange, since the Board has given multiple decisions regarding information exchange and has thus opined on the principles of information exchange for more than ten years.

Parties to the Information Exchange

It can be observed that the parties to information exchange differ according to the horizontal or vertical relationship between the parties.

Horizontal Relationships. Although the Board does not expressly state that information exchange among competitors should be taken into account, this notion can be easily observed in its decisions; for since its establishment, the Board has taken special care to examine cases where there is an exchange of information between competitors. For instance, the Board, in its decision dated 08.08.2002 and numbered 02-47/586-

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* ***Article of April 2013***

1 The Guidelines was submitted to public opinion at the end of 2012. For further information, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=sLwJqE8Qet01Sk2Es7ie3Q==-H7deC+LxBI8= (accessed on: 21.03.2013).

M regarding the Association of Fertilizer Producers[2], decided that the exchange of statistical information between competitors should cease since such an exchange might negatively influence the competition. In its decision dated 19.12.2005 and numbered 05-85/1182-336[3], the Board pointed to information exchange between competitors by using the phrase *"between undertakings in the same market"* . In one

of its more recent decisions dated 18.04.2011 and numbered 11-24/464-139[4], the Board did not take into consideration correspondence between the parties, as it was exchanged between Borusan and its retailer (Kosifler) – not competitors.

Board decisions on information exchange among competitors are also examined by the Council of State within the scope of annulment suits issued against Board decisions. The 13th Chamber of the Council of State, in its decision dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965[5], considered (after analyzing the effects of such information exchange in the market) information exchanged between competitors as against competition since it might negatively influence the competition.

Vertical Relations. Where there is a vertical relationship between the parties, they are in principle not competitors since they are not active in the same market. Nevertheless, even in such a situation, the Board analyses information exchanged between the parties considering that such an exchange may distort competition in the market where the receiving party is active. The Board, in its decision dated 03.05.2012 and numbered 12-24/675-195[6], analyzed whether information exchanged

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2 For information about the decision, see **PISMAF, Samil**, İktisadî ve Hukukî Açıdan Teşebbüsler Arası Bilgi Paylaşımı, Rekabet Kurumu Uzmanlık Tezleri Serisi, No. 280, Ankara 2012, p. 79.

3 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.3013).

4 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

5 To reach de decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=c30JfvlYGh59eUsyDmy7wg==-H7deC+LxBI8=&nm=251 (accessed on: 21.03.2013).

6 To reach the decision, see the following link:

between the supplier and its retailer would lead to coordination between retailers and decided that the information exchanged did not create a distortion of competition since the information exchanged between the parties (the supplier and the retailer) would not lead to any coordination between retailers. This decision is important with regards to information exchanged between suppliers and retailers.

Form of the Information Exchanged

The information exchange between parties may be direct, indirect and regular.

Direct Information Exchange. Direct information exchange is the easiest form of information exchange that may be detected by the Board. Therefore, there are a limited number of Board decisions on direct information exchange between competitors. For example, the Board, in its decision dated 16.06.2009 and numbered 09-28/600-141[7], considered the direct exchange of detailed domestic and foreign quantities of sale, monthly import quantities and similar information between Erdemir and Borçelik as anticompetitive.

Indirect Information Exchange. Indirect information exchange is the most common way to exchange information. Indirect information may be exchanged either through statistical or general information or through associations of undertakings.

- The Board prohibits every kind of statistical or general information exchange between competitors that may inform them of each other's future behavior. The Board first approached this subject in its decision dated 08.08.2002 and numbered 02-47/586-M[8], where it considered anticompetitive any kind of statistical or general information exchange which would prevent undertakings from determining their future behavior *"on the basis of factors*

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http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

7 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

8 For detailed information on the decision, see footnote 2.

other than individual preferences" . There are multiple decisions of the Board on this subject[9].

- The Board also examines information exchanged through associations of undertakings and prohibits information exchanges that may influence undertakings' future decisions. Within this scope, the Board, in its decision dated 08.02.2002 and numbered 02-07/57-26[10], decided that information was exchanged between parties through meetings held in the association of undertakings and through monthly statistical bulletins. The Board also emphasized in its decision dated 25.11.2009 and numbered 09-57/1393-362[11] that the association of undertakings facilitated the infringement of competition by sharing its work on the calculation of the total production amount of the association members with undertakings.

Regular Information Exchange. It can be observed, in light of Board decisions, that the Board considers regular information exchange as anticompetitive. The Board, in its decision dated 20.09.2012 and numbered 12-44/1350-455[12], considered skeptical, from the point of view of competition law, the exchange of information consisting of *"monthly sales data"* (considering that information was exchanged at regular short intervals). There are a lot of decisions where the Board attentively considers monthly information exchanges[13]. Furthermore, the Board also examines whether information exchanges between parties continued for a prolonged period. The Board, in its decision dated 04.07.2007 and

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9 For instance, see the Board decision dated 04.07.2012 and numbered 12-36/1040-328, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8= &nm=90 (accessed on: 21.03.2013).

10 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

11 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

12 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

13 For instance, see Board decision dated 04.07.2012 and numbered 12-36/10040-328. For information about the decision, see footnote 10.

numbered 07-56/672-209[14], considered information exchanged *"over a prolonged period"* as anticompetitive. Nevertheless, the duration of the information exchange is not stated in the decision, therefore, the Board's interpretation on the duration of "prolonged period" is not clarified.

Importance of the Information Exchanged

As has been frequently stated in Board decisions[15], information exchange does not constitute *per se* a competition violation since information exchange does not always influence competition in a negative way; it may even have positive effects on competition. Indeed, it is accepted that information exchange has positive effects on competition if it permits the parties to better organize their future investments.

However, information exchange may be anticompetitive from the point of view of the market structure and the nature of the information exchanged.

Influence of the Market Structure. It may be observed from Board decisions that market structure can have a significant influence on information exchange. The Board takes a flexible approach to information exchange where the market is transparent, since in such a case exchanged information may also be obtained from the market. For instance, the Board, in its decision dated 15.04.2004 and numbered 04-26/287-65, specified that there was low probability that the information exchanged between the parties caused coordination since the products are uniform and there are a lot of actors in the market[16].

Contrary to the aforementioned, the Board has an inflexible approach to information exchange where the market is not transparent, which means that the information exchanged between parties may not be obtained from

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[14] To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

[15] For instance, see the Board decision dated 19.12.2005 and numbered 05-85/1182-336, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

[16] For information about the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

the market. For instance, the Board, in its decision dated 16.06.2009 and numbered 09-28/600-141, considered the information exchange between parties anticompetitive since there were a limited number of actors in the market, the concentration level was high in the market and there were entry barriers to the market[17].

However, it should be stated that there is no uniformity in Board decisions regarding market structure:

- The decisions of the Board concerning market structure are inconsistent. The Board, in its decision dated 28.12.2006 and numbered 06-95/1202-365, decided that information exchange between parties did not constitute a violation of competition by reason of the nature of the aviation fuel market[18]. On the other hand, the Board, in its decision dated 04.07.2007 and numbered 07-56/672-209, stated that *"it may be concluded to be a violation of competition if the coordination and communication between the parties is proved without analyzing the structure of the market"* [19].
- The Board has also given contradictory decisions concerning the same market (the same sector). For instance, the Board, in its decision dated 09.09.2009 and numbered 09-41/998-255, decided that the exchange of updated information between the parties did not result in coordination, considering the easy entry to the automotive market[20]. On the other hand, the Board, in another of its decisions related to the same sector, emphasized that the exchange of prospective information between the parties restricted competition, without taking into account the nature of the market[21].

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17 For information about the decision, see footnote 7.

18 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

19 For information about the decision, see footnote 15.

20 To reach the decision, see the following link: http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

21 To reach the decision, see **PISMAF**, p. 83, fn. 246.

Nature of the Information Exchanged. According to Board decisions, information exchanges conducted by undertakings to help them make decisions *"on the basis of factors other than individual preferences* [22] or which prevent undertakings *"from taking individual economic decisions"* [23] (strategic information exchange) are prohibited. Additionally, in some of its decisions the Board did not consider the exchange of strategic information between the parties a violation of competition [24].

When determining the existence of a strategic information exchange, the Board considers both the content of the information and the time period to which the information is related.

- *Content of the Exchanged Information.* Even though the Board does not define strategic information, it gives some indication as to what can be deemed strategic information. The following information is accepted as strategic information:
  - o Information related to prices, capacity utilizations, production quantities and customer based sales quantities[25];
  - o Information related to detailed sales prices and quantities of brands as per provinces, regions and sub-segments as well as information related to market shares[26];
  - o Information related to monthly production numbers, payments made for raw materials and sub-industries as well as information related to paid taxes and wages on the basis of each sub-model[27];

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22 Letter of the Competition Authority to the Turkish Cement Manufacturer's' Association dated 15.05.1998. For information about the letter, see footnote 9.

23 Board decision dated 09.09.2009 and numbered 09–41/998–255. For information about the decision, see footnote 18.

24 For detailed information, see Board decision dated 24.06.2009 and numbered 09-30/637-150. The existence of exchange of strategic information is stated in the dissenting opinion, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (access on: 21.03.2013).

25 Board decision dated 04.07.2007 and numbered 07-56/672-209. For information about the decision, see footnote 15.

26 Board decision dated 15.04.2004 and numbered 04-26/287-65. For information about the decision, see footnote 17.

27 Board decision dated 20.09.2012 and numbered 12-44/1350-455. For information about the decision, see footnote 13.

- o Stock data and sales data[28];
- o Information related to any kind of parameter related to price conditions and supply control[29];
- o Consolidated or statistical information are not considered strategic information when the following conditions are fulfilled[30]:

- Tables showing data related to quantities (capacity, production, sales, exports, imports) and capacity utilization should be prepared in a manner that prevents their disclosure on the basis of an undertaking or group of undertakings which form an economic unit, and only total countrywide information should be shared;
- In addition to the distributed statistics, no comments, analyses or advice which may affect the competitive behavior of an undertaking should be disclosed;
- Estimations related to future prices, productions and capacity utilization should not be shared;
- It should be ensured that officials responsible in associations of undertakings for the collection and tabling of data conceal sensitive information from members of the association and third parties; and
- Tables showing monthly data should not be published before at least two months following the month to which they are related.
- *Time Period to which Information Exchange is related.* The Board, in order to determine whether an information exchange is anticompetitive, also examines the time period to which this information is related. Nevertheless, Board decisions on that subject are not yet uniform. Although in some of its decisions the Board

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28 Board decision dated 18.04.2011 and numbered 11-24/464-139. For information about the decision, see footnote 4.

29 Board decision dated 20.12.2006 and numbered 06-92/1172-350, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

30 Board decision dated 08.08.2002 and numbered 02-47/586-M. For information about the decision, see footnote 2.

holds that prospective information exchange is prohibited[31], it states in other decisions that retroactive information exchange may also create future coordination between competitor undertakings within a dynamic process[32].

Unilateral Information Exchange

The Board, in its recent decisions, to determine whether there is a unilateral exchange of information, examines the behavior of the undertaking receiving the information and decides that competition is violated where the undertaking receiving the information does not to the information. Further, the Board, where the information exchanged is in written form, such as an electronic mail, looks for an immediate answer from the objecting counterpart. The same principle is also applied to verbal information exchanges such as in meetings. In such cases, the Board examines whether the participants have directly objected to the information exchanged (and recorded their opposition in the minutes of the meeting) [33].

The Presumption of Information Exchange

As mentioned above, the 13th Chamber of the Council of State, in its recent decision dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965, decided that as long as it is not established that the exchange of information between parties will not influence their future decisions, it will be assumed that said exchange will result in coordination between

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[31] For instance, Board decision dated 08.08.2002 and numbered 02-47/586-M and Board decision numbered 09-41/998-M. For information about the decision, see **PISMAF,** p. 79 and 83. Additionally, see decision of the 13th Chamber of the Council of State dated 08.05.2012 and numbered E. 2008/9080, K. 2012/965. For information about the decision, see footnote 5.

[32] For instance, see Board decision dated 20.09.2007 and numbered 07-76/907-345, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

[33] For instance, see Board decision dated 11.04.2007 and numbered 07-31/325-120, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013) or Board decision dated 18.04.2011 and numbered 11-24/464-139, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 21.03.2013).

them. As per this decision, it may be stated that the Council of State has established a rule of presumption, which foresees that information exchanges will influence parties' future behavior[34]. Nevertheless, as also mentioned above, in cases where the market is transparent, and that information may be easily obtained, and where the information exchanged is related to general and statistical information, the decision of the Council of State should be made with caution. Likewise, there should be a flexible approach on the exchange of information in export transactions, which do not affect any market in Turkey[35].

Conclusion

The principle criterion considered by the Board is whether an information exchange will limit undertakings' capability *"to take individual economic decisions"*. However, the Board has not established uniform and objective conditions which facilitate the determination as to whether this criterion is met. The Board, in some of its decisions:

- Has prohibited the retroactive exchange of information;
- Has not taken into account the market structure; and
- Has brought a rule of presumption on information exchange (Council of State).

Within the scope of the aforementioned Board decisions, it can be observed that information exchanged is *de facto* restricted. However, as also mentioned above, information exchanged may sometimes have positive effects on competition. With this in mind, uniform and objective conditions should be established which facilitate a determination as to whether the criterion established by the Board is met. Hence, it is anticipated that the Guidelines, which have not yet been published, will shed some light on these subjects and be a proper guide for undertakings.

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[34] For information about the decision, see footnote 5.

[35] See Board decision dated 06.10.2005 and numbered 05-65/928-250, http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxB18=&nm=90 (accessed on: 27.03.2013).

Impact of Competition Law on Acquisitions through Privatization*

Prof. Dr. H. Ercument Erdem

Privatization may be defined as "*any process that decreases the public sector share in economic activities*"[1]. Sententiously, privatization means the transfer of a public undertaking to the private sector. In such a case, the competitive environment in the relevant market may be affected, since public undertakings buttressed by the strength of government may create monopolies, and thus may significantly lessen competition by creating a dominant position in the relevant market.

In order to ensure competition in the relevant market, competition authorities regulate acquisitions through privatization. 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] ("Communiqué No. 1998/4") was the first regulation concerning privatization sector under Turkish law. This Communiqué was abrogated after remaining in force for fifteen years by the entry into force of 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 2013/2[3] ("Communiqué No. 2013/2").

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* ***Article of June 2013***

1 See. **TEMEL, Esma**, Özelleştirme Uygulamaları ve Rekabet Politikası, Rekabet Kurumu Uzmanlık Tezleri Serisi, No. 300, Ankara 2012, p. 5.

2 Communiqué No. 1998/4 entered into force through publication in the Official Gazette dated 12.09.1998 and numbered 23461. For the Communiqué please see: http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Communiqu%C3%A9/teblig66.pdf (accessed on: 03.06.2013).

3 Communiqué No. 2013/2 entered into force through publication in the Official Gazette dated 18 April 2013 and numbered 28622. For the Communiqué please see: http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fCommuniqu%C3%A9%2fTebli%C4%9F+No+2013.2.pdf (accessed on: 03.06.2013).

Legal Ground

A specific provision on the protection of competition was included under Article 16 of Law No. 4046 on the Regulation of Privatization Applications ("Law No. 4046")[4] while Communiqué No. 1998/4 was still in force. Due to this provision, whether or not there was any legal ground for the application of competition law to privatization through acquisition was debated. Some academics argued on the basis of the last sentence of Article 7 of the Act on the Protection of Competition No. 4054 ("Competition Act") that it enables the issuance of special communiqués[5]. It states that: "*The Board shall declare, through communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order for them to become legally valid*" . As for other academics, they argued that there was not any legal ground in the Competition Act to issue such special communiqués[6].

There is no doubt that the Competition Authority has the power to issue special communiqués since it has been established with a view to ensure competition in the relevant market and that Article 7 of the Competition Act provides legal ground for such power. Communiqué No. 1998/4, which was one of the first special communiqués, was prepared within this purpose. Furthermore, in 2005, Article 16 of Law No. 4046 was also abrogated[7].

Why a New Communiqué?

The fundamental purpose of Communiqué No. 2013/2 is to replace the market share and turnover threshold system established under Communiqué No. 1998/4 by just the turnover threshold system.

Such amendment was made in order to comply with European Union Regulations and harmonize Turkish legislation.

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4 See. Art. 2(d) and 16 of the Act No. 4046.

5 See. **ERDEM, Ercüment**: "Quelques réflexions sur la Loi de la Privatisation", Prof. Dr. Ali Bozer'e Armağan, Ankara 1998, p. 708.

6 See. **ASLAN, Yılmaz**, Rekabet Hukuku, Genişletilmiş 4. Bası, Bursa 2007, p. 606.

7 The related article has been abrogated pursuant to Art. 11 of the Act dated 3.7.2005 and No. 5398 which was published in the Official Gazette dated 21.7.2005 and numbered 25882.

Compliance with EU Regulations and Harmonization. The Communiqué on Mergers and Acquisitions No. 2010/4[8] ("Communiqué No. 2010/4"), which requires the Permission of the Competition Board, entered into force on 01.01.2011 and complies with European Union regulations by abandoning the market share and turnover threshold system and adopting the turnover threshold system. Such compliance should also be ensured in the privatization area, thus Communiqué No. 1998/4 based on both turnover and a market share threshold was amended.

Why a Special Communiqué?

Acquisitions regulated under Communiqué No. 2013/2 are related to the transfer of public undertakings, or some of their parts, to a private undertaking. Public undertakings, by comparison to private undertakings, form legal and/or natural monopolies and have some privileges[9]. In light of the foregoing, acquisitions through privatization significantly differ from general mergers and acquisitions.

In order to make up the differences, Communiqué No. 2013/2, unlike Communiqué No. 2010/4, foresees different thresholds and a two-stage notification system, as explained in detail below.

Evaluation of the New Communiqué

The most important issues covered in Communiqué No. 2013/2 are related to the scope of privatization and the notification procedure.

Scope of the Communiqué

Acquisition of all or part of a company's interests or other rights and instruments of an undertaking in such a way as to change control over the undertaking or to affect its decision-making bodies, or full or partial acquisition via privatization of units intended for the production of goods and services fall within the scope of Communiqué No. 2013/2.

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8 To consult Communiqué No. 2010/4, see the following link: http://www.rekabet.gov.tr/File/?path=ROOT%2FDocuments%2FCommuniqu%25c3%25a9%2F2010_4ing.pdf (accessed on: 03.06.2013).

9 See. **TEMEL,** p. 46.

However, the below-stated situations are excluded from the scope of Communiqué No. 2013/2:

- Transfers to public institutions and organizations, including local governments, and to education institutions with the nature of public entities,
- The acquisition of immovable property that is not intended for the production of goods and services,
- Sales in foreign capital markets,
- Public offerings,
- Block sales which include delayed public offerings with a duration of no more than 3 years, without prejudice to the provisions of the capital markets legislation,
- Acquisition by employees, sales in stock markets by normal orders as well as by special orders which do not lead to a change in the control of the undertaking,
- Sales to securities investment funds and/or securities investment trusts, and
- The acquisition of shares which does not lead to a change in the control of the undertaking.

Apart from "*Transfers to education institutions with the nature of public entities*" and "*share transfers which do not lead to a change in the control of the undertaking*", which are excluded from the scope of Communiqué No. 2013/2, the scope of Communiqué No. 1998/4 was exactly preserved under Communiqué No. 2013/2.

The evaluation of the above-stated difference shows that such difference was not legally "necessary". In fact:

- Where there is a share transfer to an educational institution with the nature of a public entity, if the transferring company is not a private entity, then it cannot be stated that "privatization" has occurred;
- First paragraph of Article 2 of Communiqué No. 2013/2 states that transactions "*that cause a change of control*" over an undertaking

will be considered within the scope of this Communiqué. Thus, it was not necessary to repeat that the acquisition of shares that does not lead to a change in the control of the undertaking will not be considered within the scope of the Communiqué.

Notification Procedure under the Communiqué

Communiqué No. 2013/2 is based on a turnover threshold system and foresees a two-stage notification system:

The Turnover Threshold System. As per Communiqué No. 2013/2, privatizations, which are subject to notification, are determined within the turnover threshold system. Within this scope, in the calculation of the turnover, sales by the undertaking or unit intended for production of goods or services to be privatized to public institutions and organizations including local governments made on the basis of a legislative provision shall not be taken into account.

Pre-notification. In acquisitions through privatizations, where the turnover of the undertaking or unit intended for production of goods or services to be privatized exceeds 30 million Turkish liras, a pre-notification with the Competition Authority shall be filed and the opinion of the Competition Board shall be received before the public announcement of tender specifications. The opinion of the Competition Board shall be valid for three years, unless otherwise stipulated.

The three year validity period of the Competition Board's opinion is an appropriate provision newly integrated by Communiqué No. 2013/2 since such provision:

- Foresees the average changing period of the conditions in the market and therefore prevents the contradiction of the opinion of the Competition Board within the current market structure; and
- Prevents the Competition Authority from incurring a heavy and unnecessary work-load due to re-applications in circumstances where transactions are not concluded immediately.

The Competition Board shall prepare its opinion within forty business days following the entry of the pre-notification into its records. The distribution of the forty business days is as follows:

- The opinion of the relevant professional department of the Competition Board shall be prepared within twenty-four business days.
- In addition to the opinion stated above, the Competition Board shall receive the opinion of the Presidency of Privatization Administration within six business days.
- The Competition Board shall prepare its opinion in the remaining 10 business days.

These periods may be extended by half at most, with a Competition Board decision for the 24 and 10 business day periods, and upon the discretion of the Privatization Administration for the 6 business day period, depending on the characteristics of the undertaking or unit intended for production of goods or services to be privatized, or of the relevant product market.

Form of Pre-notification. Pursuant to Communiqué No. 2013/2, the pre-notification shall comprise the contact information of the unit to be privatized, its area of operations and any available information and documents concerning this area of operations.

Such conditions were not delineated under Communiqué No. 1998/4; thus, pre-notifications were made with the notification form under the Communiqué on Mergers and Acquisitions which Require the Approval of the Competition Board No. 1997/1[10] ("Communiqué No. 1997/1). This is because Communiqué No. 1998/4 stipulated that the provisions of the Communiqué No. 1997/1 that were not in contradiction shall be applicable for the issues that it did not regulate.

Communiqué No. 2013/2 contains a similar provision. However, contrary to Communiqué No. 1998/4, Communiqué No. 2013/2 also defines the content of the pre-notification. The existence of these provisions cause hesitation concrning the use of the notification form under Communiqué No. 2010/4.

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[10] The Communiqué no 1997/1 has been abolished with the entry into force of Communiqué No. 2010/4.

We think that the notification form under Communiqué No. 2010/4 will continue being used since the explanations stated under Communiqué No. 2013/2 regarding the content of the pre-notification are general and limited. Otherwise, there would be a long period of information exchange between the Competition Authority and the notifying persons, which may cause unnecessary work-loads and loss of time. Therefore, direct reference to the notification form under Communiqué No. 2010/4 would be more appropriate.

Final Notification. In order for acquisitions through privatization requiring pre-notification to the Competition Authority to become legally valid, it is mandatory to get authorization from the Competition Board.

Authorization applications to the Competition Board (final notification) are made by the Presidency of the Privatization Administration after the conclusion of the tender process, but before the decision on the final acquisition transaction. This application shall be prepared in the form of individual files for each bidder to be included in the High Board of Privatization draft decision to be submitted to the High Board of Privatization by the Privatization Administration.

Conclusion

The most fundamental change in Communiqué No. 2013/2 is the abandonment of the market share and turnover threshold system and the preservation solely of the turnover threshold system in compliance with Communiqué No. 2010/4. This fundamental change is well directed, both in terms of harmony with the European Union and uniformity in the domestic legislation.

We believe that most of the changes made in Communiqué No. 2013/2 are not legally "necessary". For instance, "*transfers to education institutions with the nature of public entities*" are not within the scope of the Communiqué. However, in any case, such transfers do not qualify as privatization.

In addition to this, since the content of the pre-notification is not clearly regulated under Communiqué No. 2013/2, it would be more incisive to refer to the notification form under Communiqué No. 2010/4.

Abuse of Dominant Position through Predatory Pricing*

Prof. Dr. H. Ercument Erdem

Distortion of competition in the relevant market through predatory pricing is a common form of competition infringement. In practice, an undertaking in a dominant position aims to push its rivals out of the market by obstructing their competitiveness with low prices, and prevents potential rivals from entering the market. After rivals are pushed out of the market, the undertaking compensates its losses by increasing its prices above the competitive price limit.

In the light of the foregoing, this article will review predatory pricing as a common form of infringement of competition.

Legal Basis

Article 6, entitled "Abuse of Dominant Position", of the Act on the Protection of Competition No. 4054 ("Competition Act") states a *non numerous clausus* list of abuses of dominant position.

The Competition Board ("Board") accepts predatory pricing as an abuse of dominant position, despite not being listed in this above-mentioned article. For instance, the Board accepted in its decision dated 23.11.2000 and numbered 00-46/488-266[1] ("Microsoft Decision"), that predatory pricing is an abuse of dominant position after asserting that *"Article 6 of Act No. 4054 prohibits predatory pricing by undertakings that have a dominant position."*

In a recent decision of the Board, it is also expressly stated that predatory pricing may be considered an abuse of dominant position[2].

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* ***Article of September 2013***

1 See the following link to reach the Board's decision: http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar312.pdf (accesson on: 03.10.2013).

2 For instance, see Board's decision dated 20.06.2013 and numbered 13-39/496-218, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-39-496-218.pdf (accessed on: 03.10.2013) or Board's decision dated 18.07.2013 and numbered 13-46/589-259, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-46-589-259.pdf (accessed on: 03.10.2013).

On 18.07.2013, the Draft Guidelines on the Evaluation of Exclusionist Misconduct of Dominant Undertakings[3] ("Draft Guidelines") were published on the official website of the Competition Authority ("Authority") and submitted to public opinion. In these Draft Guidelines, predatory pricing is defined as an abuse of the dominant position and its conditions are explained.

Definition

Under the decisions of the Board, predatory pricing is generally defined as the pushing out of rivals from the market by taking a dominant position in the market with an aggressive price decrease policy followed by a mid or long term price increase policy[4].

The Board asserts in some decisions, by referring to the potential competition, that predatory pricing results also in the pushing out of *"existing or potential rivals"* from the related market[5].

Evidently, potential competition shall always be taken into account. As a matter of fact, concentration analysis is generally done in two steps consisting of the positions of both existing and potential rivals[6].

The definition of predatory pricing set forth in the Draft Guidelines includes all elements previously stated in the Board's decisions. Thus, a full and correct definition of such competition infringement is given in the Draft Guidelines:

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3 Opinions regarding the Draft Guidelines should have been submitted until 08.09.2013. See the following link to reach the Draft Guidelines: http://www.rekabet.gov.tr/default.aspx?nsw=aVa3WSjRz7DBxI8WRvMWVA==-H7deC+LxBI8= (accessed on: 03.10.2013).

4 For such definition, see for instance the Board's decision dated 09.05.2013 and numbered 13-27/371-172, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-27-371-172.pdf (accessed on: 03.10.2013).

5 For such definition, see for instance Board's decision dated 09.05.2013 and numbered 13-27/371-172, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-27-371-172.pdf (accessed on: 03.10.2013).

6 See for instance Board's decision dated 06.02.2013 and numbered 13-09/127-57, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-09-127-57.pdf (accessed on: 03.10.2013).

"Predatory pricing is an anti-competitive pricing strategy by which a dominant undertaking engages in predatory conduct by deliberately incurring losses (sacrifice) in the short term, so as to foreclose or discipline or prevent by other means the competitiveness of one or more if its actual or potential competitors with a view to strengthening or maintaining its market power."

Historical Development

The Board gave its first decisions on predatory pricing in the 1990s. The Board, in those decisions, gave a general decision on this practice and stated that it should be considered under Article 6 of the Competition Act[7].

Then, the Board stated step by step in its decisions the required conditions in order for a company's behavior to be considered as predatory pricing. For instance, in the Board's decision ("Aycell Decision"), dated 14.08.2003 and numbered 03-56/655-301[8], the Board called attention to the objective of the undertaking which allegedly applied predatory pricing and decided that there was no predatory pricing since Aycell did not intend to push its competitors out of the market.

In addition to the abovementioned condition, the Board also specified in its decision dated 19.10.2004 and numbered 04-66/955-231[9] ("Hürriyet Gazetesi"), that a price should be temporarily determined as being below the product value in order for it to raise the question of predatory pricing.

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7 For instance see the Board's decision dated 26.11.1998 and numbered 93/750-159 http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar10.pdf (accessed on: 04.10.2013) or the Board's decision dated 29.02.2000 and numbered 00-9/89-44 http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar41.pdf (accessed on: 04.10.2013).

8 To reach the decision http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar742.pdf (accessed on: 04.10.2013) Also see the Board's decision dated 02.10.2002 and numbered 02-60/755-305, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar633.pdf (accessed on: 04.10.2013).

9 To reach the decision. http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar1027.pdf (accessed on: 04.10.2013).

A temporary period of time means a period of time during which a product may be hold to the market.

It is also emphasized in the Board's decision dated 05.06.2008 and numbered 08-37/487-171[10] ("evdi.com.tr Decision"), that the undertaking which is supposedly engaged in predatory pricing be in a dominant position in order for it to be the question of predatory pricing.

Moreover, in its decision dated 30.12.2009 and numbered 09-61/1498-394[11], the Board referred to the condition of profitability and emphasized that in predatory pricing, the related undertaking should earn profits by increasing the prices afterwards.

When the Board's recent decisions are examined, it is observed that the Board evaluated the abovementioned conditions together and determined that there is no predatory pricing in the event that one of the conditions is not fulfilled[12].

Finally, as per the Board's practice over the last fifteen years, the determined conditions are handled and expressed in the Draft Guidelines.

Conditions

To determine whether or not there is predatory pricing, the conditions applied are as follows:

Pre-condition: To be in Dominant Position

In order to be considered an abuse of dominant position, the primary required condition (pre-condition) is that the relevant undertaking is in the dominant position in the relevant market.

However, when the Board's decisions are examined, it is mostly seen that the Board does not make such a determination. For instance, in its

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[10] To reach the decision http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar2474.pdf (accessed on: 04.10.2013).

[11] See the following link to access the Board's decision: http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar2474.pdf (accessed on: 04.10.2013).

[12] For instance, see the Board's decision dated 18.07.2013 and numbered 13-46/589-259, footnote 2.

decision dated 06.12.2012 and numbered 12-62/1633-598, in which it defends that Kale Kilit ve Kalıp Sanayi Anonim Şirketi has not abused its dominant position through predatory pricing and a rebate system ("Kale Kilit Decision")[13], the Board did not make a dominant position determination due to its determination that the pricing policies did not constitute an infringement of competition.

The Draft Guidelines (§7) set forth that in cases where no dominant position exists or of the existence of one of the states of abuse, the Board may choose not to examine the other element. It is not possible to agree with such an opinion of the Board.

The Draft Guidelines were prepared during the European Union accession period, as part of the harmonization of the European Union Acquis and Turkish Law, and in this context, the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("Guidance") the was taken as example. The Guidance explicitly state that the first thing to be done is to determine whether the undertaking is in a dominant position (§9).

Other Conditions

In evaluating predatory pricing, the Board particularly examines if the prices of the undertaking in the dominant position are below production costs (competitor test), the purpose of the undertaking in the dominant position in implementing the predatory pricing and if there is a possibility of profitability once the strategy results in success[14].

The above mentioned criteria are listed under the Draft Guidelines. In accordance with the Draft Guidelines, in the competitor test, the possibility of market closure to a competitor with equal effectiveness is investigated.

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[13] See the following link to reach the Board's decision: http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f12-62-1633-598.pdf (accessed on: 03.10.2013).

[14] Further information may be found in the Board's decision dated 18.07.2013 and numbered 13-46/589-259. To access the decision see footnote 2.

Within the competitor test, average avoidable cost (AAC) and long term average increasing cost (LTAIC) are evaluated. AAC is obtained by dividing an undertaking's saved costs in the event it goes out of business to the total production amount whose production has been abandoned. LTAIC is found by subtracting the total production cost accrued where the related product was not produced from the total production costs of an undertaking and dividing this remaining cost by the production amount related to said product. In other words, the pricing under the AAC demonstrates that the undertaking in the dominant position sacrifices short-term profit and the competitor with equal effectiveness may not be able to provide services to customers without suffering a loss. Moreover, the pricing under the LTAIC sets forth that the undertaking in dominant position cannot bear the entirety of the directly relatable fixed costs incurred due to production of the related product or service and thus the competitor with equal effectiveness may be excluded from the market.

The costs expressed above are examined in detail in the Kale Kilit Decision of the Board[15].

While analyzing the undertaking in a dominant position, the issue of whether the implementation has arisen as a result of market forces or within a systematic plan intended to disable the competitor is investigated. The Draft Guidelines do not put emphasis on this criterion; nevertheless the Board considers and examines this criterion in its decisions[16].

Lastly, the undertaking in a dominant position must reap something from this implementation. The harvest refers to the earnings accrued in the long term following the predatory pricing which caused the loss suffered in the short term. This criterion has not been explained in detail in the Draft Guidelines.

Conclusion

Predatory pricing represents one of the abuses of dominant position. The Board has evaluated the practice in detail in different decisions.

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15 For further information see the footnote 13.

16 Further information may be found in the Board's decision dated 06.12.2012 and numbered 12-62/1622-598. To access the decision, see the footnote 13.

The practice should be examined under the Draft Guidelines since all conditions stated in the Board's decisions should have been included in the Draft Guidelines. Nevertheless, in the Draft Guidelines, it is not mentioned that (i) occupying a dominant position is a pre-condition for predatory pricing. In addition, no reference is made to (ii) the conditions of profitability and objective and to (iii) detailed decisions of the Board.

In other words, the Draft Guidelines are not sufficient to guide undertakings in their practices.

The Turkish Competition Board Authorized the Acquisition of Sırma by Danone*

Prof. Dr. H. Ercument Erdem

The Turkish Competition Board ("Board"), authorized, in its decision dated 29.05.2013 and numbered 13-32/426-188[1], the acquisition of 50,10% of the shares of Sırmagrup İçecek Sanayi ve Ticaret A.Ş. ("Sırma") by Danone SA ("Danone") since this transaction does not create a dominant position or strengthen an existing dominant position in the relevant market.

Parties to the Operation

Acquirer. Danone is a multinational company established as per the laws of France and worldwide active in the production of fresh milk, packed water and special products for babies and sick persons or old people having some sensibility.

Danone is active in the Turkish market through the companies Danone Hayat İçecek ve Gıda Sanayi ve Ticaret A.Ş. ("Danone Hayat"), Danone Tikveşli Gıda ve İçecek Sanayi ve Ticaret A.Ş. ("Danone Tikveşli") and Numil Gıda Ürünleri Sanayi ve Ticaret A.Ş. ("Numil"). All shares of Danone Hayat, Danone Tikveşli and Numil pertain to Danone.

Danone Hayat is active in the field of water production, bottling and sale. Danone Hayat realizes the sale of bottled and packed water between 0,3 and 19 liters through various distribution channels. In the meanwhile, Danone Hayat also realizes the sale of mineral water through the trademark Akmina.

In addition to the above, Danone also controls Holding Internationale de Boissons, which is established in France.

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* ***Article of November 2013***

[1] In order to reach decision, see: http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-32-426-188.pdf (accessed on: 24.10.2013).

Transferor. Sırma is a joint-stock company active as per the laws of the Republic of Turkey. Sırma is active in the production of water between 0,33 and 19 liters through a manufactory established respectively in Bursa and Burdur and two manufactories established in Sapanca and in the distribution of the branded packed water throughout Turkey.

Certain shares of Sırma are held by the Dişli Family, the Karabacak Family and DCEMF Mez Hold BV.

Operation

The transaction consists of the acquisition of 50,10% of the shares of Sırma by Danone. Within this scope, Sırma's shares belonging to the members of the Dişli Family will be transferred to Dişli Holding A.Ş. and Sırma's shares belonging to the members of the Karabacak Family will be transferred to Karabacak Holding A.Ş. Both Dişli Holding A.Ş. and Karabacak Holding A.Ş. will be newly established. Following these operations, DCEMF Mez Hold BV will transfer all Sırma's shares in its possession to Dişli Holding A.Ş. Finally, Dişli Holding A.Ş. and Karabacak Holding A.Ş. will transfer some of Sırma's shares in their possession to Holding Internationale de Boissons, which is controlled by Danone.

In addition to the acquisition of the control of Sırma by Danone, an agreement regarding the use of the intellectual property rights of the brand Sırmakeş by Kaynaksu was also signed between Kaynaksu, which is controlled by the Karabacak Family and Sırma. As per this agreement, Kaynaksu will have the right to product and sale packed water with the Sırmakeş brand in Istanbul, Kırklareli, Edirne and Tekirdağ and Sırma will have such right for all other regions.

Legal Framework of the Operation

According to Article 5/1(b) of Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board[2] ("Communiqué No. 2010/4"), *"The acquisition of direct or indirect*

[2] In order to reach the Communiqué no:2010/4, see: http://www.rekabet.gov.tr/File/?path=ROOT%2FDocuments%2FCommuniqu%25c3%25a9%2F2010_4ing.pdf (accessed on: 24.10.2013).

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 provided there is a permanent change in control" shall be considered as a merger or acquisition within the scope of the Act on the Protection of Competition ("Competition Act").

Article 5/2 of Communiqué no:2010/4 gives the definition of control. According to this article, the *"control may be acquired through rights, contracts or other instruments which, separately or together, allow de facto or de jure exercise of decisive influence over an undertaking. In particular, these instruments consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking."*

In the said case, as also mentioned above, there is a transfer of shares since Danone will acquire 50, 1% of the shares of Sırma. Furthermore, upon analysis of the Shareholders' Agreement signed between the parties on 04.05.2013, it can also be noted that, contrary to Dişli Holding A.Ş. and Karabacak Holding A.Ş, Danone will have a decisive influence over the administration of Sırma. In other words, the control of Sırma will be permanently transferred to Danone, by the way of share transfer.

In the light of the foregoing, the operation between Danone and Sırma is considered as a merger or an acquisition within the scope the Communiqué No. 2010/4.

Threshold System

In accordance with Article 7/1 of the Communiqué 2010/4, in case that (a) the total turnovers of the parties in Turkey exceed TRL one hundred million, and turnover of at least two of the parties in Turkey each exceed TRL thirty million or (b) the asset or activity subject to acquisitions, and at least one of the parties in mergers have a turnover in Turkey exceeding TRL thirty million and the other party has a global turnover exceeding TRL five hundred million, the operation shall be submitted to the authorization of the Board.

Considering that in the said case the above-stated thresholds are exceeded, the operation is submitted to the authorization of the Board as per the Communiqué No. 2010/4.

Board Examination

In Turkish competition law, merger or acquisition operations: which (1) create or strengthen a dominant position (2) resulting in significant lessening of competition in the relevant product market are illegal and prohibited.

For that reason, the Board, in order to determine whether the operation between the parties is prohibited within Turkish law, has respectively realized a thorough analysis as follows:

(i) The Board has determined the relevant product market and the affected market subject to the said operation;

(ii) The Board has examined whether the said operation will create a dominant position or strengthen a dominant position in the relevant product market (1st test) and in the affirmative, whether the operation will significantly lessen the competition in the relevant product (2nd test);

(iii) The Board has examined the ancillary restraints in the Shareholders' Agreement.

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, 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.

In addition to the above-stated, according to the Paragraph 20 of the Guidelines on the Definition of Relevant Market[3] ("Guidelines"),

[3] In order to access to Guidelines, please look at: http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Guide/kilavuz8.pdf (accessed on 25.10.2013).

"…in case the transaction under examination does not pose concerns for competition within the framework of potential alternative market definitions in terms of both product and geography, or in case there are competition distorting effects for all alternative definitions, a market definition may not be prepared."

In this regard, the Board has decided not to determine the relevant product market since the operation will not create competition concerns even though the market is defined in the strictest manner. However, the Board has not explained in the decision why the operation will not create such competition concerns although the Board decisions shall involve the grounds and the legal basis as per Article 52(h) of the Competition Act. Within this scope, the Board decision is likely to be criticized.

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 and in which the conditions of competition are sufficiently homogeneous and which can be disassociated from neighborhood markets because competitions conditions are sensibly different therein.

In the said case, the Board has determined that relevant geographic market as Turkey.

Affected Market

The Communiqué No. 2010/4 refers for the first time to the notion of "affected market" and stipulates that in such case the long notification form shall be filled.

The affected market is relevant product markets that might be affected by the transaction to be notified and where (a) two or more of the parties are commercially active in the same product market (horizontal relationship) or (b) at least of one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates in (vertical relationship).

The Board, in the said case, determined that there is a horizontal relationship between the parties and thus the affected markets are

respectively the “packed water market”, the “aromatized mineral water market” and the “mineral water market”. However, the Board did not define the notion of “affected market” in the decision and did not point out the importance of the affected market within mergers and acquisitions.

Board Analysis and Findings

The Board examined the operation respectively for every affected market:

Packed Water Market. The Board determined that after the operation of acquisition, Danone’s total market share would be 10% - 15% and that Danone would rise to the second rank in the relevant product market. In addition, Nestlé will preserve its dominant position in the packed water market through its brands Erikli ve Pure Life. As to the water cooler bottle market, the Board determined that Danone market share will increase to 0,5%.

In the light of the foregoing, the Board concluded that the operation would not create a dominant position or strengthen a dominant position in the packed water market.

Mineral Water Market. The Board determined that after the operation of acquisition, Danone’s total market share would be 5% - 10% and that Danone would be in the third rank in the mineral water market after Kızılay and Uludağ. Thus, the Board also concluded that the operation would not create any competition concern in the mineral water market either.

Aromatized Mineral Water Market. The Board determined that after the operation of acquisition Danone’s market share would be 20%-30% in the aromatized mineral water market, that the market share of its closest competitor Uludağ would be 15%- 20%, followed by Freşa, which will have a market share of 10%- 15%. Thus, the Board concluded that Danone would be in dominant position in the aromatized mineral water market.

However, the Board stated that the aromatized mineral water market is competitive market since it is a fast-growing market and that the undertakings’ market shares active in the market vary in years. Thus, the

Board concluded that the operation would not create a dominant position or strengthen a dominant position in the aromatized mineral water market.

The Board applied in the decision the two steps test. Hence, the Board examined first the dominant position in conformity with the Competition Act and determined that the said operation will create a dominant position in the relevant market. Then, the Board examined whether the competition will be strengthened due to the dominant position and concluded that the dominant position will not significantly distort the competition in the relevant market.

Evaluation of Ancillary Restraints

There are two ancillary restraints within the said operation of acquisition: non-compete and non-employment obligations and restraint of intellectual property rights usage.

The most important criterion in order that an ancillary restraint is allowed under Turkish competition law is that the ancillary restraint is directly related and necessary within the operation of merger or acquisition[4].

Non-Compete and Non-Employment Obligations. Even though the operation has not the characteristic of a joint venture, the Board concluded that the non-compete and non-employment obligations should be considered as ancillary restraints since they are directly related and necessary within the operation of acquisition. Indeed, both Dişli Holding A.Ş. and Karabacak Holding A.Ş. will continue to be the shareholders of Sırma and they will have a right of access to delicate commercial information of Sırma.

Restraint of Intellectual Property Rights Usage. The said restraint aims to prevent any damage to be suffered by Sırma and the economic depreciation of the operation of acquisition, which may be caused by the similarity between the names Sırmakeş and Sırma. However, the activities of Kaynaksu in the regions where the water branded Sırmakeş are produced

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4 For further information, please see the article entitled "Non-Compete Agreements" Within Mergers and Acquisitions", http://www.erdem-erdem.av.tr/en/articles/non-compete-agreements-within-mergers-and-acquisitions/ (accessed on: 01.11.2013).

and distributed are not within the scope of this restraint. Moreover, such restriction does neither prevent the production and distribution of similar products under another brand. Within this framework, the Board concluded that this restraint is directly related and necessary within the operation of acquisition and thus considered this restraint as an ancillary restraint.

Conclusion

The said decision is an extremely important decision in terms of mergers and acquisitions for Turkey since all important matters are examined:

- The affected markets are determined. However, it would be more appropriate had the Board defined this notion and explain its importance within mergers and acquisitions.
- The two-steps test is applied and within this scope it is determined that the said operation will not cause competition concerns in the relevant market.
- Ancillary restraints are examined and within this scope it is determined that they may be allowed since they are directly related and necessary within the operation of acquisition.

Abuse of Dominant Position through Refusal to Supply[*]

Prof. Dr. H. Ercument Erdem

Under Turkish competition law, undertakings, whether in a dominant position or not, are in principle not obliged to conclude contracts with other undertakings, in line with the principle of freedom of contract. In other words, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. However, in some cases, undertakings in a dominant position are under the obligation to conclude contracts in opposition to the principle of freedom of contract. Under competition law, this obligation is referred to as the "essential facilities doctrine".

The situations in which the "refusal to supply" or the "refusal to contract" may create an infringement of competition are examined in this article.

Definition of "Refusal to Supply"

Prohibition of use or procurement of products, services or any other undertaking's material or immaterial components by an undertaking in a dominant position may be defined as "refusal to supply" or "refusal to contract".

The Competition Board ("Board") also qualifies the supply of high priced or low quality goods as the refusal to supply[1].

Legal Framework

The Act on the Protection of Competition No. 4054 ("Competition Act") does not expressly state that the "refusal to supply" or the "refusal to

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[*] ***Article of December 2013***

[1] Please see the Board decision dated 04.06.2013 and numbered 13-33/447-198, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-33-447-198.pdf (accessed on: 03.01.2014) or the Board decision dated 10.09.2012 numbered 12-43/1322-435, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar4976.pdf (accessed on: 03.01.2014).

contract" constitutes an infringement of competition. "Refusal to supply" or "refusal to contract" was first regulated under the Draft Guidelines on the Evaluation of Abusive Exclusionary Conduct of Dominant Undertakings ("Draft Guidelines"), which were opened to public opinion after being published on the official website of the Competition Authority on 18.07.2013. The Draft Guidelines have not yet entered into force.

Upon examination of Board decisions, it may be observed that refusal to supply may be considered, under certain conditions, as an abuse of dominant position[2]. It is even stated, in the Board decision dated 28.08.2012 and numbered 12-42/1257-409[3], that refusal to supply is not expressly regulated under the Competition Act, but qualifies as an infringement of competition in Board decisions.

Types of "Refusal to Supply"

"Refusal to supply" or "refusal to contract" may appear either as an interruption of an existing contractual relationship or as a refusal to contract with potential customers. The refusal may be direct / indirect or conditional / unconditional[4].

Counterpart of the Contract Related to "Refusal of Supply"

"Refusal to supply" may be related to competitors or non-competitive clients in a downstream market.

Components of the "Refusal to Supply"

Competition law does not prohibit being in a dominant position, but the abuse of dominant position. "Refusal to supply" may also constitute an abuse of dominant position under certain conditions.

The above-mentioned conditions are stated in the Board's decision, dated 28.08.2012 and numbered 12-42/1257-409[5], and are as follows:

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[2] For exemple, see the Board decision dated 02.08.2007 and numbered 07-63/777-283, http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar2155.pdf (accessed on: 03.01.2014).

[3] To reach the decision, see http://www.rekabet.gov.tr/default.aspx?nsw=tfjcBAxVih5pUKigR05EaA==-H7deC+LxBI8=&nm=90 (accessed on: 18.03.2013).

[4] Draft Guidelines, § 39.

[5] For detailed information on the decision, see. footnote 3.

Objective Necessity of the Product or Service in the Downstream Market. An essential facility means the necessary usage of a product or infrastructure in order to enter into a market or to initiate an activity, as no other alternative exists or is granted.

As defined above, in cases where an input, facility or infrastructure owned by an undertaking in dominant position is essential to ensure effective competition on the downstream market and when it is not legally, technically or economically possible to find an alternative for this input, facility or infrastructure, an obligation to supply this input, facility or infrastructure to competitors in the downstream market is imposed on undertakings in a dominant position through the "essential facilities doctrine".

Upon examination of Board decisions, it can be observed that the Board attentively examines the existence of an essential facility in each refusal to supply case in order to determine whether there is an abuse of dominant position.

The Board uses different criteria in order to determine whether there is an essential facility.

- *Alternative Source of Procurement*. When evaluating the existence of an essential facility, the Board considers whether there is another current or potential alternative source for the undertaking. For instance, the Board, in its decision dated 28.08.2012 and numbered 12-42/1257-409[6], determined that the refusal to supply by Unilever San. ve Tic. A.Ş., which is in a dominant position in the industrial ice-cream market, does not constitute an abuse of dominant position, since various alternative sources exist in the relevant market. The Board also states, in its decision 03.01.2013 and numbered 13-01/3-3[7], that the alternative sources of procurement also include potential alternative sources of procurement.

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6 For detailed information on the decision, see footnote 3.

7 For detailed information on the decision, see http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-01-3-3.pdf (accessed on: 03.01.2014).

Actually, the criterion pointed out here is the objective necessity of the essential facility. The Board, in its abovementioned decision, dated 03.01.2013 and numbered 13-01/3-3[8], defines the objective necessity of the essential facility as follows: *"This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long-term – the negative consequences of the refusal."*

The Board has quite narrowly interpreted alternative sources of procurement in its previous decisions. The Board, in its decision dated 04.01.2000 and numbered 00-1/2-2[9], evaluated four telephone operators consisting of Turkcell, Telsim, Aria and Aycell. The Board asserted that the fact that Turkcell and Telsim, which were dominant in the roaming market, did not permit Aria to profit from their roaming hindered Aria from directly entering the market and decided within this scope that Turkcell and Telsim had abused their dominant position. However, Aria and Aycell were obliged to provide 100% coverage through investments that they would make within five years as per the concession agreement. As seen above, the Board did not evaluate Aria's investment as an alternative source of procurement.

While evaluating alternative sources of procurement, it is seen in the more recent decisions of the Board that the Board investigates the market with diligence and evaluates the alternative sources of procurement. For instance, the Board decided in its decision, dated 09.01.2003 and numbered 03-03/25-7[10], that a pier for RO-RO ships may be constructed by the private sector at a similar cost and within a similar period of time. Furthermore, the Board

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8 For detailed information on the decision, see footnote 9.

9 To reach the decision, see http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar34.pdf (accessed on: 03.01.2014).

10 To reach the decision, see http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar690.pdf (accessed on: 03.01.2014).

stated that there are a lot of piers owned by the private sector. Consequently, the Board decided that the piers used by TDİ in order for RO-RO ships to carry vehicles from one side of the Izmit Bay to the other are not of an essential facility for the companies willing to do the same business on the same line.

It would be better for the Board to clearly state its opinion on the alternative sources of procurement in the Draft Guidelines. Nevertheless, when the Draft Guide is examined it is seen that this topic is examined in general terms, the Board does not expressly state its opinion and there is no reference to a Board decision.

- *Possible and Rational Alternative Source of Procurement*. The Board, while evaluating whether an essential facility exists, from the point of view of the undertaking to which the required good, service or input is not supplied, examines whether the procurement of the essential facility is possible and rational by other means. The Board, in its decision dated 02.08.2007 and numbered 07-63/777-283[11], stated that in order to enter into the newspaper and magazine editing market it is also required to enter into the downstream market, which is the distribution of newspapers and magazines. In order to enter into the newspaper and magazine distribution market, it is required to open around ten thousand selling points. Since the fulfillment of such start-up requirements is not possible and rational, the Board decided upon the fact that YAYSAT, BBD and BİRYAY, which were in a dominant position together, abused their dominant position by hindering enterprises willing to enter into the market from using the distribution networks (here the distribution networks constitute the essential facility).

  The Board also stated in its decision, dated 09.01.2003 and numbered 03-03/25-7[12], that it is possible and rational to obtain an alternative source of procurement if obtaining such alternative source of procurement is not “extremely difficult”.

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11 For detailed information on the decision http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%25c3%25a7eli%2bKurul%2bKarar%25c4%25b1%2fkarar2155.pdf (accessed on: 03.01.2014).

12 For detailed information on the decision, see footnote 9.

Elimination of Effective Competition in Downstream Market. Once the objective necessity of the input in the downstream market is established, it should be considered whether a dominant undertaking's refusal to supply is liable to eliminate, immediately or over time, effective competition in the downstream market.

The term "downstream market" is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service.

The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

Consumer Harm. In evaluating the likely impact of a refusal to supply on consumer welfare, it should be examined whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. For instance, it is considered that consumer harm may arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled. Similarly, it is also considered that a refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise.

Efficiency Grounds. Even though the above-stated three conditions are fulfilled, the Board will consider the claims put forward by the dominant undertaking that its conduct is justified and if the Board

considers that the claims of the dominant undertaking constitute efficiency grounds, the Board will not fine the dominant undertaking. The non-commercial credibility of the dominant undertaking, complete or temporary interruption of supply due to capacity limits or non-fulfillment of some safety requirement may be listed as efficiency grounds.

Conclusion

Since the refusal to supply brings an exception to the freedom of contract, it constitutes one of the most important subjects of competition law. Within this scope the conditions of such refusal should be determined in quite a detailed way.

The regulation of this subject under the Draft Guidelines was a good initiative. However, it would be more appropriate if the conditions of such refusal were explained in detail and references were made to Board decisions.

ARBITRATION LAW

ICC Arbitration Procedure pursuant to the ICC Rules of Arbitration[*]

Att. Suleyman Sevinc

Introduction

The ICC Rules of Arbitration ("Rules") regulate the ICC arbitration proceedings from beginning to end[1]. In this regard, once the parties agree on settlement of the dispute through ICC Arbitration, the ICC Arbitration procedure regulated under the Rules shall be followed by the parties. In this article, general information on the ICC Arbitration procedure will be provided.

Request for Arbitration

In accordance with Art. 4 of the Rules, the arbitration proceedings shall commence with the claimant's submission of the request for arbitration to the ICC Secretariat. The date on which the request is received by the secretariat shall be deemed to be the commencement date of the arbitration. The secretariat shall notify the claimant and respondent of receipt of the arbitration request and the date of such receipt. In this context, a request for arbitration shall include the following pursuant to Art. 4(3):

(i) The name in full, description, address and other contact details of the parties;

(ii) The name in full, description, address and other contact details of any person representing the claimant in the arbitration;

(iii) A description of the nature and circumstances of the dispute

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* ***Article of May 2013***

1 There are several versions of the Rules and the last version entered into force on January 1, 2012.

giving rise to the claims and the basis upon which the claims are made;

(iv) A statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of other claims;

(v) Any relevant agreements, and in particular, the arbitration agreement;

(vi) In case claims are made under more than one arbitration agreement, a specification of the arbitration agreement under which each claim is made;

(vii) All necessary information and opinion or proposals regarding the number of arbitrators and their election in compliance with the provisions of Articles 12 and 13 and any nomination of an arbitrator required thereby; and

(viii) The place of arbitration, the applicable law and the language of arbitration.

Payment of the Costs

In accordance with Art. 4(4) of the Rules, the claimant shall pay the filing fee in force on the date the request is submitted. The relevant costs and the ICC's cost system are regulated under Articles 36 and 37 of the Rules, as well as by Appendix III. Pursuant to Art. 37 of the Rules, the costs of arbitration shall include the fees and the expenses of the arbitrators, ICC's administrative expenses, the expenses incurred for the experts referred to when required, witnesses, discoveries, legal opinion etc. and the reasonable legal or other expenses incurred by the parties for the arbitration.

Exchange of Pleadings

In accordance with Art. 4(5), the request for arbitration shall be transmitted to the respondent for his answer, as soon as a sufficient number of copies has been procured pursuant to Art. 3(1) of the Rules, and the required advance cost has been paid to the secretariat.

The issues regarding the respondent's answer are regulated under Art. 5 of the Rules. Pursuant to said article, the respondent shall submit his answer within 30 days following the receipt of the request. The secretariat

may provide an extension of time for the submission of the answer. However, the application for the extension must include information and proposals concerning the number of arbitrators and their election. If this issue is not resolved, the Court shall proceed in accordance with the Rules. In compliance with Art. 5(5) of the Rules, the respondent shall submit his counterclaims, if any, with the answer.

Pursuant to Art. 5(6) of the Rules, if there is a counterclaim, the claimant shall submit a reply to the counterclaim within 30 days. However, prior to the transmission of the file to the arbitral tribunal, the secretariat may grant the claimant an extension of time for submitting the reply.

Constitution and Authority of the Arbitral Tribunal

In accordance with Art. 12 of the Rules, the disputes shall be settled by a sole arbitrator or by three arbitrators. If the parties have agreed to settle the dispute by a sole arbitrator, the parties may nominate the sole arbitrator by mutual agreement. However, if the parties do not reach an agreement within 30 days following receipt of the claimant's request by the other party, the court shall appoint a sole arbitrator.

If the parties have agreed to resolve the dispute by three arbitrators, they will notify as such in the request and the answer the arbitrators they wish to nominate. If the parties fail to nominate an arbitrator, the appointment shall be made by the Court.

Where the dispute is referred to three arbitrators, the third arbitrator, who will act as the president of the arbitral tribunal shall be appointed by the Court, unless the parties have agreed on another procedure or their agreed procedure has failed. The arbitrators nominated by the parties shall be approved by the Court pursuant to Art. 13 of the Rules.

In accordance with Art. 6(3), if the respondent does not submit his answer or does not submit any pleas concerning the existence, validity or scope of the arbitration agreement after the nomination of the arbitrators are finalized, any question of jurisdiction or whether claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal. However, the ICC Secretary General may refer this matter to the Court pursuant to Article 6(4).

Unless the respondent's pleas are accepted and it is decided that the dispute cannot be resolved by arbitration, the arbitration shall proceed. Moreover, a party's refusal or failure to participate in any stage of the arbitration shall not affect the proceeding of the arbitration.

Terms of Reference

Pursuant to Art. 23(1) of the Rules, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in light of their most recent submissions, a document defining its terms of reference upon receiving the file from the secretariat. This document is called the "terms of reference". The terms of reference, along with the arbitration agreement is one of the most important documents of the arbitration proceedings. The terms of reference specifies the content and limits of the proceeding.

The terms of reference includes:

(i) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

(ii) the addresses to which notifications and communications arising in the course of the arbitration may be made;

(iii) the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

(iv) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

(v) the names, address and other contact details of the arbitrators;

(vi) the place of arbitration and

(vii) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono.

The parties are deemed to have accepted the authority of the arbitral tribunal and the scope of the proceeding by signing this document. In the event a party refuses to take part in the drawing up of the terms of reference or sign such document, this document shall be approved by

the Court pursuant to Art. 23(3) of the Rules. Art. 23(4) states that, after the terms of reference have been signed or approved by the Court, the parties cannot make new claims which fall outside the scope of the terms of reference unless they have been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

Conduct of the Proceeding and the Award

Within the issues determined by the terms of reference, pursuant to the Rules Art. 24(1), the arbitral tribunal shall hold a meeting in order to consult the parties on procedural measures. Article 24(2) sets forth that a procedural timetable shall be established for the efficient conduct of arbitration. Any change to this timetable shall be notified to the Court and the parties.

The arbitration proceeding shall be carried out in compliance with the terms of reference and the procedural rules and the awards rendered within this scope shall be submitted to the Court for approval pursuant to Art. 33. According to said article, the Court may modify the award as to its form and the arbitral tribunal may not render an award that is not approved by the Court as to its form.

In accordance with Art. 34(6), every award shall be binding for the parties. The parties undertake to perform the award rendered by submitting the dispute to arbitration and they are deemed to have waived their right to recourse, insofar as such waiver can validly be made. However, it shall be indicated that the execution of the award rendered as a result of the arbitration proceeding is subject to the enforcement decision rendered in the court of the relevant country.

Conclusion

As seen in the explanations above, the ICC arbitration procedure is regulated under various provisions of the ICC Rules of Arbitration. The arbitration proceedings commence with submission of the arbitration request to the ICC secretariat and end with the rendering of the award. Even though the award rendered in the arbitration has a binding nature, the enforceability of the award requires an enforcement decision from the court of the relevant country.

The Applicable Law to the Substance of an Arbitration Agreement*

Att. Fatih Isik

Introduction

As is known, an arbitration agreement and the underlying contract between the parties are independent of each other[1]. In this regard, "the applicable law to the substance of the dispute (i.e. the dispute to be settled via arbitration)" and "the applicable law to substance of the arbitration agreement" are different.

The applicable law to the substance of an arbitration agreement must also be evaluated separately from the law applicable to the form requirements of an arbitration agreement and to the capacity of the parties. The applicable law to the substance of the arbitration agreement basically applies to the arbitration agreement, the validity/invalidity of the parties' intentions, the fulfillment (delay, impossibility etc.) and extent of the arbitration agreement; it is not applicable to form requirements of the arbitration agreement and to the capacity of the parties[2].

It is essential to consider the intentions of the parties in order to determine the law applicable to the substance of an arbitration agreement. Parties may agree on the law applicable to the substance of the arbitration agreement; however, in practice, the problems occur when parties do not clearly agree on this before or after a dispute arises.

For instance, pursuant to Art. VI(2) of the 1961 European Convention on International Commercial Arbitration, which opened for signature at

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* ***Article of October 2013***

1 For details regarding the relation between the arbitration agreement and the underlying contract, please see **Isik, Fatih,** "The Separability of an Arbitration Clause from the Underlying Contract", Erdem & Erdem Newsletter July 2013 http://www.erdem-erdem.av.tr/en/articles/the-separability-of-an-arbitration-clause-from-the-underlying-contrat/ (Access date 05.11.2013).

2 However, applicable law to substance of arbitration agreement, to form requirements, to capacity of parties, and even to substance of dispute might be the same in some cases. Thus, evaluations shall be made by taking into account conditions of each different case.

Geneva, the existence or the validity of an arbitration agreement will be examined under the law to which the parties have subjected their arbitration agreement. Failing any indication thereon, it shall be examined under the law of the country in which the award is to be rendered or where, at the time when the question is raised in court and the country in which the award is to be rendered cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

Therefore, in order to determine the applicable law to the substance of an arbitration agreement, it is important to find out at which point such a question would arise. Yet, claims related to the substance of the arbitration agreement may be asserted before the arbitral tribunal or before the national courts at different stages, which will be explained below. **Assertion of Invalidity of an Arbitration Agreement before an Arbitral Tribunal**

Claims of invalidity regarding the substance of an arbitration agreement can be asserted before an arbitral tribunal. In such a case, the arbitrators shall first examine the invalidity of the arbitration agreement by taking into consideration the parties' consent. However, the main problem occurs in cases when there is no choice of law.

Arbitrators determine the applicable law to the substance of an arbitration agreement by taking into consideration different criteria. It is observed that arbitrators use the law of the place of arbitration, the law applicable to the substance of the principal contract and the arbitration rules of the chosen arbitral institution as criteria[3].

In this regard, it might be useful to determine the law of the place of arbitration as the law applicable to the substance of the arbitration agreement in order to shield the arbitral award from annulment requests. Such a choice would also be coherent with the arbitrators' obligation of maximum effort to facilitate the execution of arbitral awards, since annulment of an arbitral award on the grounds of contradiction to the law of place of arbitration can be avoided if the validity of the arbitration agreement is subject to that law.

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[3] **Ozel, Sibel,** "Milletlerarası Ticari Tahkimde Kanunlar İhtilafı Meseleleri", Legal publications, December 2008, p. 84.

The law of the country where the award will be enforced may also be taken into consideration in order to determine the law applicable to the substance of an arbitration agreement. However, contrary to the country where the award's annulment will be sought, the country where the enforcement will be sought may not be known during the arbitral proceedings. Thus, it may not be possible in all cases to utilize the law of enforcement country as the applicable law to the substance of an arbitration agreement. However, where the enforcement country is known beforehand, it is useful to take into account the laws of said country.

Examination of the Validity of an Arbitration Agreement before National Courts

The validity of an arbitration agreement can be examined before national courts in the event an objection in favor of arbitration is asserted or as grounds for refusal of enforcement where the enforcement of the award is requested, or as grounds for annulment where the annulment of the award is requested.

Assertion of an Arbitration Agreement's Existence as an Objection in favor of Arbitration

Where a lawsuit is initiated before national courts despite the existence of an arbitration agreement, the other party may raise an objection in favor of arbitration (i.e. that the dispute must be resolved through arbitration and cannot be resolved before the national courts due to the presence of an arbitration agreement between the parties).

The validity of an arbitration agreement brought before the national courts will be examined in accordance with the conflict of laws rules of *lex fori*[4].

In Turkish law, Art. 4/3 of the Act on International Arbitration No. 4686 ("AIA") distinguishes the applicable law to an arbitration agreement from the underlying contract, and subordinates the arbitration agreement to the law chosen by the parties or failing any indication thereon, directly to Turkish law. Consequently, if the applicable law to an arbitration

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[4] **Ozel,** p. 80.

agreement is not clearly stated and the principle contract is subjected to any law other than Turkish law, the arbitration agreement shall not be affected by said chosen body of law and the validity of the arbitration agreement shall be directly evaluated pursuant to Turkish law.

Therefore, where a dispute arises to which AIA applies (disputes in which the parties select Turkey as the place of arbitration or they accept the application of AIA despite the fact that the place of arbitration is a different country), the arbitration objection to be asserted before other states' courts shall be resolved in accordance with Turkish law[5].

Assertion of Invalidity of an Arbitration Agreement during an Action for Annulment

The invalidity of an arbitration agreement is regulated as grounds for annulment in several national and international legal texts. Pursuant to Art. 34(2)(a)(i) of UNCITRAL Model Law on International Commercial Arbitration, an arbitral award may be set aside only if said arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the state where the annulment is requested. In the event the annulment of the arbitral award is requested from the Turkish courts, the judge, in accordance with Art. 4/3 of AIA, shall evaluate the substantial validity of the arbitration agreement according to the law to which the parties have subjected it or, failing any indication thereon, according to Turkish law.

Assertion of Invalidity of an Arbitration Agreement before the Court of Enforcement

In Turkey, as in many other states, the recognition and enforcement of arbitral awards is conducted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958 ("New York Convention"). Art. V(1)(a) of the New York Convention states that the request for enforcement may be refused if the arbitration agreement is invalid in accordance with the law to which the parties have subjected it or, failing any indication thereon, under the law of the

5 In this case, it might be required that application of Turkish law is not contrary to *lex fori*.

country where the award was rendered. In accordance with this article, the applicable law to the substance of an arbitration agreement is the law of the place where the arbitral award is rendered.

The above-mentioned rule of conflict of laws of the New York Convention is also included in Art. 62(e) of the International Private and Civil Procedure Code No. 5718. Pursuant to this article, the request for enforcement may be refused *"if the arbitration agreement or arbitration clause is invalid according to the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was rendered*".

Conclusion

In order to execute an arbitral award, the first condition is to insure the validity of the arbitration agreement. Consequently, providing this validity requires a detailed examination. As seen, the applicable law to the substance of an arbitration agreement can be different from the applicable law to the form of an arbitration agreement, to the capacity of the parties and to the substance of the dispute being arbitrated. Additionally, the applicable law may also depend on the stage of examination of the issue (i.e. at the initiation of the arbitration; request for annulment or enforcement of an award). Therefore, the substantial validity of an arbitration agreement should be evaluated separately from the law applicable to the form requirements of an arbitration agreement and the capacity of the parties, considering each stage of the dispute separately.

The Separability of an Arbitration Clause from the Underlying Contract *

Att. Fatih Isik

Introduction

Arbitration is an alternative dispute resolution method based on the consent of the parties, which is often preferred to domestic judicial systems for the settlement of disputes arising from international commercial relationships. A dispute may be brought to arbitration where the parties have voluntarily entered into an arbitration agreement. Thus, as long as the subject matter of the dispute is arbitrable, the parties may decide to settle the dispute through arbitration.

An arbitration agreement may be concluded as a separate agreement, or as a clause within a contract between two parties. Arbitration agreements concluded within a contract are defined as "arbitration clauses". In practice, almost all arbitration agreements are concluded in the form of arbitration clauses.

Although the arbitration clause is a part of the underlying contract, they are essentially independent from each other. This is referred to as the "separability", "severability" or "autonomy" of the arbitration clause. This article will focus on this notion, known as the "separability" of the arbitration clause.

Principle of Separability

In most disputes, the validity of the agreement is in question. For instance, if a party claims non-performance of the agreement by the other party, the latter will claim that the agreement is invalid, if possible. However, in order to conduct arbitration proceedings, the arbitration clause should remain unaffected by the claim of invalidity. In this context, the doctrine of separability has been introduced and accepted in the practice of international commercial arbitration. The separability of the

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* ***Article of July 2013***

arbitration clause from the underlying agreement has been accepted as a principle which allows for arbitration proceedings related to an agreement whose validity is put into question.

According to the separability principle, the invalidity of the underlying agreement will not have an impact on the arbitration clause; likewise, the invalidity of the arbitration clause will not render the underlying agreement invalid. In other words, the requirements for validity of the arbitration agreement may differ from those sought for the validity of the underlying agreement. For instance, in Turkish law, a representative may conclude a share purchase agreement on behalf of the principal and this does not necessitate that the representative have specific authority to do so. However, the same representative needs specific authority to conclude an arbitration agreement on behalf of the same principal. In such event, the provisions of the share purchase agreement concluded by the representative will be valid, except for the arbitration clause, due to lack of specific authority[1].

Consequently, even if the underlying agreement is pronounced invalid for any reason, the arbitration clause will remain valid; on the other hand, if the arbitration clause is invalid, the underlying contract will remain valid and the dispute arising from the underlying agreement will be resolved before national courts.

Indeed, the arbitration clause and the underlying agreement are two different agreements despite the fact that both exist within the same text. While the underlying agreement creates a relationship of obligation between the parties, the arbitration agreement solely addresses the settlement of disputes between the parties.

Due to aforementioned reasons, the principle of separability establishes that the arbitration agreement and the underlying agreement have different qualities; the arbitration agreement is juridically autonomous and shall not be affected when the main contract is rendered invalid.

Nonetheless, this principle does not necessarily require that the "fate" of these two agreements is always different. Certain reasons invalidating the underlying agreement may affect the validity of the

[1] However, this should be assessed on a case by case basis.

arbitration agreement as well. For instance, where either or both parties are found to lack the capacity to have entered into the agreements, both agreements will be deemed invalid. Similarly, the arbitration agreement will be assigned to a third party if the underlying agreement is assigned (provided that the assignee consents to arbitrate).

The effect of the separability of arbitration agreements upon the choice of applicable law should also be analyzed; i.e. whether the law applicable to the underlying agreement will be, automatically, different from the law applicable to the arbitration agreement by reason of its separability. In other words, is the choice of law applicable to the main contract also applicable to the arbitration agreement?

This issue is especially important for arbitration clauses. Choice of law and arbitration clauses are often stipulated in international agreements; either as part of the same phrase, or as two paragraphs of the same article, or as consecutive articles. In such cases, it should be analyzed on a case by case basis whether or not the applicable law stated in the choice of law clause shall apply to the arbitration agreement or not.

Conclusion

The arbitration agreement is accepted as a distinct agreement, separate from the underlying agreement – a concept defined as the separability principle. This principle prevents the validity of one agreement from being affected by the other one; it effectively establishes the full autonomy of an arbitration agreement and the integrity of the arbitral process. Nonetheless, the two may be assessed together. However, it is important to consider, because of the separability of the arbitration agreement, whether the choice of law stipulated by the parties in the main contract is applicable to the arbitration agreement. Thus, dispute resolution and choice of law clauses should be drafted with the utmost caution and care.

Extension of the Arbitration Clause to Group Companies*

Att. Ezgi Babur

The extension of the arbitration agreement to third parties has become a subject of interest in recent years. The extension of the arbitration agreement, which is signed by a company taking part in the same group of companies as the parent company, which is economically stronger, is preferable. Additionally, the extension is favorable for the claimant in recognition and enforcement proceedings, since it gives the opportunity to initiate recognition and enforcement proceedings against the parent company taking part in the same group of companies.

The acceptance of the extension in arbitration proceedings and arbitral awards given as a result of such proceedings may cause issues, especially in recognition and enforcement proceedings. Similarly, for arbitration proceedings during which the extension of the arbitration agreement was not granted but which are subject to recognition and enforcement proceedings, the extension of the arbitration agreement may be subject to debate. At this point, the extension of the arbitration agreement, signed by a member of a group of companies, to another company within the same group of companies is a topic worth analyzing.

In General

As is known, the declaration of intent concerning the resolution of disputes through arbitration is the essential element of the arbitration agreement. For a valid arbitration agreement, the parties should declare their intent concerning the resolution of disputes through arbitration in a clear manner and without giving rise to confusion[1]. The fact that arbitration has both contractual and judicial characteristics emphasizes that the arbitration intent should be clarified without giving rise to any confusion. Also, the exceptional character of arbitration as a dispute resolution mechanism indicates the importance of the arbitration intent.

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* ***Article of September 2013***

1 **Ziya AKINCI**, Milletlerarası Tahkim, Ankara 2007, p. 82.

The extension of the arbitration agreement to companies taking part in the same group of companies is a subject which should be analyzed.

The extension of the arbitration agreement to third parties is the name given to cases in which third parties are affected by the arbitration agreement, by having the quality of claimant or respondent. In terms of groups of companies, the extension of the arbitration agreement may be paraphrased as the application of the arbitration agreement to parties involved in the performance of the agreement or in disputes arising therefrom, on the condition that they prove that they were aware of the arbitration agreement based on their position[2].

Importance of the Extension in terms of Recognition and Enforcement Proceedings

The importance of the extension of the arbitration agreement in terms of recognition and enforcement proceedings arises from the fact that a valid arbitration agreement is among the conditions for the recognition and enforcement of arbitral awards. Indeed, the presence of a valid arbitration agreement is analyzed in recognition and enforcement proceedings conducted both according to the International Private and Procedural Law No. 5718 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10th, 1958 (the "New York Convention"). The extension of the arbitration agreement is of great importance in terms of recognition and enforcement.

Analysis under Turkish Law

As is known, all companies taking part in a group of companies have a legal entity distinct and independent from the other companies in the group of companies. However, in some cases, based on intra-group relations, the parties signing and performing the arbitration agreement may be different companies.

Considering the actual trend in Turkish law, the practice of forming a group of companies is quite frequent. Accordingly, the group of companies

[2] **Emre ESEN**, Uluslararası Ticari Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili, İstanbul 2008, s. 100.

has been regulated under the Turkish Commercial Code No. 6102 ("TCC"). Setting aside the new provisions under the TCC concerning the extension of the arbitration agreement to groups of companies, within the framework of legal provisions and precedents of the courts, it is stated that the extension is not possible based on the group of companies' theory[3].

In terms of the precedents of the Court of Appeals, it may be seen that the Court of Appeals attaches great importance to the notion of "party" in the recognition and enforcement of arbitral awards. In a decision that indirectly concerns this issue, the Court of Appeals rejected an enforcement suit directed at the parent company based on an arbitration agreement signed by the subsidiary[4]. Based on the fact that the parent company and the subsidiary are distinct legal entities, it is clear that an arbitral award obtained against the subsidiary may not be subject to recognition against the parent company[5]. In any case, in the arbitration proceeding concerning the aforementioned recognition suit, the extension of the arbitration agreement to the parent company was not accepted.

In addition to the precedents of the courts, Turkish doctrine follows the view that the extension of the arbitration agreement to a separate legal entity which did not declare its intent to arbitrate based on its taking part in the same group of companies may be accepted for only exceptional cases[6].

Analysis under Comparative Law

In terms of international arbitration practice, among arbitrators taking part in ICC arbitration, there is a strong tendency that the arbitration agreement signed by a company taking part in a group of companies would be extended to other companies in the group, on the condition

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3 **ESEN**, p. 101.

4 Decision numbered 1990/2931 E. and 1990/6828 K. of the 11th Civil Chamber of the Court of Appeals. Source: **Cemal ŞANLI**, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, İstanbul 2011, p. 323.

5 **Banu (ŞİT) KÖŞGEROĞLU**, Yabancı Hakem Kararlarının Üçüncü Kişilere Karşı Tenfizi, Gazi Üniversitesi Hukuk Fakültesi Dergisi, C. XV, Y. 2011, Sa.3, p. 4.

6 **KÖŞGEROĞLU**, p. 7.

that they fulfill certain conditions[7]. On the other hand, it should not be neglected that there are many ICC awards in which the extension was rejected[8].

An important award in which the extension of the arbitration agreement to group of companies was rendered was in the *Dow Chemical* arbitration proceeding[9]. In this proceeding, the arbitrator decided that the group of companies involved in the arbitration form a single economic entity, and that all the companies in the group of companies intended to be bound by the arbitration agreement. At this point, the elements such as the group of companies' acting as party to the agreement, the fact that the buyer had dealings with the group and not the individual companies and that it took an active role in the conclusion of the arbitration agreement have been considered by the arbitrator. The Paris Court of Cassation rejected the request of cancellation concerning said award. Consequently, the decision on the extension was not considered grounds for cancellation by the French courts. In parallel with this decision, it was recently asserted under French law that international arbitration agreements shall be extended to all disputes directly related to the performance of the agreement[10].

Similarly, in the United States of America, in accordance with the arbitration-friendly tendency which aims to sustain the validity of arbitration agreements, it is deemed possible that the arbitration agreement would be extended to the parent company within the same group of companies[11].

Conclusion

The extension of the arbitration agreement to companies within the same group of companies is an issue subject to much debate in practice. On one hand, the significant increase in the practice among groups of

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7 **ESEN**, p. 99.

8 Please see **ESEN** p. 116 and following pages.

9 Dow Chemical France v. ISOVER Saint Gobain ICC Award no. 4131/1982.

10 **Pierre MAYER**, The Extension of the Arbitration Clause to Non-Signatories, the Irreconcilable Positions of French and English Courts. Source: http://www.auilr.org/pdf/27/27.4.7.pdf.

11 **ESEN**, p. 106.

companies, and the TCC answering to said increase with new provisions, indicates the importance of this issue. Within this framework, the need to follow a practice by taking into consideration the characteristics of groups of companies and the importance of the parties' intent to arbitrate in the arbitration proceedings. On the other hand, generally, it is not possible to conclude that the extension of the arbitration agreement to third parties, more specifically to companies within the same group of companies, is a widely accepted practice. Concerning this issue, it would be preferable to conduct an analysis concerning the cases in which the extension is possible, and reaching a definite conclusion with regard to the cases where extension would be a far-reaching interpretation[12]. This issue will remain within the realm of debate given the extensive group of companies practice in the commercial arena.

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[12] **KÖŞGEROĞLU**, p. 6.

Enforcement of Partial Arbitral Awards*

Att. Fatih Isik

Introduction

In order to execute a foreign arbitral award in Turkey the award must be enforced by the Turkish courts. Under Turkish law, the enforcement proceedings are conducted in accordance with the provisions of the Act on International Private and Procedural Law No. 5718 ("IPPL") and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), dated 10 June 1958.

Article 5 of the New York Convention and Article 64 of the IPPL regulate the grounds for refusal to enforce the award. Pursuant to these articles, the enforcement of foreign arbitral awards may be refused where the parties to the arbitration agreement were under incapacity to conclude it or the agreement is invalid, the party against whom the award is invoked was not given proper notice of the arbitration proceedings or was otherwise unable to present his case, the award contains matters beyond the scope of the arbitration agreement, the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place, the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country, the subject matter of the award is not capable of being settled by arbitration under the laws of Turkey or the enforcement of the award would be contrary to Turkish public policy.

In this article, the enforceability of partial awards shall be assessed. However, it should be noted that, the subject of this article is "enforcement of partial awards" and not the "partial enforcement of arbitral awards". Partial enforcement of an arbitral award is where, the award is related to the entire dispute but the parties are willing to enforce only some parts of the award[1]. However, for the enforcement of a partial award, arbitrators

* ***Article of March 2013***

[1] For detailed information with regards to partial enforcement of arbitral awards, please see **BABUR, Ezgi**; Partial Enforcement of Arbitral Awards, http://www.erdem-erdem.com/newsletter.php?katid=12110&id=15034&main_kat=15033&yil=2012 (Access date: 22.03.2013).

render the award only for certain aspects of the dispute; the entire dispute is not yet assessed.

The Final and Binding Character of Arbitral Awards

Pursuant to Article 60 of the IPPL and Article 5/1 (e) of the New York Convention, the arbitral award to be enforced must be final and binding on the parties. The "final and binding" character of the award must be determined in accordance with the procedure applied to the arbitration. For instance, the award may be accepted as *"final and binding"* where it is stated in the rules applied to the arbitration that the award shall be binding on the parties upon the signature of the award by the arbitrators, or that the approval of an authority other than the arbitrators is not required in order for the award to be binding upon the parties.

Consequently, an award that is not final and binding cannot be enforced. Therefore, the final and binding character of a partial award, which does not address the entire dispute, and the enforceability of such an award is a controversial issue.

Partial Arbitral Awards

The IPPL and the New York Convention do not regulate the enforcement of partial arbitral awards. However, the Act on International Arbitration No. 4686 ("AIA"), dated 21.06.2001, states in Article 14/A that the arbitrators may render partial awards. Accordingly, Article 6 of the Communiqué on the International Arbitration Fees Tariff states that in the event the arbitrators render a partial award, the fee shall be calculated in accordance with the value of the dispute subject to partial award, and where the partial award is rendered as the final award, the whole of the tariff fee shall be paid. In light of these provisions, it is clear that the notion of "partial award" is accepted under Turkish law. Therefore, the enforceability of partial awards in Turkey may be accepted accordingly.

The enforceability of partial awards is accepted by legal scholars on two grounds[2]. In the first, it is stated that the IPPL and the New York

2 **SIT, Banu**; Kurumsal Tahkim ve Hakem Kararlarının Tanınması ve Tenfizi, Ankara 2005, p. 226.

Convention do not define or regulate arbitral awards and that the word "award" does not refer only to final awards which address the entire dispute. Therefore, "partial awards" are also "awards" in technical meaning and should be enforceable.

The second ground is based on the fact that partial awards shall be final and binding with regards to the part of the dispute for which the award is rendered. However, for enforceability of such partial award, the relevant part must be independent from other parts of the dispute and a decision with regards to other parts of the dispute must not be required for execution of the partial award.

Legal scholars also hold that partial awards are final on the matter to which they are related and therefore they are different from interim awards in this respect[3]. Accordingly, interim awards, unlike partial awards, may be enforced only with the final award[4]. It follows that partial awards may be enforced separately from final awards.

With respect to procedural law, it is stated that partial awards are final for the related part of the dispute and they have the effect of "definitive judgment" with regards to that part[5]. The judgment for the relevant part is finalized with the partial award. Therefore, partial awards are also final and the legal remedies under the *lex arbitri* for final awards may be applied to partial awards[6].

In addition to the scholarly opinions defending the enforceability of partial awards, Article 15/1 (e) of the AIA should be mentioned. Said article regulates the grounds for annulment of arbitral awards, and it stipulates that the award may be annulled in the event it is proved that the award is not rendered for the entire dispute. On the basis of this article, it may be alleged that to render a partial award constitutes grounds for annulment of the award and therefore partial awards cannot be enforced.

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3 **OZSUNAY, Ergun**; Uluslararası Ticari Tahkimde Hakem Kararı, Uluslararası Ticari Uyuşmazlıklarda Kurumsal Tahkimin Güncel Sorunları, ITO Publications, 2004 -16, p. 154.

4 **OZSUNAY**, p. 155.

5 **YESILOVA, Bilgehan**; Milletlerarası Ticari Tahkimde Nihai Karardan Önce Mahkemelerin Yardım ve Denetimi, Izmir 2008, p. 470.

6 **YESILOVA**, p. 473.

Conclusion

As seen above, even though there is no clear provision under Turkish law with regards to enforcement of partial awards, they are accepted in provisions other than those regulating enforcement. However, it must be considered that partial awards must be final and binding in order to be enforceable. Therefore, it is necessary to examine whether the award is "final" for the parties considering the circumstances of each case.

The New Emergency Arbitrator Procedure under the ICC 2012 Rules [*]

Att. Fatih Isik

Introduction

The new Arbitration Rules of the International Chamber of Commerce entered into force as of January 1, 2012 (the "Rules"). In a general sense, the Rules aim to improve efficiency in arbitration cases, control expenses and shorten the duration of arbitration. Within this scope, the Rules provide for an "emergency arbitrator" procedure. This significant and remarkable procedure aims to provide urgent interim measures for parties who cannot await the constitution of an arbitral tribunal.

Emergency Arbitrator Provisions and Scope of Application

Parties in need of urgent interim or conservatory measures and which cannot await the constitution of an arbitral tribunal may make an application for such measures (defined as "Emergency Measures"). This application shall be made in accordance with Article 29 of the Rules and Appendix V- Emergency Arbitrator Rules (together referred to as "Emergency Arbitrator Provisions" or "EAP").

The Emergency Arbitrator Provisions shall be applied within the scope of arbitration agreements signed on or after January 1, 2012. If the parties are not willing to apply Emergency Arbitrator Provisions, the arbitration agreements signed after January 1, 2012 must clearly specify that fact. The parties may agree in writing to apply EAP to agreements concluded before January 1, 2012.

Pursuant to Article 29(6)(c), EAP shall not be applied if the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

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[*] ***Article of June 2013***

Application Proceedings

A party seeking recourse to an emergency arbitrator must provide the appropriate documents and information for examination of the dispute; however, it is not necessary for such applicant to have already submitted a request for arbitration. Nonetheless, the applicant party is obliged to submit its request for arbitration to the Secretariat within 10 days following the date of application for an emergency arbitrator. This period may be extended where the emergency arbitrator deems necessary.

The application shall contain (among other information): the circumstances giving rise to the application, the dispute referred or to be referred to arbitration, a statement of the emergency measures sought and the reasons why the applicant needs urgent interim or conservatory measures and any relevant agreements, especially the arbitration agreement. On the basis of the information contained in the application, the President of the Court ("President") considers whether to apply Emergency Arbitrator Provisions or not. If the President considers, pursuant to Articles 29(5) and 29(6) of the Rules, that Emergency Arbitrator Provisions apply, a copy of the application shall be transmitted to the defendant; if the President considers otherwise - with regards to some or all of the parties - the parties shall be informed that the emergency arbitrator proceedings shall not take place.

Since the emergency arbitrator aims to take urgent measures, the emergency arbitrator shall be appointed within as short a time as possible. Therefore, the President shall appoint the emergency arbitrator as quickly as possible, generally within two days. Nonetheless, the emergency arbitrator appointed by the President may be challenged. A challenge against the emergency arbitrator must be made by the party making the challenge within three days from receipt of the notification of the appointment, or from the date when that party was informed of the fact and circumstances on which the challenge is based. The court shall make a decision on the challenge after the emergency arbitrator and the other party or parties have had the chance to provide their comments in writing within a suitable period of time.

Proceedings

In order to conduct an independent and impartial proceeding, the emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence before his appointment and they shall not act as an arbitrator in any arbitration proceedings in relation to the dispute that gave rise to the application.

Within two days from the transmission of the file to the emergency arbitrator, the emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible. The proceedings shall be conducted in the manner the emergency arbitrator deems most appropriate, taking into account the nature and urgency of the application.

The emergency arbitrator's decision shall take the form of an Order. The Order shall be made no later than fifteen days from the date on which the file was transmitted to the emergency arbitrator. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

The parties must respect the emergency arbitrator's Order and they commit to do so. The orders granted by the emergency arbitrator are not definitive since the orders of the emergency arbitrator are not binding on arbitration court in terms of subject, evaluation and justification. The arbitration court may amend and limit the orders granted by the emergency arbitrator and it may nullify them completely as well.

A party or parties' application for urgent interim and conservatory measures within the scope of the Emergency Arbitrator Provisions does not prevent them from seeking conservatory or urgent interim measures from a competent judicial authority before, or in some cases after, the EAP application is made. Article 29(7) of the Rules do not deem such measures being sought as breach of or waiver from the arbitration agreement. However, when interim and conservatory measures are sought from the competent courts, the Secretariat should be informed without any delay.

Conclusion

The ICC 2012 Arbitration Rules, which have been in force as of January 1, 2012, introduce the new concept of an emergency arbitrator whereby a party in need of urgent interim or conservatory measures and which cannot await the constitution of an arbitral tribunal may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. The Parties' application for urgent interim and conservatory measures within the scope of Emergency Arbitrator Provisions does not prevent them from seeking conservatory or urgent interim measures from a competent judicial authority before the EAP application is made and, in some special cases, even afterwards. Furthermore, it should be kept in mind that, unless clearly specified in writing that the parties are not willing to apply them, the Emergency Arbitrator Provisions shall be applied within the scope of arbitration agreements signed on or after January 1, 2012.

ICSID for the Settlement of Investment Disputes *

Att. Suleyman Sevinc

Introduction

As an element of international trade practice, foreign investments are of great importance. Most actors in international trade conduct their investment activities in foreign countries. However, the legislation and the political authorities of the countries where the investments are to be made may cause incertitude for foreign investors. In order to avoid such incertitude and encourage investment, states conclude bilateral or multilateral agreements on the protection of investments and the contracting states undertake to protect the rights of investors with regards to investments made in their countries.

Multilateral Protection of Investments

In addition to the bilateral agreements between the states, foreign investments are also protected by multilateral agreements, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention"). The World Bank initiated the formulation of the Convention, and it was submitted to its member governments for their consideration with a view to its signature and ratification. The Convention entered into force on October 14, 1966, after being ratified by 20 countries.

The Convention established an institution for the settlement of disputes, which is the International Centre for the Settlement of Investment Disputes ("ICSID" or "Centre") based in Washington, D.C. In accordance with the provisions of the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states.

The provisions of the Convention are complemented by the Regulations and Rules adopted by the Administrative Council of the Centre

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* ***Article of January 2013***

pursuant to Article 6(1)(a)–(c) of the Convention. ICSID Regulations and Rules also comprise Rules of Procedure for Conciliation ("Conciliation Rules") and Rules of Procedure for Arbitration ("Arbitration Rules"). The latest amendments to ICSID Regulations and Rules adopted by the Administrative Council of the Centre entered into effect on April 10, 2006.

ICSID Jurisdiction

The Centre's Jurisdiction is defined in Article 25(1) of the Convention as follows:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."*

However, a legal entity established in the country of the contracting state which is party to the dispute shall be treated as a foreign investor if said legal entity is under the control of nationals of another contracting state (clause (b) of Article 25(2)).

Additionally, the dispute should be a legal dispute arising from an "investment". However, the notion of "investment" is not defined in the Convention; though contracting states do have the option to stipulate in advance the class or classes of disputes they will and will not consider submitting to the jurisdiction of the Centre (Article 25(4)). Disputes arising from issues other than investment do not fall within the jurisdiction of the Centre. Therefore, the nature of each dispute must be carefully reviewed in order to determine whether or not it falls within the Centre's jurisdiction.

With regards to ICSID's jurisdiction, a recent case known as "the Libananco Case", filed against the Republic of Turkey, should be mentioned. This case is an important example of the issues examined when determining if a dispute falls within ICSID's jurisdiction. In this case, Libananco (Libananco Holdings Co. Limited), a Cypriot company, filed a lawsuit against the Republic of Turkey before ICSID, citing the

unjust seizure of two Turkish utility companies - Cukurova Elektrik Anonim Sirketi ("CEAS") and Kepez Elektrik Turk Anonim Sirketi ("Kepez") - of which Libananco is a shareholder. Libananco claimed that the Republic of Turkey had breached the Energy Charter Treaty. However, the arbitral tribunal decided it had no jurisdiction over the case since Libananco had not proved that it owned CEAS and Kepez before the date of seizure, which means Libananco could not be presumed a foreign investor as of that date.

The Settlement of Disputes

Investment disputes may be settled through either conciliation or arbitration. Conciliation proceedings are conducted in accordance with the Conciliation Rules, which comprise of 34 articles. The Conciliation Rules regulate issues such as the establishment and working of the commission (including representation of the parties, the appointment, displacement and disqualification of conciliators), procedural languages, the submission of the parties' arguments, hearings, closure of the proceeding and preparation and communication of the report to the parties.

Arbitration proceedings are conducted in accordance with the Arbitration Rules which comprise of 56 articles. Much like the Conciliation Rules, the Arbitration Rules regulate issues such as the constitution of the arbitral tribunal, representation of the parties, the appointment/displacement of arbitrators, written and oral procedures, the examination of witnesses and experts, provisional measures, rendering of the award, and annulment and stay of enforcement of the award.

The Rapport between Turkey and the Convention

The Convention was ratified by Turkey on 27.05.1988 by Act No. 3460, which is published in the Official Gazette dated 02.06.1988 and numbered 19830, and with Resolution No. 88/13325 of the Council of Ministers dated 07.10.1988, which is published in the Official Gazette dated 06.12.1988 and numbered 20011.

According to ICSID's official website, the Republic of Turkey is or has been party, as respondents, to eight disputes (both pending and

concluded disputes). There are also some Turkish companies that have initiated legal proceedings before ICSID against other contracting states, especially for disputes arising from construction activities.

Conclusion

The fact that Turkey is party to the Convention encourages both foreign investors who may invest in Turkey and Turkish investors who may invest in other contracting states. The Convention protects the rights of foreign investors. Therefore, for Turkish investors who may invest abroad, it may be appropriate to consider whether the country where the investment will take place is a contracting state to the Convention.

CAPITAL MARKETS LAW

Provisions Introduced by the New Capital Markets Law *

Att. Nilay Celebi

The Capital Markets Law No. 6362, which was accepted on 06 December 2012 (“Law”), was published in the Official Gazette dated 30 December 2012 and entered into force on the date of publication. The Capital Markets Law No. 2499 was abrogated with the entry into force of the Law. The Law foresees that the secondary legislation under this Law shall be enacted within one year as of the date of publication of the law on the Official Gazette (i.e. until 30 December 2013), and the provisions of the current secondary legislation which do not contravene the Law shall continue to be in force until the issuance of the new legislation.

Issuance of Capital Markets Instruments

Capital Markets Board of Turkey (“CMB”) shall grant its approval for the issuance of capital markets instruments. CMB only approves the prospectus or relevant issuance document and with the new Law the registration of shares or securities by the CMB is no longer necessary. In accordance with Article 6 of the Law, CMB shall decide whether or not to approve the prospectus application within 10 business days and the relevant persons shall be notified. During the initial public offering, the prospectus review period is 20 business days. The approved prospectus shall be published in compliance with the principles determined by the CMB; registration with the trade registry and publication in the Turkish Trade Registry Gazette (“TTRG”) is not required. However, the place where the prospectus is published shall be registered with the trade registry and published in the TTRG. Pursuant to Article 7 of the Law, the prospectus may be published before the approval in accordance with the principles determined by the CMB.

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* ***Article of March 2013***

Pursuant to Article 8 of the Law, investors may withdraw their offers to purchase within 2 business days following the publication of the additions and amendments made to the prospectus. Article 9 of the Law stipulates the validity period of the prospectus as 12 months from the first date of publication. More than one issuance may be conducted within 12 months with a sole prospectus.

Public Disclosure

Financial statements and reports shall be prepared and submitted in compliance with Turkish Accounting Standards regulations as to form and substance.

In accordance with Articles 14 and 15 of the Law, all information, instances and progress, which may affect the value of the capital markets instruments, the market price or the investment decision of the investors, shall be disclosed to the public. The liability of persons preparing reports with material disclosures and the scope of issues subject to material disclosure has been widened with the Law.

Public Companies

Included in the Law are provisions with regard to corporate governance principles which were regulated only under a communiqué before. The CMB may require that listed companies apply the corporate governance principles.

Pursuant to Article 17/3 of the Law, a resolution by the board of directors, which determines the principles of a transaction, must be adopted before entering into a transaction with the relevant party. The resolution must be adopted with the approval of the majority of the independent board members. If the independent board members do not approve, this issue shall be disclosed to the public and submitted to the approval of the general assembly.

The approval of the CMB is required for companies to enter the registered capital system. However, as per Article 18 of the Law, additional approval of the CMB is not required for companies that have already entered the registered capital system pursuant to Turkish Commercial Code No. 6102.

The CMB no longer determines dividend ratios. Public companies may distribute profit in accordance with the profit distribution policies as determined by their general assemblies. The CMB may, however, determine that different principles shall be applied to certain companies and certain sectors, as per Article 19 of the Law.

A separate provision with regard to prohibition on the hidden income (income shifting) has been added to the Law (art. 6).

The Law defines which transactions are regarded as being of an important nature for public companies and authorizes the CMB to determine the principles and procedures to be applied to such transactions, as well as the sanctions to be imposed in case of noncompliance.

Article 24 of the Law provides for the "*right to exit*". This right allows shareholders who attend general assembly meetings where resolutions regarding transactions of an important nature are taken, and who vote against such resolutions, to exercise the right to sell.

A shareholder's voting rights shall be frozen where they are in noncompliance with the mandatory call obligation pursuant to Article 26 of the Law.

Art. 27 of the Law addresses takeover bids. Known as the "*squeeze-out right*", this right arises in cases where a shareholder reaches a certain threshold of shares, to be determined by the CMB. Having reached the required threshold, such a shareholder may exercise his right to purchase the shares of or "squeeze-out" minority shareholders by paying them fair compensation for their shares.

The Law gives the CMB the authority to terminate the privileges related to voting rights and representation on the board of directors in public companies who show losses for 5 consecutive financial years, pursuant to their financial statements. However, pursuant to Article 28 of the Law, this provision shall not apply to the privileges of state institutions and organizations.

In line with corporate governance principles, the Law holds that the general assembly shall be convened to meet as determined in the articles of association and by announcements made on the Company's website, Public Disclosure Platform and/or other places as determined

by the CMB. This call must be made at least 3 weeks before the date of the meeting, excluding the date of publication and date of the meeting. Moreover, pursuant to Article 29 of the Law, upon request of the CMB, matters may be added to the agenda of the general assembly meeting and the principle of commitment to the agenda shall not apply in such a situation.

Pursuant to Article 29 of the Law, the provisions of the Turkish Commercial Code No. 6102 shall apply to general assembly resolutions and meeting quorums, except the special quorums set for certain resolutions. Moreover, observers may be sent by the CMB to the general assemblies in accordance with Article 95 of the Law.

Capital Markets Institutions and Activities

Regulations regarding collective investment companies have been introduced with the Law. The Open Ended Investment Trusts, which are formed by different portfolios/companies, was added to the Law.

Detailed provisions regarding stock exchanges are regulated for the first time in the Law. Moreover, central exchange, central custody and data storage institutions, which are financial infrastructure institutions, are regulated under the Law.

A Recovery Center for Investors has been established (Art. 82 et seq.)

Supervision and Measures

The CMB is authorized to audit all of the institutions that fall within the scope of the Law. Companies may not avoid providing the information and documents requested by the CMB by invoking privacy and secrecy provisions in other laws.

Measures have been written into the Law in a detailed way. For example, as per Article 94 of the Law, the CMB may file a case for the return of an amount determined by the CMB to the affected company (which incurs losses) in case it determines an income shifting. Further, a new article has been introduced which authorizes the CMB to prevent access to web sites conducting unauthorized capital market activities via electronic means (Art. 99).

Capital Markets Crimes

Articles 106-108 of the Law cover abuse of information (insider trading) and market fraud (manipulation), and the circumstances that do not fall within the scope of these crimes are indicated separately.

With regards to market fraud, provisions regarding active regret have been added to the Law. A reduction in the sanctions may be granted by the CMB if an amount equal to twice the benefit is paid to the Treasury.

Conclusion

The Law has introduced significant regulations in accordance with the new laws and necessities of the new age; and has been structured in line with the long term experiences. The secondary legislation should be issued immediately to complement the Law. We are of the opinion that the Law, will be understood more efficiently in practice and with the help of secondary legislation.

Independent Board of Directors' Members under Corporate Governance Principles *

Att. Revan Sunol

Introduction

Corporate governance principles came into effect through the Turkish Commercial Code No. 6102 ("TTC"). By these principles, the disposition of rights and obligations of the companies' board of directors, managers, auditors and the decision mechanism in company business are regulated. Thus, corporate governance plays an important role in protecting the interest of the shareholders by observing the decision-making structure of the company.

In actualizing the corporate governance principles, formation the board of directors and the existence of independent members have a significant importance.

Board of Directors' Members under Corporate Governance Principles

The Communiqué on the Determination and Application of Corporate Governance Principles (Serial: IV, No: 56) ("Communiqué") by the Capital Markets Board, which was published in the Official Gazette dated 30.12.2011 and numbered 28158, regulates the corporate governance principles for companies that are within the scope of the Capital Market Legislation.

As is known, one of the characteristics of the companies subject to Capital Market Legislation is the difference between executive and non-executive board members. When executive board members participate in the daily decision-making and operational mechanism of the company, the non-executive board members are liable for determining and overseeing the general policy and strategy of the company.

Therefore, as the executive board members act as if they work for the company, the non-executive board members are supposed to be

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* ***Article of August 2013***

independent in order to supply objectivity. This carries importance in procuring transparency and accountability.

Independent Board of Directors' Members

Generally accepted applications have been established with regards to the existence of the board members, the duties of independent members and the formal requirements thereof and some certain criteria concerning the board member as an independent member, as stated in the Communiqué.

Members who are qualified as independent board members: (i) should not have direct or indirect commercial relations with the company, a related party of the company or with shareholders who directly or indirectly have 5% or more shares in the capital of the company (certain family members as determined within the Communique should also not be a party to such relations) (ii) should not work or be a member of the board of directors in companies which conduct all or some part of the activities and organization of the company and not; and (iii) should not be a shareholder, worker or board of directors' member; where he is a shareholder, his shares should not be more than 1% and be privileged, and he should reside in Turkey pursuant to Income Tax Law.

The independent board members are supposed to have occupational education, knowledge, occupational respectability and the experience to complete their tasks properly. In order to protect the rights of the beneficiaries within the company and to remain impartial, a person who can make decisions independently, has strong ethical values and the time to deal with company business should be elected as an independent member.

Election of Independent Board of Directors' Members

The Nomination Committee ("Committee") was established in order to elect independent board members who fulfill the above-stated criteria. This Committee receives requests for nominations from board members and shareholders, takes them into consideration and then presents its evaluation for the approval of the board of directors. Then, the board of directors submits the Committee report to the Capital Markets Board

("CMB") and if the CMB presents a negative opinion thereof, the related candidate cannot be nominated as an independent member of the board of directors to the general assembly of the company.

The board members appointed as independent members may lose their independence where they have to resign, are not available to fulfill their duties or an event occurs that causes them to lose their independence. In such cases, the board of directors should be informed promptly. Any board member losing his independence must resign as a matter of principle.

When a vacancy occurs in independent board membership, the Committee steps in and makes evaluations for the election of an independent member and then makes its candidate list and finally submits its report to the board of directors. The evaluations submitted by the Committee to the board will then be submitted to the CMB for evaluation, as stated above.

Economic Independence and Liabilities of Independent Board of Directors' Members

An independent board member should have economic independence in order to be considered "independent". If the independent board member relies on the income gained from his position on the board of directors, he cannot act independently while fulfilling his duty. Independent board members condoning issues without consideration and involvement in corporate operation is not acceptable in respect of the aim of independent board membership. Therefore, the income of the independent board members should be such that it affords protection of their independence.

Additionally, the TCC has brought a regulation on the liabilities of board members. Under Art. 553 of the TTC, the liability of the board of directors is limited by law and by the articles of association. Pursuant to the article, in the event the founders, board of directors' members, administrators and official liquidators breach their duties arising from the law and the articles of association by their "fault", they shall be held responsible for damages they cause to the company, shareholders and company receivables. Therefore, it is possible to set forth that, where the board members, of their own fault, breach their responsibilities arising from the law and the articles of association, they shall be held liable.

Conclusion

Regulations on corporate governance, imposed on companies by the Capital Markets Board with the Communiqué, provide for the determination and actualization of corporate governance principles. Within the scope of such corporate governance principles, objectivity and transparency is required from the non-executive board members while when determining the general policy and strategy of the companies. Therefore, independence is the criteria taken into consideration primarily in the election of independent board members.

Communiqué Regarding Debt Securities [*]

Att. Nilay Celebi

The Communiqué Regarding Debt Securities (II-31.1) ("Communiqué") was published in the Official Gazette dated 07 June 2013 and numbered 28670. The Communiqué on the Principles Regarding the Registration and Sale of Debt Securities (Serial: II, No: 22) was abrogated with this Communiqué. The Communiqué entered into force on 07 July 2013.

Issuance of Debt Securities

Debt securities may be issued through public offering or through private sale without being offered to the public. Sales conducted without a public offering are concluded as private placement and the debt securities are sold to a qualified investor.

The debt securities to be issued may be sold in tranches within the issuance limit, to be calculated pursuant to the Communiqué, and within the issuance limit deemed appropriate by the Capital Markets Board ("**Board**"). The issuance limit shall be determined in Turkish Lira for domestic issuances. The issuance limit shall be determined in Turkish Lira or a foreign currency for issuances conducted abroad. If the sale of the debt securities within a year, is made within the currency other than the approved currency by the Board, the serial issuance certificate shall be prepared in the sale currency. In such case, whether the sale amount is within the issuance limit shall be determined as follows:

1) If the serial issuance certificate is granted in a foreign currency and the issuance limit is given in Turkish Lira, the sale amount shall be converted to Turkish Lira based upon the Central Bank of Turkey (CBT) selling exchange rate on the business day prior to the application to the Board for the approval of the related serial issuance certificate.

2) If the serial issuance certificate is granted in Turkish Lira and the issuance limit is given in a foreign currency, the sale amount shall be

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[*] ***Article of July 2013***

converted to the relevant foreign currency based upon the CBT selling exchange rate on the business day prior to the application to the Board for the approval of the related serial issuance certificate.

3) If the serial issuance certificate is granted in a foreign currency other than the currency in which the issuance limit is given, the sale amount shall be converted to the foreign currency that determined the limit over the CBT cross rate on the business day prior to the application to the Board for the approval of the related serial issuance certificate. Where the cross rate disclosed by the CBT does not exist, CBT selling exchange rates should be taken into consideration for the calculation.

Debt securities offered to the public must be traded at the exchange and when application to the Board for approval is made, the issuers shall also apply to the relevant stock exchange.

The Board may request from the issuers that the payment obligations regarding the debt securities be guaranteed by a bank resident in Turkey or by a third legal person, or that the sale be open only to qualified investors.

Authorized Body Decision

A resolution by the general assembly for the issuance of debt securities is required. Unless clear higher quorums are determined under the company articles of association, Articles 418 - for public companies; and 421/(3) and (4) - for non-public companies - of the Turkish Commercial Code ("**TCC**") regarding meeting and decision quorums of the general assembly shall be applicable.

The authority to issue debt securities may be transferred to the board of directors through the articles of association. The articles of association shall expressly stipulate that the board of directors has the authority to issue debt securities.

Pursuant to Art. 505 of the TCC, the general assembly may delegate the authority to issue debt securities to the board of directors for a maximum of 15 months. The related general assembly resolution shall expressly stipulate that the authority to issue has been transferred to the board of directors.

The maximum amount of debt securities intended to be issued and whether or not the sale will be held through public offering, or by private

placement without resorting to a public offering option, must be resolved in the related authorized body decision.

Registration of Debt Securities and Notification to the Central Registry Agency ("CRA")

Debt securities issued domestically must be registered electronically with the CRA and the rights arising from such securities must be tracked in the name of the right holder. Likewise, debt securities to be issued abroad must be registered electronically with the CRA.

The Board may, upon request from the issuer, give exemption to the requirement of the securities to be registered in the CRA so that the debt securities can be issued abroad. In such a case, the issuer must submit the following information to the CRA within 3 business days from the date of issuance of the securities abroad: amount of the issuance, date of the issuance, ISIN No., the commencement date of the term, maturity date, interest rate, clearing agent, currency and a list of countries where the issuance is conducted.

For issuances made before the Communiqué came into force and if the debt securities are still and currently in circulation, the issuers shall inform the CRA within one month following the effective date of the Communiqué of any debt securities issued abroad.

Issuance Limit

The issuance limit is calculated based on the annual financial statements for the fiscal year that are prepared in accordance with Board regulations regarding financial statements and reporting for companies traded on the exchange, and that are subject to independent auditing.

The issuance limit for public companies cannot exceed five times that of the equity amount provided in their annual financial statement, whereas for non-public companies the maximum issuance limit can be three times that of the equity amount provided in the financial statement. If the company is preparing consolidated financials then the equity of the parent company shall be taken into consideration.

The Board Fee

The fee to be paid to the Board is calculated from the issuance value in accordance with the rates below:

a) maturity up to 179 days, 0,05%,

b) maturity between 180 and 364 days, 0,07%,

c) maturity between 365 and 730 days, 0,1%

d) maturity longer than 730 days, 0,2%

The fee for debt securities issued abroad shall be paid before the serial issuance certificate (which is prepared before each issuance within the issuance limit) is approved and given to the issuer. Where the serial issuance certificate is prepared in a foreign currency, the amount constituting the basis for the calculation of the Board fee shall be determined in the Turkish Lira equivalent, which will be calculated by taking into account the CBT selling exchange rate on the business day prior to the application to the Board for approval of the related serial issuance certificate.

Conclusion

Although the Communiqué does not fully change the Communiqué (Serial: II, No: 22), certain points have been modified pursuant to provisions of the TCC and Capital Markets Law No. 6362. The issuance limits have been changed with the new Communiqué. Further, the registration requirement with the CRA for issuances abroad has been introduced.

The Regulation regarding Angel Investment Capital [*]

Att. Ozgur Kocabasoglu

Introduction

Until recently, there was not any specific regulation in Turkey with respect to providing financing to entrepreneurs who had unique ideas and projects but not enough funding. However, there were indications of the preparation of a regulation regarding this issue.

Angel investment capital is a financial tool for start-up or growth stage ventures that lack financing; it is a system where real persons provide financing or become a shareholder by providing capital to such ventures. State support for angel investment capital was introduced with provisional Article 82 annexed to the Income Tax Law ("ITL") and additional article 5 of the Law regarding the Organization and Duties of the Undersecretariat of Treasury which was added with Article 14 of the Law numbered 6327.

The Regulation regarding Angel Investment Capital ("AICR" or "Regulation"), which was published in the Official Gazette dated 15.02.2013 and numbered 28560, contains principles and procedures regarding state support of angel investment capital and supervision of the activities of the investors. Within this article, the innovations brought by AICR shall be analyzed.

Benefiting from State Support

AICR stipulates that real persons investing as an angel investor to a venture firm may benefit from state support. The aim of this regulation is to entice investors and accordingly increase the number of investments qualifying as innovations. AICR and provisional Article 82 of the ITL set forth the conditions required to benefit from such state support. Pursuant to the Regulation, angel investors must hold the acquired participation shares, which belong to the venture company, for at least two years and

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[*] ***Article of February 2013***

must place the committed amount into the bank account of the venture company in cash. In addition, the industry sectors which can benefit from state support are set forth in AICR Annex 4. State support shall apply only to the sectors determined under Annex 4 of the Regulation. Furthermore, the Regulation indicates that investments may be made only in joint stock companies and the qualities that these companies must possess are specified in the Regulation.

The Regulation determines the minimum and maximum investment amounts in order to benefit from the tax-allowance. Accordingly, the value of the acquired company shares cannot be less than TRL 20.000 and more than TRL 1.000.000 per annum. These values are determined as fixed values and the non-specification of a rate of increase may be deemed as a weakness in the AICR. Moreover, angel investors may benefit from state support for up to twenty joint stock companies during a five year period of license validity.

Further to the provisions stated above, AICR contains an essential provision which holds that foreign nationals may be angel investors along with Turkish citizens.

Angel investors fulfilling the stipulated conditions will benefit from the tax-allowance ratios as stated in the Regulation. However, the tax-allowance amount has an upper limit of TRL 1.000.000 under the AICR.

Licensing and Application

AICR requires the pursuance of certain steps in order to benefit from the tax-allowance.

Pursuant to the Regulation, real persons must obtain a license for tax support. The license application is made to the Undersecretariat of Treasury through accredited angel networks and different documents are requested from the high-income earning and experienced investors pursuant to Article 7 of the Regulation. According to the Regulation, the license is valid for five years and licenses may be extended for a period of five years. If any situation stipulated under Article 11 of the Regulation materializes, the license will be canceled.

In addition to the above requirements, AICR stipulates in Article 21 separately that an application by the angel investors accompanied by

documents such as a business plan and articles of association is necessary to gain tax support. Notwithstanding the requirement in Article 5 of the Regulation regarding the obtainment of a license, Article 21 of the Regulation sets forth the necessity of the application with other documents to the Undersecretariat to benefit from the support. Therefore, it may be concluded that the documents to be submitted and the procedures to be followed in order to benefit from state support are not specified in a clear and orderly manner under the Regulation.

Specific Regulations for the Angel Investor

The Regulation sets forth different provisions and regulations for angel investors.

Among the provisions, the one regarding angel investors' participation in the management of the venture company is of importance. Pursuant to this provision, the investors' participation in company management is limited to participation in the official management body. Angel investors cannot have any duty in the company except the board of directors and cannot work as company personnel in the venture company. Moreover, angel investors may not receive remuneration and salary. Therefore, the participation of angel investors in a start-up company is limited.

The Regulation provides an opportunity to angel investors for making investments into venture companies as a group. These joint investments are defied as "angel groups". In such cases, pursuant to the Regulation, the shareholders shall be subject to the provisions regarding joint-stock companies in the Turkish Commercial Code.

The angel network is defined in the Regulation as the structures where entrepreneurs come together with the angel investors. The Regulation governs the accreditation, accreditation criteria and the authority provided to the networks as a result of accreditation. The application to the Undersecreteriat is submitted through such accredited networks. These networks are authorized to file and finalize applications, supervise, audit the networks' members and report any irregularities to the Undersecretariat.

The Regulation sets forth certain reporting and notification obligations for venture companies. Pursuant to the Regulation, the venture company

is obliged to send an activity report to the Undersecretariat indicating the company's business stage according to the business plan for two years as of the date angel investors become shareholders in the venture company and pay the capital to the bank account in cash.

Conclusion

AICR aims to support entrepreneurs and venture companies who experience financial difficulties, but have innovation-oriented creative ideas, by regulating angel investment capital, a financing tool for ventures who lack funding. This Regulation aims to, institutionalize angel investment capital and induce investments.

LAW OF OBLIGATIONS

Spousal Consent under the Surety Agreement pursuant to Article 77 of the Law No. 6455 and the Provision Added to Article 584 of the TCO [*]

Assoc. Prof. H. Murat Develioglu

Introduction

Following the entry into force of the Turkish Code of Obligations No. 6098 ("TCO"), many types of agreements have been subject to different provisions as compared with the former Code of Obligations No. 818. One of these agreements is the surety agreement. Indeed, the amendments made to the Swiss Law of Obligations in 1941 in order to protect the surety, especially those related to the validity of the surety agreement, are adopted in the Code of Obligations No. 6098. One of these amendments is related to the capacity of a married person to be a surety in accordance with Art. 584 of the TCO. Pursuant to this article, if the surety is married, the validity of the surety agreement is subject to the written consent of the other spouse unless there is a separation decision rendered by the court or the right to live separately for the spouses has arisen. This provision has been criticized on the grounds that it is a hindrance to business life, and is amended with Article 77 of the Law No. 6455 on the Amendment to Customs Law and Certain Laws and Decree Laws, which entered into force through publication in the Official Gazette dated 11.04.2013 and numbered 28615.

Consent of the Spouse under Swiss Law

Unlike the Turkish Code of Obligations whose provisions regarding suretyship have not been amended as of 1926, the Swiss Federal Code of Obligations which dates back to 1881, underwent extensive changes in 1911 and the section regarding the surety agreement took its latest form

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[*] ***Article of April 2013***

with amendments made in 1941. One of the reforms adopted with the Federal Act dated December 10, 1941, which entered into force on July 1, 1942, was the provision regarding the consent of the spouse under the surety agreement (Swiss CO Art. 494). One of the reasons for enacting said provision was to protect the family. Paragraph 2 of that article set forth that if the surety is the owner of an enterprise registered to the trade registry, shareholder of an unlimited liability company, unlimited partner of a limited partnership, manager or director of a joint stock company, manager of a limited partnership divided into shares or the shareholder who is a director of a limited liability partnership, the person has sufficient business experience and spousal consent is not required; in other words, protecting the family through the requirement of spousal consent was not necessary. However, the Parliament abrogated this paragraph on June 17, 2005 and it remained in force until December 1st of the same year. According to the legal affairs commission of the national council, it was not appropriate to compare today's economic conditions with the year 1941[1]: "*Nowadays, the mere fact of being registered with the trade registry, is not sufficient to evaluate the results of the suretyship. If the economic conditions of a company are not duly assessed, the surety agreement may result in unfavorable consequences that were not paid attention to beforehand with regards to the surety and his family. Therefore, the consent of the spouse shall be required in all cases for married persons which are not in the process of separation and who desire to be a surety.*" Consequently, as Swiss CO Art. 494, paragraph 2 has been abrogated since December 1, 2005, the spousal consent has become obligatory for the sureties by the persons stated in the abrogated paragraph as well.

Consent of the Spouse under Turkish Law

The aforementioned amendments made to the Swiss Code of Obligations (which were made after 22.4.1926, the date of promulgation of the Code of Obligations numbered 818), were not adopted under the Turkish legal system until the entry into force of the Code of Obligations No. 6098.

The draft text of the Code of Obligations No. 6098 set forth the

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[1] Feuilles Fédérales 2004 4659.

following provision, which was in line with the aforementioned abrogated provision of the Swiss Code of Obligations:

> "*If a surety is granted with respect to an enterprise, by the owner of the enterprise registered with the trade registry, shareholder of an unlimited liability company, unlimited partner of a limited partnership, manager or director of a joint stock company, manager of a limited partnership divided into shares or the shareholder who is a director of a limited liability partnership, the consent of the spouse shall not be required.*"

With the amendments to the Swiss Code of Obligations in 2005 stated above, which coincided with the period where said provision was included in the Draft TCO, this provision corresponding to paragraph 2 of Article 585 of the TCO has been excluded from the draft text. Accordingly, the exceptional provision regarding the instances where the consent of the spouse is not required with respect to the validity of the surety contract was deleted from the first version of the Code of Obligations No. 6098.

The provision of the TCO requiring spousal consent has been criticized for a long time since it does not stipulate any exceptions and thus adversely affects business life.

On the grounds to make "*amendments for the easement of the natural flow of business life*" the relevant article of the TCO has been amended with Article 77 of the Law No. 6455 on the Amendments to Customs Law and to Certain Laws and Decree Laws, dated 28.3.2013. The article, which entered into force on 11.04.2013 in accordance with Art. 90 of the Law No. 6455, is as follows:

> *"The consent of the spouse shall not be required for the sureties granted in relation to an enterprise or a company by the owners of the enterprises registered with the trade registry or by the shareholder or director of the company; the sureties granted by the craftsmen and artisans registered to the craftsmen and artisans registry in relation to their occupational activities, the sureties to be granted for the credits used within the scope of Law numbered 5570 and dated 27.12.2006 on the Provision of Credit Facilities Supported by Interest Carried out by Banks with Public Capital; and the sureties granted for agricultural credit, agricultural sale and craftsman and*

artisan credit and surety cooperatives and to the shareholders of the cooperatives by public institutions and organizations."

As seen, similar to the draft version of the TCO, the new provision does not require spousal consent for sureties to be granted with respect to the enterprise by the owner of an enterprise registered to the Trade Registry. Additionally, a similar provision has been established with respect to other partnerships. However, unlike the provision in the draft TCO, the types of partnerships have not been specified one by one, and a general expression was used in the amended TCO provision which exempts "*the sureties to be granted with respect to a company by the shareholder or the director of the company*" from spousal consent.

In addition, it has been accepted that under certain circumstances, which have not been stipulated either under the Draft or under the provision of the reference Code amended on 1941 and abrogated afterwards, a surety agreement may be established without the consent of the spouse.

In addition to the shareholder or director of a company, the sureties granted by the craftsmen and artisans registered to the craftsmen and artisans registry concerning their occupational activities are exempted from the consent of the spouse.

Similarly, in the sureties to be granted for the credits to be used within the scope of the Law No. 5570 and dated 27.12.2006 on the Provision of Credit Facilities Supported by Interest Carried out by Banks with Public Capital, the consent of the spouse shall not be required.

Finally, it has been accepted with a more general listing method, that the consent of the spouse shall not be required in the sureties granted in the credits which will be made available to agricultural credit, agricultural sale and craftsman and artisan credit and surety cooperatives and to the shareholders of the cooperatives by public institutions and organizations.

Conclusion

The provision which the TCO introduces in relation to "*spousal consent*" was subject to severe criticism from the date of entry into force of the Code on the grounds that it is a hindrance to business life. An additional paragraph was introduced as a result of such criticism and in the above described circumstances, the surety agreements entered into by married persons do not require spousal consent in order to be valid.

Types of Contracts of Suretyship within the Scope of the Turkish Code of Obligations *

Att. Ceyda Buyukoral

Articles 585 to 588 of the Turkish Code of Obligations ("TCO") numbered 6098 and dated 01.07.2012 set forth the types of Contracts of Suretyship. The types of Contracts of Suretyship are named in the TCO as i) simple surety ii) joint and several surety iii) co-surety and iv) collateral surety and counter-surety.

Simple Surety

According to Article 585 TCO, the creditor cannot resort to debt recovery via a simple surety before suing the principal debtor. The creditor may resort to the surety only under the following circumstances:

1. If a definitive certificate of loss is issued as a result of the debt enforcement proceeding,
2. If the debtor can no longer or hardly be sued in Turkey,
3. If the debtor is declared bankrupt, and
4. If the debtor obtains a debt restructuring moratorium.

Where the claim is secured by pledges, a simple surety may include a provision that requires the creditor to satisfy his claim first from such pledges. But this provision shall not be applied if the debtor has been declared bankrupt or obtained a debt restructuring moratorium.

Where the surety was undertaken solely to cover a shortfall, the surety may only be enforced if a definitive certificate of loss has been issued as a result of the debt enforcement proceeding or the debtor can no longer be sued in Turkey or a composition agreement has been concluded. In such a case, an obligation to first resort to the principal debtor may be regulated by the contract.

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* ***Article of October 2013***

Joint and Several Surety

According to Article 586 TCO, if the guarantor assumes responsibility for an obligation where the words “joint and several”, or an equivalent phrase, are appended, the creditor may resort to him before suing the principal debtor or before foreclosure of pledged immovable property. However, for the application of this provision, the principal debtor must be in default on his debt payments and be issued with payment reminders to no avail, or be manifestly insolvent.

Where the debt is secured by a pledged chattel or claim, the surety may not be enforced before going after said pledged chattels and claims. However, the surety can be enforced before pursuing the pledge if the pledge is deemed by the court unlikely to cover the debt or where the debtor has been declared bankrupt or obtained a debt restructuring moratorium.

Co-surety

According to Article 587 TCO, where two or more persons stand surety for the same obligation, each of them is liable as guarantors for their share and as collateral surety for the shares of the others.

Where the sureties have assumed joint and several liabilities by agreement with the principal debtor or among themselves, each of them is liable for the whole obligation. However, a co-surety may refuse to pay more than his share if the debt enforcement proceedings have not been commenced against all other jointly and severally liable co-sureties with whom he entered into the contract of suretyship, and who may be sued for the obligation in Turkey. He has the same right if his co-sureties have paid their share or furnished real security. Unless otherwise agreed, a co-surety who paid his share has a right of recourse against other jointly and severally liable co-sureties to the extent that each of them has not yet paid their share. This right may be exercised before recourse against the principal debtor.

Where it was apparent to the creditor that the surety entered into the contract on the condition that others would stand surety with him for the same principal obligation, the surety is released if such condition is not

fulfilled or if subsequently one of the co-sureties is released from his liability by the creditor, or if his undertaking is declared invalid.

Where several persons have independently agreed to stand surety for the same principal obligation, each of them is liable for the whole amount of the obligation. However, unless otherwise agreed, a surety who pays the whole amount of the obligation has a right of recourse against the others for their respective shares.

Collateral Surety and Counter-Surety

According to Article 588 TCO, a collateral surety who stands to the creditor for performance of the obligation assumed by the primary surety is liable together with the latter in the same way as a simple surety is liable with the principal debtor.

A counter surety acts as guarantor for the right of recourse of the surety against the debtor.

Conclusion

The types of Contract of Suretyship are named in the TCO as i) simple surety ii) joint and several surety iii) co-surety and iv) collateral surety and counter-surety.

Pursuant to Article 585 TCO, the creditor cannot enforce a suretyship agreement before suing the principal debtor.

Article 586 TCO stipulates that in a situation of joint and several surety, if the surety stands as guarantor for an obligation by appending the words “joint and several” in the contract, then the creditor may resort to the guarantor before suing the principal debtor.

Pursuant to Article 587, in a co-surety, where two or more persons serve as guarantors for the same obligation, each of them is liable as surety for their share and as collateral surety for the shares of the others.

According to Article 588 TCO, a collateral surety who guarantees the performance of the obligation assumed by the primary surety is liable together with latter in the same way that a simple surety is liable for the principal debtor.

Relationship of the Surety with the Creditor and the Debtor in accordance with the New Turkish Code of Obligations [*]

Att. Pelin Baydar

Articles 589 to 597 of the Turkish Code of Obligations ("TCO") No. 6098, which entered into force on 01.07.2012, regulates the relationship of the surety with the creditor and the debtor.

Relationship between the Surety and the Creditor

Scope of Liability. Pursuant to Article 589 TCO, in all cases, the surety's liability is limited to the maximum amount indicated in the surety contract.

Unless otherwise agreed, the surety is liable up to this limit for:

1. the amount of the principal obligation, including the legal consequences of any fault or default on the part of the debtor;
2. the costs of debt enforcement proceedings and legal action brought against the debtor and, where applicable, costs of delivering pledges and transferring liens; and
3. interest at the contractually agreed rate payable for the current year and the previous year or, where applicable, for the annual payments due for the current year and the previous year.

Unless otherwise provided by the contract, the surety is liable only for the principal debtor's obligations arising after the contract of surety was concluded. Agreements providing that the surety will be liable for damage resulting from the extinction of the contract and any contractual penalty are of absolute nullity.

Resort to the Surety. Pursuant to Article 590 TCO, the creditor may not apply to the surety in respect of the principal obligation before the date fixed for its payment even if such date is brought forward following the principal debtor's bankruptcy.

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* ***Article of November 2013***

Under a contract of surety of any type, in exchange for furnishing real security, the surety may request that the court suspend the debt enforcement proceedings against him until all pledges have been foreclosed and a definitive certificate of loss has been issued against the principal debtor or a composition of bankruptcy agreement has been concluded with the creditors.

Where the principal obligation may not fall due without notice being served by the creditor or the debtor, the time limit for the surety does not commence until the date on which he receives such notice.

Defenses. Pursuant to Article 591 TCO, the surety is entitled and obliged to plead against the creditor all defenses open to the principal debtor or his heirs which are not based on the insolvency of the principal debtor. Suretyship for obligations that are not binding on the principal debtor owing to error or incapacity to make a contract or for time-barred obligations, are not included in the scope of this provision.

Where the principal debtor waives a defense that is open to him, the surety may nevertheless plead it.

Where the surety makes payment due to not knowing the existence of the defenses open to the principal debtor, he will have the right to recourse. On the other hand, where the principal debtor proves that the surety knew or should have known these defenses, the surety forfeits his right of recourse to the extent that such defenses would have released him from liability if he asserted them.

Creditor's Duty of Diligence and Duty to Release Documents and Pledges. Pursuant to Article 592 TCO, where the liens and other securities and preferential rights furnished when the surety contract is concluded, or subsequently obtained from the principal debtor for the specific purpose of securing the claim under surety, are reduced by the creditor to the detriment of the surety, the latter's liability is decreased by an equal amount. Claims for restitution of the over-paid amount are reserved.

Moreover, in the case of contracts of surety for the performance of official and civil service obligations, the creditor may not request the debt from the surety as a result of his failure to supervise the employee as required or to act with the diligence that could reasonably be expected of him.

On being satisfied by the surety, the creditor is required to furnish him with such documents and information as are required to exercise his rights. The creditor must also release to him the liens and other securities furnished when the contract of surety was concluded or subsequently obtained from the principal debtor for the specific purpose of securing the claim under surety, or must take the requisite measures to facilitate their transfer.

Where the creditor refuses without just cause to take such measures or has alienated the available evidence or the pledges and other securities for which he is responsible through gross negligence, the surety is released from his liability. The surety may demand the return of sums already paid and seek compensation for any further damage incurred in such case.

Right to Demand Acceptance of Payment. Pursuant to Article 593 TCO, as soon as the principal obligation falls due, even as a result of the bankruptcy of the principal debtor, the surety may at any time demand that the creditor accepts satisfaction from him. Where several persons stand surety for an obligation, the creditor is obliged to accept partial payment, provided it at least equals the share of the surety offering payment.

Where the creditor refuses without just cause to accept payment, the surety is released from his liability. In the event of joint surety, the liability of all other jointly and severally liable co-sureties is decreased by the amount of his share.

If the creditor is prepared to accept satisfaction, the surety may pay him even before the principal obligation falls due. However, the surety has no right of recourse against the principal debtor until the obligation falls due.

Creditor's Duty to Notify and to Register his Claim in Bankruptcy and Composition Proceedings. Pursuant to Article 594 TCO, where the debtor is six months in arrears in the payment of capital, interest accrued over half a year or an annual repayment, the creditor must notify the surety.

In the event of bankruptcy or composition proceedings concerning the principal debtor, the creditor must register his claim and do everything conscionable to safeguard his rights. He must inform the surety of the bankruptcy or debt restructuring moratorium as soon as he himself learns of it.

Should the creditor fail to take any of these actions, he forfeits his claims against the surety to the extent of any damage to the latter resulting from such failure.

Relationship between the Surety and the Principal Debtor

Right to Security and Release. Pursuant to Article 595 TCO, the surety may require that the principal debtor furnish security and demand his release from liability once the principal obligation falls due:

1. where the principal debtor breaches the agreements made with the surety, and in particular his promise to release the surety by a certain date;
2. where the principal debtor is in default or has relocated his domicile abroad and legal action against him in foreign courts has been substantially impeded as a result; and
3. where the surety faces substantially greater risks than when he agreed to offer the surety because of a deterioration in the principal debtor's financial situation, a decrease in the value of the security furnished or the fault of the principal debtor.

Surety's Right of Recourse. Pursuant to Article 596 TCO, the surety is subrogated to the creditor's rights to the extent that he has satisfied the creditor. The surety may exercise the creditor's rights when the obligation falls due.

However, unless otherwise agreed, he is subrogated only to those liens and other securities furnished when the contract of surety was concluded or subsequently obtained from the principal debtor for the specific purpose of securing the claim. If on paying only part of the debt, the surety is subrogated to only part of a lien, then the part remaining with the creditor takes precedence over that already paid by the surety.

Special claims and defenses arising from the legal relationship between the surety and the principal debtor are reserved.

Where a pledge securing a claim under surety is realized or the owner of the pledge pays voluntarily, he may only have recourse against the surety for such payment where an agreement to this effect was reached between the pledgor and the surety or the pledge was given subsequently by a third party.

The limitation period for the surety's right of recourse commences upon satisfaction of the creditor by the surety.

The surety has no right of recourse against the principal debtor for payment of any obligation that is not actionable or not binding on the principal debtor as a result of error or incapacity to make a contract. However, if he has assumed liability for a time-barred obligation at the behest of the principal debtor, the latter is liable to him pursuant to the provisions governing representation.

Surety's Duty to Notify. Pursuant to Article 597 TCO, where the surety pays the principal obligation in full or in part, he must notify the principal debtor.

If he fails to do so and the principal debtor pays it again because he was not and could not be expected to be aware of the surety's payment, the surety forfeits his right of recourse against the principal debtor.

This does not affect any claim against the creditor for unjust enrichment.

Conclusion

Pursuant to Article 589 TCO, in all cases, the surety's liability is limited to the maximum amount indicated in the surety contract. The creditor may not approach the surety to fulfill the principal obligation before the date fixed for its payment, even if such date is brought forward following the principal debtor's bankruptcy.

Pursuant to Article 591 TCO, the surety is entitled and obliged to plead against the creditor all defenses open to the principal debtor, or his heirs, which are not based on the insolvency of the principal debtor. As soon as the principal obligation falls due, even as a result of the bankruptcy of the principal debtor, the surety may at any time demand that the creditor accept satisfaction from him.

Pursuant to Article 596 TCO, the surety is subrogated to the creditor's rights to the extent that the surety has satisfied the creditor. The surety may exercise these as soon as the principal obligation falls due. Where the surety pays the principal obligation in full or in part, he must notify the principal debtor.

New Provisions of the TCO Regarding Change of Parties: Transfer and Adhesion Agreements*

Att. Leyla Orak

Introduction

In the last chapter of its general provisions, the Turkish Code of Obligations No. 6098[1] ("TCO") regulates the transfer of agreements and adhesion to agreements within the scope of change of parties in contractual relations.

These provisions introduced under the TCO are innovative and, by comparison, there is no specific regulation under the Swiss Code of Obligations, which is the reference code for the TCO, regarding such agreements[2]. However, during the application of the former Code of Obligations, it was generally accepted that within the scope of contractual freedom it was possible to transfer or adhere to an agreement, and that such agreements would be atypical agreements.

This Newsletter article will analyze the transfer of and adhesion to an agreement.

Transfer of an Agreement

The TCO defines the transfer of an agreement as an agreement entered into between the transferor, transferee and the remaining party of the agreement, whereby the transferor cedes its title of party to the agreement together with all its rights and obligations to the transferee (Art. 205/1). Through this means, one of the parties to an agreement will transfer the title of being a party, all its rights and obligations to another person. The transfer of an agreement regulated under this article is a voluntary transfer. Statutory provisions governing succession in situations such as heritage and pledge are reserved.

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* ***Article of May 2013***

1 Published in the Official Gazette dated 4 February 2011 and numbered 27836, and entered into force on 1 July 2012.

2 **M. Kemal Oguzman/Turgut Oz**, Borçlar Hukuku Genel Hükümler (General Provisions of Law of Obligations), Volume – 2, 9th Edition, Istanbul 2012, p. 598.

Even prior to introducing this provision under the TCO, academics accepted that the transfer of an agreement was possible within the scope of liberty of contract, which would constitute a *sui generis* agreement. Especially prior to the entry into force of this specific provision, there was an academic debate as to whether a party assigning all its receivables and transferring all its obligations arising under an agreement to another party would be deemed to have transferred the agreement or not. However, pursuant to the prevailing opinion (theory of unity) the transfer of an agreement differs from the joint assignment of receivables and transfer of obligations, as it results in the synchronized transfer of the titles of creditor and obligor and all innovative rights arising under the agreement (such as termination, renunciation from contract, elective rights, notice of default etc.) conferred to such party. On the other hand, the assignment of receivables and the transfer of obligations result respectively in the transfer of the actives and passives of a contractual relationship (thus the title of creditor and obligor of the agreement), however the party to the agreement remains as the transferor of the receivables and obligations[3].

Transfer Agreement

The TCO foresees the transfer agreement as a trilateral agreement. The parties to the agreement are the transferor, the transferee and the unchanged remaining party to the original agreement. Upon the execution of the transfer agreement, the transferor ceases to be a party to the transferred agreement. This transfer agreement is a dispositive act for the transferor, an acquisition act for the transferee and an innovative agreement for the remaining party to the original agreement[4].

However, it is not mandatory for this agreement to be executed in the form of a trilateral agreement. Pursuant to the TCO, it is possible to transfer an agreement by obtaining the prior consent or succeeding approval of the remaining party to a bilateral transfer agreement signed by the transferor and the transferee.

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3 **Oguzman/Oz**, p. 598; **Ahmet M. Kilicoglu**, Borçlar Hukuku Genel Hükümler (Law of Obligations, General Provisions), 15th Edition, Ankara 2012, p. 809.

4 **Oguzman/Oz**, p. 601.

Form of the Agreement

The TCO states that the transfer agreement shall be made in the same form as the original (transferred) agreement. Thus, if the transferred agreement is made in ordinary or qualified written form or official form, the transfer agreement shall be subject to the same form. Moreover, pursuant to TCO Art. 29, a promise to execute an agreement is also subject to the same form as the promised agreement. Therefore, an agreement to promise to transfer an agreement is subject to the same form requirement mentioned above. Nonetheless, the approval of the remaining party is not mandatory in order for a promise to transfer an agreement to generate an obligation[5].

TCO Art. 205, applicable to trilateral agreements without any hesitation, gave rise to disputes on how it will be applicable to bilateral agreements subject to the approval of the remaining party of the original agreement. TCO Art. 205/2 states that the agreement between the transferor and the transferee shall be subject to the provisions governing transfer agreements. However, there is a legal gap concerning the form of the approval of the remaining party. Accepting that such approval should conform to the form of the transferred agreement may result in certain difficulties in practice. In such an event, for instance, when transferring an agreement made under official form at the land registry pursuant to an agreement between the transferor and the transferee, the remaining party would be obliged to execute a separate transaction at the land registry. Nonetheless, such a transaction is not among the defined actions under the Land Registry By-Laws. From an academic point of view, it is also argued that the approval of the remaining party is a declaration for achieving a legal purpose, and therefore that it is not subject to any form requirement; nonetheless the principle of proof based on a deed (executed document) should be taken into consideration[6].

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5 Nonetheless, it should be stated that in the event the transferor is faulty of not foreseeing that the remaining party would not consent to the transfer agreement, while executing the promise to transfer, it is accepted that this will constitute a violation of contractual obligations. **Oguzman/Oz**, p. 601.

6 **Oguzman/Oz**, p. 600; **Kilicoglu**, p. 811.

Provisions Governing the Transfer Agreement

Upon the execution of the transfer agreement, the transferee shall replace the transferor, assuming all their rights and obligations. Nonetheless, apart from the change of parties, all other provisions of the agreement remain unchanged. The new party assumes all rights of its successor and undertakes all its obligations and owns its innovative rights (elective right to choose the performance, determine the due date, renounce from the contract, etc.). Thus, in the event a compensation obligation arose from the violation of the agreement by the transferor prior to the transfer, the transferee shall have assumed this obligation as well[7].

It is accepted by scholars that the transfer of an agreement is independent from its legal cause. Pursuant to this opinion, unless there are grounds directly affecting the validity of the transfer agreement, the invalidity of the legal cause for executing the transfer agreement shall not automatically render the transfer void. Nonetheless, it is possible for the transfer agreement itself to be invalid or subject to annulment pursuant to the general provisions of the TCO. In the event of invalidity or annulment, the parties to the agreement shall be deemed to remain unchanged.

In order for a transfer agreement to be executed, it is necessary for a valid agreement, which may be transferred, to exist. A renounced agreement, or an agreement which became impossible to be performed may not be transferred as there will be no agreement which may constitute the subject matter of the transfer in such cases.

Certain agreements may not be transferred even if the transfer agreement complies with the necessary form requirements. The reason for such limitation may arise from the fact that certain obligations may only be performed by certain persons having specific qualities. For instance, an attorney who is party to a mandate agreement may not transfer this agreement to a person who is not an attorney.

Adhesion to an Agreement

As with the transfer agreements, adhesion to an agreement has been regulated for the first time under the TCO. Nonetheless, it was generally

[7] **Oguzman/Oz**, p. 603.

accepted that adhesion to an agreement was possible despite the lack of an express provision.

In General

The TCO defines adhesion as an agreement between the adhering person and the parties to the original agreement, by which the adhering person is entitled to the rights and assumes the obligations of one of the parties to the original agreement together with such party (Art. 206/1). The previous parties to the agreement continue to be the parties following the adherence. The adhering person on the other hand becomes the new party to the agreement next to one of the parties thereto.

TCO Art. 206 is materially similar to the provision governing the transfer of an agreement. The adhesion agreement is regulated as a trilateral agreement and is subject to the form of the original agreement. Unlike the transfer agreement, there is no article in the TCO enabling a bilateral agreement between the adhering person and the party whose rights and obligations will be assumed which shall be subject to the approval of the other party.

The adhering person will jointly own the rights and jointly assume the obligations of one party next to whom it joins the agreement. Thus, the adhering person will be in a position of joint creditor and debtor with the relevant party of the agreement.

The TCO does not regulate the exercise of innovative rights (for instance elective rights in the event of default by the other party) by the adhering party nor the original party in the event of adhesion. However, scholars argue that the principles of joint ownership will be applicable by analogy[8].

Differences from Participation to an Obligation

Participation to an obligation has been regulated for the first time under the TCO (Art. 201) and it is possible to participate in an obligation through the execution of an agreement between the creditor of a receivable

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8 **Oguzman/Oz**, p. 605.

and the participant. In such an event, the participant shall become a joint obligor of the obligations arising from an agreement, even without obtaining the approval of the obligor. Thus, a person not bound by the obligations of a contractual relation will become jointly responsible for the obligations along with the original obligor through a participation agreement executed with the creditor[9].

This mechanism differs from adhesion to an agreement. The reason is that, as a result of the adhesion, the adhering person becomes joint creditor and joint obligor together with one of the parties of an agreement, which therefore includes becoming the creditor of certain obligations in the agreement. Moreover, unlike participation to an obligation, adhesion to an agreement is not a bilateral agreement; to the contrary, both parties to the agreement in addition to the adhering person shall execute the agreement.

Conclusion

Transfer and adhesion agreements are regulated for the first time under the TCO. However prior to the introduction of the relevant provisions, it was accepted that transfer and adhesion was possible within the scope of the liberty of contract principle and that such agreements would constitute *sui generis* agreements.

Pursuant to the provisions of the TCO, transfer of and adhesion to an agreement is possible with an agreement executed between the transferee or the adhering person, as the case may be, and the original parties of the agreement. It is also possible for the transferor and the transferee to execute a bilateral agreement subject to a separate approval of the remaining party when transferring an agreement. Both transfer and adhesion agreements are subject to the form of the original agreement.

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[9] In principle, the agreement regarding participation to an obligation is not subject to any requirement of form; nonetheless, the provisions governing capacity, form and the consent of the spouse for surety may be applicable for participations for the purpose of providing collateral pursuant to TCO Art. 603. **Oguzman/Oz**, p. 592.

Term and Prescription of Letters of Guarantee [*]

Att. Revan Sunol

Introduction

Letters of guarantee have come to prominence with the increase in the variety and size of commercial transactions. With bigger transactions, as the non-performance of the obligations undertaken may cause non-compensable damages to the obligee, it became necessary for a reassurance to be obtained for the compensation of damages that may arise from such non-performance by a third party. Letters of guarantee, and especially bank letters of guarantee, are demanded in commercial transactions because they are payable immediately and unconditionally upon demand, provide fast compensation and because any defense and obligations that the obligor may have against the obligee may not be raised by the issuer of the letter of guarantee against the addressee of the letter. The objective is to reassure the addressee of the letter of guarantee as an incentive for entering into a transaction.

Legal Characteristic and Elements of Letters of Guarantee

Legal Characteristic

Although the legal characteristic of letters of guarantee has been subject to discussion for a long time, today it is widely accepted to be a guarantee agreement.

The Court of Appeal's Decision of Joint Chambers dated 13.12.1967 and numbered E.1966/16, K.1967/7 describes bank guarantee letters as guarantee agreements. According to said decision, the bank's undertaking with the addressee is completely separate and independent from the main agreement and the relationship between the parties to such agreement. The decision qualifies guarantee agreements as the undertaking of a third party's performance. However, practice with respect to the characteristics of letters of guarantee continued to be uncertain. As a result, the Court of

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* ***Article of December 2013***

Appeal issued a second Decision of Joint Chambers in 1969. Pursuant to the 1969 decision, the clause included within letters of guarantee setting forth that immediate and unconditional payment shall be made upon the written demand of the obligee under the main agreement shows that letters of guarantee are a type of guarantee agreement which is the undertaking of a third party's performance as regulated under article 110 of the old Code of Obligations ("old CO") No. 818. The undertaking of a third party's performance has been regulated in line with the old CO under the new Code of Obligations No. 6098 ("new CO") in its article 128.

Elements

In practice, letter of guarantee agreements are required to include certain elements in order to be deemed as a guarantee agreement.

First, the risk that is undertaken must be predetermined. The guarantee must be given in order to induce the guarantee to act in a certain way and especially to enter into a commercial relationship with the beneficiary. The guarantor must be undertaking an independent obligation to the guarantee. The relationship between the guarantor and the guarantee and the relationship between the guarantee and the beneficiary, who is the obligor under the main agreement, shall be completely independent from one another. The issuer of the letter of guarantee shall be undertaking a primary and independent obligation. Lastly, consideration for the letter of guarantee is subject to discussion.

Term and Prescription of Letters of Guarantee

As letters of guarantee are deemed to be guarantee agreements and there are no specific regulations for guarantee agreements, letters of guarantee shall be subject to the general prescription period of ten years as regulated under Art. 125 of the old CO and Art. 146 of the new CO.

Letters of guarantee may have an expiration date. An expiration date bears importance in respect of the determination of the responsibility of the issuing party.

In order for the issuing party to be held liable, the undertaken risk must be realized within the term as well as the demand of payment.

Letters of guarantee that do not include an expiration date do not have a term of validity and remain in effect indefinitely. The issuer is liable for the risk starting as of the date of realization of the risk until the end of the term of prescription. Liability arising from a letter of guarantee which does not include an expiration date shall begin at the date of maturity which is the date of the realization of the risk. If the date of realization of the risk, and therefore the date of maturity, cannot be determined and more than ten years has passed as of the date of issuance, the issuer may object on the grounds of prescription. If the guarantee objects, the date of the realization of the risk shall be proven by the issuer[1].

It should be noted that pursuant to Art. 26 of State Procurement Law No. 2886, letters of guarantee provided for works that fall within the scope of said law shall not include an expiration date.

Where letters of guarantee include a date of expiration, the letter of guarantee shall be terminated if the risk is not realized or demand for compensation is not made within the period of expiration.

The Court of Appeals accepts within its jurisprudence that payment may be demanded during the ten year prescription period if it is proven that the risk was realized within the term of expiration. Art. 128, par. 2 of the new CO, which corresponds to Art. 110, par. 2 of old CO sets forth that in agreements for the undertaking of a third party’s action, clauses stating that the agreement shall become invalid if a written demand of payment is not made to the guarantor within the expiration term shall be valid. The Court of Appeals applies this rule. Therefore, in order for a letter of guarantee including an expiration date to actually become invalid at the end of its term, it must include specific wording stating that it shall become invalid if a written demand of compensation is not made within the term. However, it must be noted that wording only stating that the demand for compensation must be made within the term of the letter of

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1 Seza Reisoğlu, Banka Teminat Mektupları Uygulamalarında Ortaya Çıkan Başlıca Sorunlar, Türkiye Bankalar Birliği, https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwww.tbb.org.tr%2FDosyalar%2FKonferans_Sunumlari%2FSR_Banka_Teminat_Mektuplari.doc&ei=EwfUUsWbDLGu7Ab5m4D4CA&usg=AFQjCNGeE2sPIgfXUhXCloynlVGmV7Rb-A&sig2=H15xI9m3ZUc-6JulMarM1w&bvm=bv.59026428,d.ZGU&cad=rja.

guarantee is not sufficient to render the letter of guarantee invalid at the end of the term.

This is affirmed with the decision of the Court of Appeals dated 24.01.2013 and numbered 2012/798 E., 1542 K. According to this decision, in order for a letter of guarantee to become invalid at the end of its term if no demand for compensation is made, this must be stated explicitly within the letter. The letters of guarantee subject to said decision stated a date of expiration but did not include a clause specifically stating that they would become invalid if a written demand of compensation was not made before the end of the term. The Court of Appeals deems that, in such cases, even if the term of the letter of guarantee ends, the letter of guarantee shall remain in effect for ten years as of the date of expiration.

Conclusion

Issues with respect to the term and prescription of letters of guarantee, which are frequently used in commerce, require attention. Letters of guarantee with a fixed term may be subject to execution during the ten year prescription period, starting from the end of the term of the letter of guarantee, unless it is specifically stated within the letter that it shall become invalid at the expiration date unless a demand for compensation is made before the end of its term. The consistent opinion of the Court of Appeals affirming this may be seen in its recent judgments.

Unjust Enrichment under the Turkish Code of Obligations [*]

Att. Pelin Baydar

Introduction

Unjust enrichment is regulated under Articles 77-82 of the Turkish Code of Obligations No. 6098 ("TCO"). In the TCO, unjust enrichment is regulated as a third source of obligation along with agreements and torts.

As per Article 77 of the TCO, anyone who is enriched unjustly from someone else's property or services is obliged to restitute this enrichment. In order to mention the occurrence of an unjust enrichment, there must first of all be enrichment in the property of a person (enrichment). On the other hand, there must also be a decrease in the property value of another person (impoverishment) and there must be a causal link between such enrichment and impoverishment.

Enrichment in the property of a person obtained against the benefit of another person does not always result in the obligation of restitution, even where there is a causal link. The obligation of restitution arising from unjust enrichment in the increase of a person's property value must rely on "lack of a legal ground".

Pursuant to Article 77 of the TCO, the obligation of restitution arises where enrichment especially relies on an (i) invalid, (ii) unrealized or (iii) terminated cause.

It should be understood that, as per the law, unjust enrichment creates a relationship of obligation between the enriched and impoverished person, and the subject of this obligation is the restitution of enrichment in property value. The offer of restitution relies on a relative claim right arising from a debt relationship. Thus, the claim of restitution may only be addressed to the enriched person and all of his successors.

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* ***Article of May 2013***

Payment in Satisfaction of a Non-existent Obligation

Article 78 of the TCO is entitled "payment in satisfaction of a non-existent obligation". As per this article, a person who has voluntarily satisfied a non-existent debt has a right to restitution of the sum paid only if he can prove that he paid it in the erroneous belief that the debt was owed. Therefore, where an obligation that does not actually exist is satisfied, in order to rely on an unjust enrichment, there are some conditions that must be realized: (i) payment should be conducted for the performance of the obligation, (ii) there should be a non-existence of debt and (iii) the person performing the obligation should presume himself under the obligation by error.

It is clearly designated in the law that enrichment arising from the performance of a time-barred obligation or from fulfillment of a moral duty cannot be reclaimed. However, other provisions of the law with respect to reclaiming the performance of non-existing debts are reserved.

The scope of a restitution obligation arising from unjust enrichment differs depending on whether the enriched person acted in goodwill or bad faith.

Scope of Restitution

Under Article 79, unless the person being unjustly enriched can show that he has disposed of some part of the enrichment at the time the claim for restitution is brought, he shall be held responsible for restitution of what he has not disposed. On the other hand, where the person being unjustly enriched disposes of the enrichment in bad faith or is aware that he is bound to return the enrichment in the future, then the enrichment must be restituted fully.

Article 80 foresees the expenses which may be claimed by the person enriched unjustly. Herein, the expenses to be claimed differ depending on whether or not the person acted in goodwill or in bad faith. Where the enriched person acted in goodwill, he may claim the necessary and useful expenses. However, where the enriched person acted in bad faith, he is only entitled to reimbursement of the increase in the property value at the time of its return, along with the necessary expenses. Nevertheless, if no compensation is offered to him he may, before returning the property,

remove anything he had added to it, provided that it is possible to do so without damaging it.

Article 81 sets forth that there is no right to restitution with respect to anything given which produces an unlawful or immoral outcome. In case an action is brought, the judge may decide on restitution for the benefit of the state.

Time Limits

As per Article 82 of the TCO, a claim for unjust enrichment becomes time-barred two years after the date on which the injured party learned of his claim and in any event ten years after the date on which the claim first arose. However, if the unjust enrichment is arising from a claim against the injured party, the injured party may refuse to satisfy the claim.

Conclusion

Unjust enrichment under Articles 75-82 of the TCO is regulated as a third source of obligation along with agreements and torts. Anyone who is enriched unjustly from someone else's property or service is obliged to restitute this enrichment. The scope of the restitution arising from unjust enrichment and the expense claims vary based on whether or not the enriched person acted in goodwill or in bad faith. A claim for unjust enrichment becomes time-barred two years after the date on which the injured party learned of his claim and in any event ten years after the date on which the claim first arose.

The Adaptation of Contracts *

Assoc. Prof. Dr. Murat Develioglu

Introduction

The fundamental principle of *sanctity of contracts (pacta sunt servanda),* which is also adopted in Turkish law, suggests that the obligor remains bound to the terms of the contract under any conditions in accordance with the principle of good faith and predictability of the law.

Nevertheless, the circumstances present while concluding the contract may significantly change due to unforeseen supervening events. This change may result in excessive burden for one side as a consequence of a disproportion between performance and counter-performance; in other words, the foundation of the transaction collapses and the obligor cannot reasonably be expected to uphold the contract. The insistence on the performance of the disadvantaged party in accordance with the terms of the contract and applying the principle of sanctity of contracts strictly in such a case may be contrary to the principle of good faith, equity and justice. The contract should be adapted in accordance with the changed circumstances in order to prevent such unfavorable situations.

Although the Court of Cassation and scholars accept such adaptation of contracts, there is always a discussion around the legal basis of the adaptation. The different theories will be explained below.

Fundamental Regulations under Turkish Law Regarding the Adaptation of Contracts

The former Code of Obligations (CO) No. 818 did not provide for the adaptation of the contract and neither the termination of the contract if adaptation of the contract is not possible, as a general regulation. However, art. 365/2 of the CO stipulated a specific regulation regarding adaptation only for lump sum work contracts.

* ***Article of August 2013***

In that period there were different theories of scholars and jurisprudence on the legal basis of the adaptation of the contracts, apart from work contracts.

Civil Code (CC) art. 2 was considered by the majority of Turkish scholars and jurisprudence as the legal basis for the adaptation and the revocation of contracts in case of a fundamental alteration of the equilibrium of the contract. Almost every court decision about the adaptation referred to said article[1]. Nevertheless, besides the principle of good faith, legal institutions were taken as a basis while determining the legal basis for adaptation.

Some scholars argued that CO art. 365/2, which provides for the adaptation and revocation of the work contract, could be applied to all types of contracts by *mutatis mutandis*. The Court of Cassation referred to that article in certain of its decisions regarding the adaptation[2].

According to another opinion, the *"theory of the collapse of the foundation of transactions"* was the legal basis for the adaptation of contracts. This theory, which was legislated in Germany in 2001, suggests that if circumstances which became the basis of a contract have significantly changed after the contract was entered into and the aggrieved party cannot reasonably be expected to uphold the contract without alteration, then the foundation of the transactions collapses thus, adaptation of the contract may be demanded due to this collapse[3]. That theory has been invoked by the Court of Cassation when deciding on cases involving the adaptations of contracts[4]. For example, the Court of Cassation has defined the collapse of the foundation of the transactions as the *"distortion of the balance of*

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1 As an example, see Cas. C. 13. Civil Chamber, 30.3.1995 3221/3147, (www.kazanci.com.tr).

2 As an example, see Cas. C. 13. Civil Chamber, 24.6.1997 5647/5759, (www.kazanci.com.tr).

3 This theory is comprised of three possibilities: Hardship (Leistungserschwernisse), disproportion between the performances (Äquivalenzstörung) and frustration of purpose of the contract (Zweckstörung). See **Baysal, Başak**: The Adaptation of the Contract, On Iki Levha, Istanbul, 2009, p. 87. According to another opinion, the notion of the foundation of the transaction is within the scope of CO art. 24/1 b.4. The notion of foundation of transaction which is used to determine the substantial error during the conclusion of the contract is relied on for the collapse of the foundation of transactions after the conclusion of the contract. There is only a temporal difference between the substantial error and the collapse of the foundation of transactions. See **Baysal, Başak**: The Adaptation of the Contract, On Iki Levha, Istanbul, 2009, p. 287.

4 As an example, see Cas. C. 13. Civil Chamber, 26.4.1994 2733/4120, (www.kazanci.com.tr).

performance and counter-performance by unexpected changes such that the performance of the obligation would be onerous"[5].

Article 138 of the Turkish Code of Obligations No. 6098 (TCO) provides for the adaptation of all types of contracts generally under the heading of hardship. This new provision will be examined below.

Required Conditions for Adaptation According to Art. 138 TCO

Art. 138 TCO provides for the adaptation and the revocation of the contract if adaptation is not possible in the third section, "Termination of the Debts and Obligations"[6]. According to art. 138 TCO, entitled "*Hardship*", all of the required conditions mentioned below should be present to justify the adaptation of a contract.

An Unexpected Event, Which Was Unforeseen and Not Expected to be Foreseen by the Obligor, Must Occur after the Contract Was Entered into

This means events which the obligor is not obliged to take into account during the course of ordinary daily life, such as war, economic crisis and high devaluation. The essential criterion here is whether the parties can be expected to foresee the relevant event, considering all possible risk and assumptions or not. It is assumed that in high-risk cases, such as aleatory contracts and speculative transactions, the parties implicitly agree not to assert hardship later[7].

There Must be No Negligence on the Obligor's Side in the Occurrence of the Unexpected Event

The obligor must be non-negligent in the occurrence of the unexpected event to be able to request the adaptation of the contract. If the relevant event occurs due to a default by the obligor, the obligor may not request

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5 See Cas. C. 13. Civil Chamber, 7.2.2013, 8250/2623, (www.kazanci.com.tr).

6 Of the foundation of the transactions played an important role in the general provision of the adaptation in TCO. See Preamble of Articles of the TCO No. 6098, Art. 137.

7 **Gülekli, Yeşim**: "Hardship and theory of the collapse of the foundation of transactions in case of material conceptions that have become the basis of the contract are found to be incorrect.", MHAD 1990, p. 43-69.

the adaptation unless he proves his non-negligence related to the default. TCO art. 138 does not clearly specify the rights of the obligor in relation to default, however the obligor, who proves non-negligence in the event of default should be able to require the adaptation of the contract according to the teleological interpretation of this article[8].

Performance Must Have Become Excessively Burdensome for the Obligor Because of the Unexpected Event in Light of the Principle of Good Faith

The change must have effect on the essential points of the contract and disturb the equilibrium of risks and benefits in the period between the date of the performance of the contract and when the contract was entered into. The performance of the contract must become sufficiently onerous and excessively burdensome in the light of CC art. 2. If the excessive burden already exists before the contract was entered into and was unnoticed only by the obligor, the contract cannot be adapted pursuant to TCO art. 138. In such a case, TCO art. 30 et seq. shall be applied to the contract.

Obligor Must Perform His Obligation by Reserving the Right of Hardship or the Obligor Must Not Yet Perform the Contract

Reserving the right of hardship during the performance of the contract is only possible where performance is partial; otherwise the full performance would void the right to claim hardship and adaptation of the contract would not be possible. In such a case, if an unexpected event occurs after the partial performance, only the non-performed part will be adapted.

Rights of the Obligor

TCO art.138 provides the obligor two remedies where all the required conditions of hardship are met:

The Adaptation of the Contract in Accordance with the Changed Circumstances May Be Requested

The obligor may request the adaptation only before the court. The obligor may first request the adaptation of the contract from the court,

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8 **Öz, Turgut**: Law of Obligations General Provisions Volume-1, Vedat, Istanbul, 2011, p. 211-212.

and then only if the adaptation is not possible, he may request the revocation of the contract. The judge examines the case ex officio and may determine the obligation and its extent on his own if the adaptation is possible. Meanwhile he must definitely consider the equilibrium of benefits and the risk between the parties.

If Adaptation of the Contract Is Not Possible; the Obligor May Revoke the Contract

Where a contract comprises continuing obligations, the right to terminate replaces the right to revoke, as stated in the last sentence of TCO art. 138/1. It seems possible to revoke a contract with an extrajudicial notification, however if the court holds that the adaptation was possible, then the revocation would be invalid. Therefore it is suggested that the right to revoke be exercised before the court.

Conclusion

Unforeseen supervening events can fundamentally change the circumstances which are the basis of a contract after the contract was entered into and this change may result in excessive burden for the parties as a consequence of the altered equilibrium of the contract. This situation demonstrates that the principle of *sanctity of contracts (pacta sunt servanda)*, which is also adopted in Turkish law, may be contrary to the principle of good faith.

In such cases, contracts should be adapted in order to restore the balance regarding the risk allocation of the parties.

Although the Code of Obligations No. 818 did not explicitly provide for the adaptation of the contract, the scholars and the jurisprudence accepted the institution of adaptation. There were discussions about the legal basis of adaptation, and most of the opinions were based on art. 2 CC.

The Turkish Code of Obligations No. 6098 clearly provides for the adaptation of the contract in case of hardship and thus the former discussions came to an end. The obligor may demand the adaptation and the revocation of the contract if adaptation is not possible through meeting all of the required conditions, as specified under art. 138 TCO.

The Term Business Partnership and the Legal Status of Business Partnerships*

Att. Tuna F. Colgar

Introduction

As a result of developing commercial activities and large-scale investments, especially concluded in the fields of construction, energy and mining, companies are seeking to participate in these investments by uniting their powers and expertise to take advantage of financial opportunities together. This tendency among companies has caused the term "Business Partnership" to appear more frequently in commercial life. In this regard, it is necessary to determine the legal status of the term Business Partnership and to study the legal structure of the Business Partnership to be established. This article will assess the legal nature of Business Partnerships between parties and in relation to third persons.

The Definition of Business Partnership and Its Legal Status

A "Business partnership" is defined as the relationship established by the gathering of more than one economically and legally independent real or legal persons within the context of an agreement, for the purpose of performing the contractual activates that has been committed to the project owner, mostly in the construction business, provided that each partner of the Business Partnership is separately liable to the project owner, for the fulfillment of the work in full[1].

In line with this definition, in practice, Business Partnerships are formed by the gathering of two or more companies that are legally and financially independent from each other, within the context of an agreement concluded between themselves, for the purpose of conducting certain business together without distinguishing the parts related to their expertise areas and thus jointly and severally sharing the risk of that business.

The characteristic of the business partnership and the aspect distinguishing it from a consortium is that in business partnerships, the

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* ***Article of June 2013***

1 **Nami Barlas**, Adi Ortaklık Temeline Dayalı Sözleşme İlişkileri, 3. Bası, İstanbul 2012, p. 277.

partners assume liability for the whole business against the project owner rather than being liable for certain parts of the business. Even if the business as a whole does not fall into the area of activity or expertise of a partner and the work is shared in interior-relation, the partners shall be severally liable to the project owner for the entirety of the work.

The conclusion of a written contract between the parties is important in order for the Business Partnership to be established to rely upon strong basis. A Business Partnership agreement may explicitly provide that each partner shall be jointly and severally liable for the performance of the commitments and businesses within the scope of the contract concluded with the project owner and of the obligations arising from that Contract but headed towards the partnership.

A Business Partnership is a special type of Joint Venture, which is solely depending on an agreement. In other words, a Joint Venture is a broader term which includes Business Partnerships.

The doctrine defines a Joint Venture as follows: "*An establishment of a commercial partnership or a contractual agreement joining together two or more real or legal parties which are independent from each other legally and economically, for the purpose of executing a particular business or a continuous activity in order to generate income. All parties agree to be severally liable for the risks of such activity.*"[2]

Within the scope of the above definition, Joint Venture agreements are separated into two as "Joint Venture Solely Depending on an Agreement" and "Joint Venture Through Capital Participation". Under the Joint Venture Solely Depending on the Agreement, the relationship is merely a law of obligations agreement concluded between the parties; fulfillment of the participation stipulations by the partners is sufficient for achieving mutual purpose and the establishment of a commercial company with legal personality is not required. In a Joint Venture model through Capital Participation, the parties joining the venture by concluding a Joint Venture agreement first and establishing a partnership relation which qualifies as an ordinary partnership; subsequently establish a commercial company with legal personality or join an already-existing partnership as such.

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2 **Barlas**, p. 262, 263.

Definition of Business Partnership under the Relevant Legislation

The definition of Business Partnership is set forth under Article 4 of the Law dated 04.01.2002 and numbered 4734 on Public Tender ("PTL"), with the amended heading "Definitions" under Article 2 of the Law numbered 5812. The definition pursuant to the said provision is as follows: "the real or legal persons active in the said tender area, who may be eager and who bought the tender or prequalification documents or the joint ventures formed by these".

Article 10 of the Law dated 30.07.2003 and numbered 4964, amended by Article 14 of the PTL titled "*Joint Ventures*", includes both business partnerships considered as Joint Venture and consortiums in technical sense. In this provision "joint venture" has been used as a covering concept which involves both business partnership and the consortium. The Article stipulates as follows:

"joint ventures may be established by more than one real or legal person either in the form of a business partnership or as a consortium. Members of a business partnership carry out the whole business jointly having equal rights and responsibilities while members of consortium carry out the business with separate rights and responsibilities according to their expertise field for the purpose of performing relevant parts of the business. Business partnerships may participate in any kind of tender. However, in cases where different expertise are needed, the contracting authorities shall indicate in tender documents whether the consortium are allowed or not to submit tenders. At the tender stage, the joint venture shall be asked to submit an agreement indicating the mutual agreement of the parties to form a business partnership or a consortium. The pilot partner and the coordinator partner shall be specified in business partnership agreements and in consortium agreements respectively. In case the contract is awarded to the business partnership or consortium, a notary-certified business partnership or consortium agreement shall be submitted prior to signing the contract. In both business partnership agreement and contract, it has to be stated that the real or legal persons establishing the business partnership are jointly and severally liable in the fulfillment of the commitment, whereas in consortium agreement and contract it has to be clarified which part of the business has been committed by real or legal persons establishing the

consortium and they would ensure the coordination among them through coordinator partner in fulfilling the commitment."

In accordance with the explicit expression of the provision, the partners of a Business Partnership shall be severally liable for the whole business, rather than being liable for a particular part of the committed business. However, the liability of the parties of a consortium agreement shall be limited since their commitment covers only their area of expertise.

The term Business Partnership is defined under the corporate tax legislation as well. Subparagraph (d) of Article 1 and paragraph 7 of Article 2 of the Corporate Tax Law dated 13.06.2006 and numbered 5520[3], and Article 2.5 of the General Communique on Corporate Tax Serial No. 1[4] ("GCCT") regarding the implementation of this Law comprise legal provisions on "Business Partnerships" which are accepted as a special type of Joint Venture. In accordance with this, Business Partnerships within the concept of corporate tax legislation are understood as "the partnerships that are established by the corporations, cooperatives, public economic enterprises and enterprises belonging to associations and foundations between each other or among the private partnerships or real persons for the common accomplishment of a specific project and for sharing the income[5]."

The principle of partners of the business partnership being liable to the project owner for the whole business is explicitly stipulated under Article 2.5.2 of GCCT. This provision is important for the determination of the nature of the business partnership and the provision demonstrates that it is not a consortium in the real and technical sense, but a Joint Venture solely depending on an agreement[6].

Whether the Business Partnership - Joint Venture Formed by Solely Depending on an Agreement – Has Legal Personality or Not

Since the Joint Venture formed by solely depending on an agreement has a simple structure, there is no question as to its legal status. Such

3 Official Gazette. 21.06.2006, No. 26205.

4 Official Gazette. 03.04.2007, No. 26482.

5 **Barlas**, p. 279.

6 **Barlas**, p. 280, 281.

agreements are ordinary partnership agreements pursuant to the Turkish Code of Obligations Article 620, which constitutes an ordinary partnership without legal personality.

Business Partnership carries all the elements of an ordinary partnership. There is no limitation as to the parties of the agreement in a Business Partnership. The presence of at least two real or legal persons is sufficient. The validity of the agreement is in principle, not subject to a form. There isn't a different provision other than the provision for the ordinary partnership regarding the partners' participation shares. The collective purpose and mutual endeavor for this purpose are present as well. In this regard, it is indisputable that the Joint Venture solely depending on an agreement constitutes an ordinary partnership relationship which does not have a legal personality; there is overall uniformity in the doctrine[7] and in judicial decisions with respect to this issue.

Conclusion

In light of the explanations made above, since participants in a Business Partnership do not undertake specific parts of the business, do not limit their liabilities in this context and are severally liable for the whole work, these Business Partnerships do not qualify as consortiums.

Since participants in a Business Partnership can build up a partnership by solely concluding agreements, instead of creating a legal person or joining an already established company, these Business Partnerships qualify as a "Joint Venture solely based on the conclusion of an agreement".

Lastly, since Business Partnerships that qualify as a "Joint Venture solely based upon the conclusion of an agreement" are considered ordinary partnerships according to the doctrine and judiciary judgments, it shall not have a legal personality.

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[7] **Reha Poroy/ Ünal Tekinalp/ Ersin Çamoğlu,** Ortaklıklar ve Kooperatif Hukuku, N. 19b, **Şener Akyol**, Borçlar Hukuku(Özel Borç İlişkileri), II. Fasikül, Know How, Management, Joint Venture ve Büyük Çaplı İnşaat Sözleşmeleri, İstanbul 1997, p. 75, **Sıtkı Anlam Altay**, Anonim Ortaklıklar Hukuku'nda Sermayeye Katılmalı Ortak Girişimler, İstanbul 2009, p. 36, 51, **Kemal Dayınlarlı,** Joint Venture Sözleşmesi, Ankara 2007, p. 290,291, **Fahiman Tekil,** Adi, Kollektif ve Komandit Şirketler Hukuku, İstanbul 1996, p. 80, **Ünal Tekinalp/ Gülören Tekinalp,** Joint Venture, Prof. Dr. Yaşar Karayalçın'a 65. Yaş Armağanı, Ankara 1988, p. 155, 164.

Buying or Selling Commission Contracts Pursuant to the Turkish Code of Obligations No. 6098 [*]

Att. Ceyda Buyukoral

Buying or selling commission contracts are regulated under Articles 532-545 of the Turkish Code of Obligations No. 6098 (“TCO”).

Definition of Buying or Selling Commission Contracts

Buying or selling commission contracts are defined under Article 532 of the TCO. Pursuant to this article, a buying or selling commission contract is a contract where the commission agent undertakes to buy or sell negotiable instruments and movables in his name but for the account of the principal, in return for a fee.

The provisions governing agency shall be applicable to commission contracts, without prejudice to the provisions of the TCO regarding commission contracts.

Duties of the Commission Agent

Article 533 of the TCO sets forth the commission agent’s duty to inform and to insure. Pursuant to said article, the commission agent is obliged to inform the principal regarding the transactions conducted and in particular must notify the principal immediately when the commission contract is performed. In principle, the commission agent is not obliged to insure the goods on commission. However, upon instruction from the principal, the commission agent must insure the goods on commission.

In accordance with the duty of care stipulated under Article 534 of the TCO, where the goods for sale on commission are evidently defective, the commission agent must safeguard the rights of recourse against the carrier, secure evidence of the defective condition of the goods, preserve the goods where possible and notify the principal immediately. In case the commission agent fails to comply with these duties, he shall be held responsible for any damage caused by such an omission. Another duty of

[*] ***Article of March 2013***

the commission agent under the duty of care is to arrange the sale of the goods where there is a risk that they will rapidly deteriorate provided that the principal is notified immediately.

The commission agent must comply with the instructions of the principal regarding the price. Likewise, Article 535 of the TCO clearly sets forth that where the commission agent sells goods below the minimum price instructed, he is liable to the principal for the difference unless he can prove that such sale averted loss or damage that the principal would otherwise have incurred and that he was unable to seek the principal's instructions within the time available. Moreover, the commission agent, in the event he is found at fault, shall be liable for other damages suffered by the principal as a result of his noncompliance with the relevant instruction. On the other hand, the commission agent who bought goods below or sold goods above the price determined by the principal shall not be entitled to retain the difference arising from these transactions.

Pursuant to Article 536 of the TCO, if commission agent, without permission of the principal, sells the goods on credit or pays the price without receiving the goods, he must bear the damage arising therefrom. However, Article 536 of the TCO stipulates an exemption regarding sale on credit. Accordingly, unless prohibited by the principal, the commission agent may sell the goods on credit as per the commercial customs in the selling area.

The commission agent cannot be held liable for the debtors' nonpayment and nonperformance of other obligations except the sale of goods on credit without permission. However, in case the commission agent explicitly gives warranty or the commercial customs at the place of business require so, the commission agent shall be liable for the debtor's nonpayment or nonperformance of other obligations. Pursuant to Article 537 of the TCO, the commission agent who assumes liability for nonperformance by the debtor shall be entitled to special remuneration.

Rights of the Commission Agent

Pursuant to Article 538 of the TCO, the commission agent is entitled to reimbursement of all expenses incurred on the principal's behalf and all prices paid plus interest on all such amounts.

Concerning the fee stipulated under Article 539 of the TCO, the commission agent is entitled to commission on execution of the transaction or failure to execute it for a reason attributable to the principal. Where transactions could not be executed for other reasons, the commission agent is entitled to remuneration for his endeavors only to the extent provided for by local custom.

Article 540 of the TCO sets forth that the commission agent shall forfeit his right to the commission if he has acted against good faith and especially if he indicates to the principle a higher price for what is purchased or a lower price for what is sold. If the price is misrepresented, the principle has the right to take action against the commission agent himself as buyer or seller for the actual price.

The commission agent is granted a right of lien by Article 541 of the TCO. Pursuant to this article, the commission agent may use the right of lien on the price of goods sold or on goods purchased.

Pursuant to Article 542 of the TCO, where the goods on commission remain unsold or the order to sell is withdrawn and the principal fails to take them back or otherwise dispose of them within a reasonable time, the commission agent may apply to the court to have them sold at auction. However, if the goods are listed or have a specific market value or have a value less than the costs to be incurred, the judge may decide to sell the goods through other way.

Pursuant to Article 543 of the TCO, unless otherwise instructed by the principal, a commission agent instructed to buy or sell goods, bills of exchange or other securities with a quoted exchange or market price is entitled, in his own capacity as seller, to deliver the goods he is instructed to buy or, in his own capacity as buyer, to purchase the goods he is instructed to sell. In such cases, the commission agent must account for the exchange or market price that applied at the time the instruction was given and is entitled to both the usual commission and reimbursement of the expenses normally incurred in commission business. However, the commission agent must inform the principle about such transactions on the same day.

Pursuant to Article 544 of the TCO, where the commission agent is permitted to act of his own account and he notifies the principal that the

instruction has been executed without naming another person as buyer or seller, the presumption is that he himself has assumed the obligations of the buyer or seller.

Pursuant to Article 545 of the TCO, the commission agent is not permitted to act as buyer or seller if the principal has withdrawn his instruction. However, this provision shall not apply if the notice of execution was dispatched before the notice of withdrawal reached the commission agent.

Conclusion

A buying or selling commission contract is regulated under Articles 532-545 of the TCO and is defined as a contract where the commission agent undertakes to buy or sell negotiable instruments and movables in his name and for the account of another, the principal, in return for a fee.

The duties of the commission agent may be listed as: (i) to notify the principle, (ii) to insure the goods on commission in case the principle gives instructions; (iii) to take care of the goods on commission; (iv) to comply with the principle's instructions with respect to the price; (v) to avoid selling goods on credit or paying in advance without receiving the goods; and (vi) liability for the debtor's nonpayment or nonperformance of other obligations where the commission agent explicitly gives warranty or the commercial customs at the place of business require so.

The rights of the commission agent are: (i) to claim the money paid and expenses incurred; (ii) to claim a commission fee; (iii) the right of lien; (iv) to arrange the sale of the goods at auction; and (v) to make transactions with himself.

Gift Agreements Pursuant to Provisions of the Code of Obligations No. 6098 *

Att. Pelin Baydar

Gift Agreements are regulated between Articles 285 and 298 of the Turkish Code of Obligations No. 6098 (“TCO”).

A Gift Agreement is an agreement in which the donor grants his assets *inter vivos* to enrich another without receiving any equivalent consideration.

Waiving a right before having acquired it or renouncing an inheritance does not constitute a gift.

A person with the capacity to act may make gifts of his assets provided that the bounds imposed by matrimonial property law and inheritance law are reserved. A person who lacks the capacity to act may accept a gift provided he has the ability to make fair judgments. However, if the legal representative of the recipient forbids him to accept the gift or instructs him to return it, the gift shall not be acquired.

Establishment of the Gift Agreement and Liability of the Donor

Articles 288 to 293 of the TCO regulate the establishment of the gift agreement. Accordingly, the validity of the gift promise is dependent on whether or not the agreement is executed in proper written form. A promise to give title or rights in rem to immovable property is valid only if done in official form.

Furthermore, a gift from hand to hand is established when the donor delivers the object to the recipient.

A gift may be subject to a condition. A gift made contingent on the donor’s death is subject to the provisions governing testamentary dispositions.

The donor may impose provisos on his gift. The donor may request the fulfillment of a proviso that has been accepted by the recipient.

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* ***Article of July 2013***

The authority to request the fulfillment of a proviso shall pass to the competent public authority if the proviso is placed in the agreement for public interest. The recipient may refuse to fulfill the proviso if the value of the gift does not cover the expenses occasioned by the proviso and he is not reimbursed for the shortfall.

The donor may set a condition stating that the object given shall revert to him in the event that the recipient dies before he does. If the gift is related to an immovable property or rights in rem to immovable property, the reversionary right may be annotated in the land register.

Furthermore, a person who proposed to give an asset to another person may revoke the gift proposal until the intended recipient has accepted, even if he separated the asset from his other assets de facto.

In accordance with TCO Article 294, the donor shall not be liable for loss of or damage caused to the gift unless he causes this loss or damage by gross negligence. If the donor has further given a warranty promise concerning the object or credit to be bestowed, he shall be liable for this.

Annulment of Gifts

Articles 295 to 298 of the TCO regulate the annulment of gifts. The donor may, upon the occurrence of one of the following circumstances, revoke the gift, and request return of the object given in the amount equal to the enrichment of the recipient:

1. If the recipient has committed a serious criminal offence against the donor or a person close to him;
2. If the recipient has significantly violated his duties arising from the law towards the donor or any one from the latter's family;
3. If the recipient has failed without good cause to fulfill the provisos attached to the gift.

If it is determined that the donor who has made a promise to give has difficulty paying or declared bankruptcy, then the obligation to perform shall cease to exist.

In compliance with Article 297 of the TCO, the donor may revoke the gift within one year commencing from the day on which the grounds for

revocation came to the donor's attention. If the donor dies before the end of this one-year period, his right of revocation passes to his heirs and his heirs may use this right until such term terminates.

In the event the donor did not learn the occurrence of revocation reason in his lifetime, his heirs may use the right of revocation within one year starting from the death of the donor.

The donor's heirs may revoke the gift if the recipient willfully and unlawfully kills the donor or prevents him from exercising his right of revocation.

Unless otherwise provided, gifts that include only periodic performances shall terminate with the death of the donor.

Conclusion

The Gift Agreement, regulated between Articles 285 and 298 of the TCO, is an agreement in which the donor grants his assets *inter vivos* to enrich another without receiving any equivalent consideration.

The validity of a promise to give is dependent on whether or not the agreement is concluded in writing. Moreover, a promise to give title or rights in rem to immovable property is valid only if done in an official form.

The donor will not be liable for damage to the gift unless it has been caused by the gross negligence of the donor.

The donor may, upon the occurrence of some of the circumstances stipulated under the law, revoke the gift, and may request the return of the object given in the amount equal to the enrichment of the recipient.

The donor may use his right to revoke within one year commencing from the day on which the grounds for revocation came to the donor's attention.

The Usufruct Lease under the Provisions of Turkish Code of Obligations No. 6098 *

Att. Ceyda Buyukoral

The "Usufruct Lease" is regulated under the Turkish Code of Obligations ("TCO") No. 6098 between Articles 357 and 378.

The usufruct lease is a contract whereby the lessor undertakes to grant the lessee the right of use of a productive object and the benefit of its fruits or proceeds in exchange for rent.

Unless there is a special provision, general provisions on lease contracts shall be applicable to the usufruct lease.

If a usufruct lease contract includes equipment, animals, the objects transferred or the goods stocked, the parties are obliged to assess the values of such items together, record them and provide a copy of the signed inventory to the other party.

Articles 360 and 361 of the TCO regulate the obligations of the lessor. Pursuant to these articles, the lessor is required to deliver the leased object including the leased movable property, if there is any, to the lessee in a condition fit for its designated use and operation and to maintain it in that condition throughout the period of the contract. Moreover, the lessor is obliged to carry out major repairs as required on the object during the lease term at his own expense and as soon as the lessee has informed him of the need for such repairs.

As per Article 362 of the TCO, the tenant or lessee must pay the rent and the accessory charges at the end of each month and at the latest upon expiry of the lease, unless otherwise stipulated under the contract or required by local custom. In the event of non-payment of the rent that has become due upon delivery of the leased or in the event of non-payment of the accessory charges, the lessor may set a written time limit of at least 60 days for payment and notify the lessee that in the event of nonpayment he will terminate the lease upon expiry of that time limit.

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* ***Article of June 2013***

Pursuant to Article 363 of the TCO, the lessee may request a reduction of the rent in extraordinary circumstances. According to the said article, the lessee may require the lessor to reduce the rent proportionately where the usual proceeds of an agricultural land decreases due to an extraordinary disaster or natural events. Initial waiver of such right shall be valid only if the possibility of occurrence of such circumstances have been taken into account in determining the rental amount or if the damage arising is covered by insurance.

Along with the obligation to pay the rent, the lessee has an obligation to use, operate and maintain the leased object. The lessee is obliged to use the leased object in accordance with its intended use and operate it with due care and in particular must ensure that its long-term productivity is sustained. The lessee must not change the operational procedure of the leased object in a manner that may be observed after the expiry of the lease period without the consent of the lessor. Moreover, the lessee must carry out the normal maintenance of the leased object. In accordance with local custom, he must carry out minor repairs and replace inexpensive equipment and tools which have become useless as a result of age or wear and tear.

Article 366 of the TCO regulates the prohibition to sub-lease and transfer the right of use. In accordance with this article, the lessee may not sub-let all or part of the leased object or transfer the right of use or operation without the lessor's consent. However, the lessee may lease some parts of the leased object provided that it does not require any change that may cause damage to the lessor. The rules regulating sub-lease shall be applicable by analogy to the lease contracts concluded between the lessee and the third party.

The circumstances that could bring an end to the usufruct lease contract are; the (i) expiry of time, (ii) notice of termination and (iii) extraordinary termination.

In principle, the lease contract automatically comes to an end upon expiry of the period where there is a usufruct lease contract for a limited duration. However, if the lease is tacitly continued, the lease contract shall be deemed renewed for an additional year unless otherwise agreed. The renewed lease contract may be terminated at the end of each lease year in compliance with the legal notification period.

Notification is required for the termination of a usufruct lease contract concluded for an indefinite period. The parties may terminate the contract in compliance with the notice period of at least six months, except where the notice period has been otherwise agreed under the contract or determined by local customs. Unless otherwise stipulated in a contract, a termination notice may be served in spring and autumn for usufruct leases on agricultural lands in accordance with the local customs. A termination notice may be served at any time for other usufruct leases.

Extraordinary termination may be possible in the event of (i) a material cause, (ii) bankruptcy of the lessee or (iii) death of the lessee.

Where performance of the contract becomes unconscionable for a party for good cause, such party may terminate the lease in compliance with the legally prescribed termination notice period. The judge shall determine the financial consequences of an extraordinary termination notice, taking into account all of the circumstances and conditions.

Where the lessee becomes bankrupt, the contract shall automatically end on the commencement of bankruptcy proceedings. However, the lessor is obliged to sustain the contract until the end of the lease year provided that the lessee has furnished the necessary security for processing the rent and for the goods documented under the inventory.

In the event of the death of the lessee, his heirs or the lessor may terminate the contract provided that they comply with the legal termination notice period of six months.

At the end of the lease, the lessee must return the object along with all items listed in the record in the condition they are in currently.

The lessee is obliged to pay compensation due to a reduction in value, which may have been prevented had the lessee better maintained the leased object. However, the lessee may not claim compensation for the increase in the value of the object resulting from a normal degree of diligent maintenance.

Where items listed in the record were valued when the object was originally handed over to the lessee, he must return a record of items of the same type and estimated value or pay compensation for any reduction in value. However, the lessee may be relieved from return or payment

of compensation by proving the fault of the lessor or the presence of force majeure. The lessee may request compensation for the expenses he incurred which resulted in an increase in the value due to his efforts.

The lessee of an agricultural land may not assert any right over the fruits not yet harvested upon the termination of the lease contract. However, the lessee may request as compensation the agriculture expenses he incurred for the growing of the product, which will be determined by the judge, and this compensation shall be reduced from the processed rents.

The lessee returning the leased object must leave enough stock as required by a regular enterprise in the leased object. The lessee may request compensation for the excess stock left, if he leaves more than he originally obtained; if he leaves less than he originally obtained, he is obliged to replace what is lacking or compensate the reduction in value.

Conclusion

The Usufruct lease, which is regulated between Articles 357 and 378 of the TCO, is defined as a contract whereby the lessor undertakes to grant the lessee the right of use of a productive object and the benefit of its fruits or proceeds in exchange for rent.

Unless there is a special provision, general provisions on lease contracts shall be applicable to the usufruct lease.

The lessor is under the obligation to deliver the leased object in a condition fit for its designated purpose, appropriate for operation and make major repairs. Moreover, the lessee, along with the obligation to pay the rent and the accessory charges, is obliged to use, operate and maintain the leased object.

The conditions which may bring an end to the usufruct lease contract are the (i) expiry of time, (ii) notice of termination and (iii) extraordinary termination.

The Bailment Contract pursuant to the Turkish Code of Obligations [*]

Att. Ceyda Buyukoral

The bailment contract is regulated between Articles 561 and 580 of the Turkish Code of Obligations No. 6098 ("TCO").

A bailment contract is a contract in which the bailee undertakes to keep a chattel entrusted to him by the bailor in a safe place.

The bailee may claim remuneration only where this has been expressly stipulated or was to be expected under the circumstances.

The bailor is obliged to reimburse the bailee for expenses incurred in performance of the contract. Moreover, the bailor is liable to the bailee for loss or damage caused by the bailment unless he can prove that such loss or damage occurred through no fault of his own.

Obligations of the Bailee

Prohibition of Use

Pursuant to Article 563 TCO, the bailee may not use the deposited chattel without the bailor's consent. If the bailee acts in violation of this prohibition, he must pay the bailor an adequate usage fee and is liable for any chance occurrence, unless he can prove that such occurrence would have affected the chattel even if he had not used it.

The Obligation to Return

The bailee is obliged to return the chattel upon the request of the bailor, even where a fixed term was agreed for the bailment. However, the bailor is obliged to pay the expenses incurred by the bailee.

The bailee may not return the bailed chattel before the expiry of the stipulated term. However, the bailee may return the bailed chattel before expiry of the stipulated term where unforeseen circumstances render

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[*] ***Article of August 2013***

the bailee unable to keep the chattel safely for the continuance of the contract or without detriment to himself. If no term has been agreed for the bailment, the bailee may return the chattel at any time. If more than one bailor deposits an object, unless a provision stipulates otherwise in the agreement or each bailor gives their consent, the bailee shall not be relieved from liability by giving the deposited chattel to one of them.

The bailed chattel is returned, at the risk and expense of the bailor, to the same place where it was to be kept.

Liability of the Bailees

In accordance with TCO Article 567, where two or more bailees jointly receive a chattel in bailment, they shall all be jointly and severally liable.

Third Party Claims

Pursuant to TCO Article 568, if a third party claims title to the bailed chattel, the bailee remains obliged to return it to the bailor, unless it has been attached by court order or the third party has brought action to establish title against the bailor. In the event of an attachment by court order or a filing of an action to establish title, the bailee is obliged to inform the bailor immediately.

Leaving to a Trustee

Pursuant to Article 569 TCO, where two or more persons, with a view to protecting their rights, deposit an object whose legal status is disputed in bailment with a third party, the latter may return it only with the consent of all bailors or by decision of the court.

Leaving to a Warehouse Keeper

Issuance of Documents of Title

Pursuant to Article 571 TCO, a warehouse keeper who publicly offers warehousing services for commercial goods may apply to the competent authority for the right to issue documents of title to the goods kept in storage.

Warehouse Keeper's Duty of Safe-keeping

In compliance with article 572 of the TCO, a warehouse keeper has the same duty of care in relation to stored goods as a commission agent. The warehouse keeper is obliged to grant permission to the bailor for the investigation of the condition of the goods and take test samples.

Warehouse Keeper's Rights and Obligations

The warehouse keeper may request the customary warehouse fee and reimbursement of all expenses not resulting from the actual storage of the goods such as maintenance expenses, freight charges and customs duties.

These expenses must be reimbursed immediately, whereas the warehouse fee is payable in arrears quarterly and in any event whenever the goods are reclaimed. The warehouse keeper has a right of lien on these goods for his claims.

The warehouse keeper is obliged to give the commercial goods back as with a general contract of bailment.

Leaving to the Operator of Inn

In General

The operator of places such as hotels, motels, pensions and holiday camps are liable for the destruction, damage or misappropriation of the objects brought by the guests. However, if the operators prove that such loss or damage is attributable to the guest himself or to force majeure or to the nature of the objects in question, they will be relieved from liability.

However, the liability is subject to an upper limit of three times of accommodation fee per guest where no fault can be ascribed to the operator or his staff.

Negotiable Instruments

If valuable objects or money in a relatively important amount or negotiable instruments have not been left for the purpose of keeping, the operator shall only be liable in case he or his staff is at fault for their loss, theft or damage.

The operator shall be liable for the whole value of the object if he took them for keeping.

Expiration of Liability

The guest's claims are forfeited if he fails to report any damage to the operator immediately.

Leaving to the Operators of Places such as Garages and Parking Areas

The operators of places such as garages and parking areas are liable for the motor vehicles and objects deposited to them. However, if the operator proves that such loss or damage is attributable to the bailor himself or to force majeure or to the nature of the objects in question, he will be relieved from liability. However, the liability may not exceed ten times the daily bailment fee taken per each deposited item where no fault can be ascribed to the operator or his staff.

The Operator's Right of Lien

Operators have a right of lien on the animals and objects brought onto their premises, garages, parking areas or similar places as security for their claims in connection with their fees or accommodation and storage.

Conclusion

The bailment contract, which is defined as a contract in which the bailee undertakes to keep a chattel entrusted to him by the bailor in a safe place, is regulated between the Articles 561 and 580 TCO.

In accordance with Article 563 TCO, the bailee may not use the deposited chattel without the permission of the bailor. He will be liable in case he acts in violation of this prohibition. Moreover, the bailee is obliged to return the chattel upon the request of the bailor even where a fixed term was agreed for the bailment.

Pursuant to Article 572 TCO, a warehouse keeper has the same duty of care in relation to stored goods as a commission agent.

The operators of places such as hotels, motels, pensions and holiday camps are liable for the destruction, damage or misappropriation of objects brought by the guests.

Publishing Contracts According to Turkish Code of Obligations [*]

Att. Pelin Baydar

Publishing contracts are regulated in Articles 487-501 of the Turkish Code of Obligations ("TCO"). Pursuant to Article 487 of the TCO, a publishing contract is a contract whereby the originator of a literary or artistic work or his legal successor undertakes to entrust the work to a publisher and the publisher undertakes to reproduce and distribute it.

A publishing contract shall be in written form.

Transfer of Copyright and Liability

Pursuant to Article 489 of the TCO, the originator's rights to the work are transferred to the publisher to the extent and for as long as required for performance of the contract. The originator shall hold the right for publication of the work at the time when the contract is concluded. Where the work is subject to copyright protection the originator shall hold the copyright. Otherwise, the originator is liable to the publisher.

It is stipulated under Article 490 of TCO that unless the period of time, designated in the contract, has expired or the customary period of time required for exhaustion of the agreed number of editions has passed, the originator may not make other arrangements regarding the work or parts thereof to the publisher's detriment. Short passages in periodicals may be published elsewhere by the originator at any time.

Number of Editions, Reproduction and Distribution

The parties shall agree on the term of the contract or the number of editions. Where no clause was agreed that stipulates the number of editions, the publisher is entitled to produce only one.

Article 492 of TCO states that the publisher is obliged to reproduce the work in an appropriate format without abridgment, addition or alteration;

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[*] ***Article of February 2013***

also to publicize and distribute the work and to take all reasonable steps in order to promote the sales thereof. The price will be determined by the publisher at his discretion provided that it does not hinder sales of the work.

Right to Remuneration

Unless otherwise agreed, the originator may request remuneration. If the price is not established contractually, where the presumption is that publication of the work would necessarily involve remuneration, the judge determines the price. Where the publisher is entitled to produce several editions, the presumption is that the level of remuneration and the other terms and conditions for subsequent editions are the same as for the first edition.

Pursuant to Article 497 of the TCO, the remuneration is payable as soon as the complete work, or in the case of works appearing in separate parts such as volumes, fascicles or issues, each part thereof is printed and ready for sale.

Termination of the Publishing Contract

If the work is destroyed by contingency after delivery to the publisher, the publisher still remains obliged to pay the originator's remuneration. Pursuant to Article 499 of the TCO, if an edition already produced by the publisher is partly or entirely destroyed by contingency before it is put on the market, the publisher is entitled to replace the destroyed copies at his own expense without giving rise to a claim for additional remuneration on the part of the originator.

Article 500 of TCO states that the contract will be terminated automatically in the event of the death or incapacitation of the originator before the work is completed or in the event that the originator is prevented from completing it without his own fault. However, the judge may decide on continuation of the contract, where this is deemed both feasible and equitable, and order any necessary alterations.

In the event of the publisher's bankruptcy, the originator may entrust the work to another publisher. However, if the originator is furnished with

security for performance of the publishing obligations not yet due at the time bankruptcy proceedings were commenced, then the originator may not entrust the work to another publisher.

Conclusion

Pursuant to Article 488 of TCO, a publishing contract shall be in written form and the originator's rights to the work are transferred to the publisher to the extent and for as long as required for performance of the contract.

The parties shall agree on the number of editions. Where no clause was agreed that stipulates the number of editions, the publisher is entitled to produce only one.

Unless otherwise agreed, the originator may request remuneration. If the price is not established contractually, where the presumption is that publication of the work would necessarily involve remuneration, the judge determines the price.

A publishing contract will be terminated automatically in the event of the death or incapacitation of the originator before the work is completed, or in the event the originator is prevented from completing it without his own fault.

LAW OF CIVIL PROCEDURE

Regulation on Notification via Electronic Means [*]

Att. Alper Uzun

Introduction

The Regulation on Notification via Electronic Means ("Regulation") which regulates procedures and principles of the notifications served via electronic means (to be referred to as "electronic notification") entered into force through publication in the Official Gazette dated January 19, 2013 and numbered 28533.

The Regulation was prepared on the basis of the principles on information security, protection of personal data, service with good quality and international standards.

The Regulation covers electronic notifications served by judicial authorities, some public administrations, administrations with private budgets, regulatory and supervisory institutions, social security institutions and provisional special administrations, municipalities, rural legal entities, bar associations and public notaries through the General Directorate of Turkish Post ("PTT").

Relevant Legislation

As known, Article 7/A, titled "Electronic Notification", was added to Notification Law No. 7021 with Law No. 6099 and electronic notification became legally valid.

The article 7/A of Notification Law No. 7201 reads as follows:

> *"Electronic notification can be made to the person who wants to be served through an electronic address by providing an electronic address which is suitable for electronic notification.*

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[*] ***Article of January 2013***

It is obligatory to make electronic notification to joint stock companies, limited liability companies, and limited liability partnerships divided into shares.

In the event electronic notification pursuant to the first and second paragraphs cannot be made due to mandatory reasons, notification will be made by other means that are mentioned in this Law.

Electronic notification is deemed to have been made at the end of the fifth day following the arrival of the notification in the electronic address of the addressee."

The justification for the Regulation prepared in accordance with this provision is as follows: In recent years, significant developments in the field of technology and informatics, and innovations as a result of these developments, may be noticed in each phase of life. Laws and secondary legislation, which must be amended accordingly, need to be up to date and meet the requirements, and also be parallel with economic, social and technological developments. In this regard, several technology related regulations have been made in Turkey and the opportunities and facilities provided by information technologies have been put into practice in many areas. Electronic communication is a much faster and cheaper way of communicating than traditional methods.

The aim of these legal provisions is to make notifications cheap, safe and easy within the shortest amount of time.

Electronic Notification

The Regulation stipulates that the authorities who make electronic notification shall obtain their electronic notification addresses only from PTT. Addressees may obtain their electronic notifications from PTT or other service providers.

The notifications shall be forwarded through the servers of PTT. The notifications will be forwarded directly to addressees who obtain their electronic notification addresses from PTT. However, the notifications to the addressees who obtain their electronic notification addresses from service providers other than PTT will be made through the servers of said service providers. Reports of notifications will be issued via PTT servers

to the system of the authorities that issued the notification. Thus, all notifications, including electronic notifications made to the authorities, will be made through PTT.

As seen in Notification Law No. 7201, the addressee has to submit an electronic address which is suitable for electronic notification in order to receive electronic notifications. The Regulation provides the use of Registered Electronic Mail ("KEP"), which provides a safe means of communication, legal validity in electronic media and is suitable for electronic notification for usage of electronic messaging. The Regulation allows addressees to get an electronic address from a mail service provider that is authorized by the Information and Communications Technologies Authority.

KEP is defined in the Regulation as a "qualified form of electronic mail, which provides legal evidence regarding usage of electronic messages including transfer and delivery". KEP has been used in European Union countries and other countries for a long time. Moreover, an international standard of ETSI TS 102 640 was published by the European Telecommunication Standards Institute ("ETSI") in November 2008 which regulates the interoperability, definition of technical formats, operation process of KEP, and usage of electronic signature and time stamp. KEP, which is defined as a special correspondence infrastructure of electronic communication that uses electronic mail infrastructure and protocols based on ETSI TS 102 640 standard, provides valid and safe transfer and delivery of information and documents, storage and legal evidence in electronic media. The Regulation of Procedures and Principles Regarding Registered Electronic Mail has been published in the Official Gazette dated 25.08.2011 and numbered 28036. The Information and Communications Technologies Authority, which has the authority to audit pursuant to the Regulation and Law on Electronic Communication No. 5809, is also authorized to audit all of the providers of electronic notification services.

Practice and Conclusion

As mentioned above, it is mandatory to make notifications via electronic means to the joint stock companies, limited liability companies,

and limited liability partnerships divided into shares. Real persons and legal entities may benefit from electronic notification at their own discretion. Addressees, who are obliged to receive electronic notifications, must submit electronic notification addresses to the authorities which are entitled to issue notifications. In the event notification cannot be made via electronic means to the addressees who are obliged to receive notifications accordingly, notification will be made by other means as mentioned in the Law.

The authority that issues the notification will transfer the electronic notification message to PTT with its electronic notification address granted by PTT. PTT relays this message with a time stamp and transfers the message to the electronic address of addressee or addressee's service provider if the addressee obtains the electronic notification address from a service provider other than PTT. The service provider who receives the electronic notification message then relays this message with a time stamp and transfers the message to the electronic notification address of addressee.

According to Article 9 of the Regulation, electronic notification is deemed to have been made at the end of the fifth day following the arrival of the notification in the electronic address of the addressee.

Electronic notification aims to meet international standards and overcome the problems regarding notification, information security and protection of personal data, while promoting good quality services.

Mediation in Civil Disputes [*]

Att. Alper Uzun

Introduction

The Law on Mediation in Civil Disputes No. 6325 (“Law”) was accepted on 07.06.2012 and published in the Official Gazette dated 22.06.2012 and numbered 28331.

The provisions of the Law will enter into force 1 year after its publication, thus on 22.06.2013. The Regulation on the Law (“Regulation”) was published in the Official Gazette dated 26.01.2013 and numbered 28540, and will enter into force on the same date as the Law.

The Law regulates mediation in Turkish law for the first time. Article 1 of the Law stipulates that mediation shall be applied only in the resolution of private law conflicts, including those having a foreign element, arising from acts or transactions of interested parties who have the capacity to settle such conflicts.

The preamble to the Law states that it aims to regulate the procedures and principles for resolving conflicts without recourse to courts; the goal is to arrive at a solution simply and easily through mediation, a form of alternative dispute resolution.

Under the Law and the Regulation, mediation is defined as “*a method of voluntary dispute resolution system carried out with the inclusion of an impartial and independent third party; who is specially trained to convene the relevant parties by way of systemic techniques and with a view to help such parties mutually understand and reach a resolution through a process of communication*” .

According to the Law, a “Mediator” must fulfill the following conditions: (a) be a Turkish citizen; (b) a graduate of the faculty of law and have at least 5 years experience in the profession; (c) be fully capable; (d) have no criminal record for having committed an intentional crime; and (e) have completed mediation training and passed the written

[*] ***Article of March 2013***

and practical exam administered by the Ministry of Justice. The persons fulfilling these conditions may act as mediators by registration to the mediators registry and may commence their services from the date of registration.

Basic Principles of Mediation

The Law and the Regulation set forth the basic principles of mediation.

Being Voluntary and Equal

The Law stipulates that the parties are free to decide whether to utilize mediation, sustain and conclude the process or withdraw from the process. The parties must first decide to resolve the conflict by mediation. No party may be included in the process against his will and all parties have the option to withdraw from mediation at any time.

Moreover, the parties shall have equal rights in their recourse to the mediator and during the mediation procedure. A party may not be excluded from the mediation process and one party's right to speak may not be restricted in reference to the other party.

Confidentiality

Unless otherwise agreed by the parties, the mediator must keep confidential all information, declarations, proposals, documents or other records submitted or acquired by any means throughout the mediation process.

The obligation of confidentiality includes all persons working with the mediator, as well as any interns. If the mediator acts against the confidentiality principle, legal and penal sanctions may be imposed.

Declarations and Documents that Cannot be Disclosed

The Law sets forth that in the event there is a lawsuit filed or arbitration proceedings conducted stemming from the dispute, the parties, the mediator or a third party including those involved in the mediation may not cite as evidence any of the declarations, information or documents submitted during the mediation process. These declarations and documents include the following:

- The invitation to mediate sent out by any party or the statement of willingness to mediate sent by any party;
- The opinions and proposals submitted by the parties to settle the conflict through mediation;
- The acceptance of any proposal, fact or assertion submitted by any party during the mediation process or;
- Documents prepared solely for mediation.

No court, arbitrator or administrative authority may request the disclosure of these documents and declarations. Even if these documents and declarations are cited as evidence, no judgment may be based thereupon. However, said information may be disclosed to the extent required for the implementation and enforcement of the mediation agreement or if there is an imperative provision of law requiring so.

Rights and Duties of Mediators

The Law holds that the mediator must fulfill their duty in person, impartially and meticulously. A mediator must treat the parties equally and may not act or behave in a way to cause any skepticism over his impartiality. The mediator shall inform the parties of important aspects and conditions of the case that will hinder his ability to remain impartial. Despite this information, the mediator can continue to act as mediator if both parties agree as such.

At the outset of the mediation, the mediator is obliged to explain the principles and procedures of the mediation and its legal consequences to the parties, personally and directly. The mediator must also inform the parties regarding qualifications and outcomes of the "Agreement", which shall be prepared if the parties come to an agreement at the end of the mediation and which has the power of a verdict upon annotation by the court.

The mediator may negotiate and communicate with each party separately or together. The parties may attend these negotiations in person or by their proxies.

Pursuant to the Law, mediators are prohibited from marketing or advertising their services. They are also prohibited from using any title

except mediator, attorney or any academic title in their sign boards and printed papers.

In the event the mediation is terminated, the mediator is obliged to preserve the notification served to them, documents entrusted and possessed and the written report prepared regarding the final outcome of the mediation for five years.

The mediator shall be entitled to claim a fee as well as expenses in consideration of his work.

Mediation Activities

The parties can decide to resort to mediation prior to or during the litigation process. The court can also enlighten and encourage the parties to do so. A party may request to apply to the mediator. If a party does not receive an acceptance of the invitation to mediate within thirty days from the day on which the invitation was sent, the invitation shall be deemed to be rejected unless otherwise stated.

Unless otherwise determined, the parties shall appoint the mediator or mediators jointly. Following the appointment, the mediator shall invite the parties to a meeting as soon as possible. Parties can freely determine the mediation procedure provided that it does not conflict with the mandatory legal rules. If no procedure is agreed upon by the parties, the mediator shall use his discretion to determine the procedure by taking into consideration the nature of the conflict, the claims of the parties and the necessary procedures and principles in order for the conflict to be resolved as quickly as possible.

The mediator may not perform actions that exclusively fall within the authority of a judge, such as viewing, consulting an expert and hearing witnesses, whose nature requires the exercise of a jurisprudential power. Likewise, the mediator may not provide legal advice to the parties during the process; develop and impose upon parties a proposal for a solution or a range of solutions, or pressure the parties to reach an agreement on a solution developed during the negotiations. However, should the mediator transmit a proposal to resolve the dispute introduced by one party to the other party and receive the other party’s opinion thereon; this shall not be construed in the above context.

The litigation process shall be adjourned for up to three months if the parties declare their intention to resort to mediation after the court case is filed. The parties may extend this period once for three more months upon joint application.

The Law regulates that the period from the initiation until the termination of mediation shall not be taken into consideration while calculating the lapse of time and foreclosure.

Completion of the Mediation

The mediation shall come to an end if (i) the parties reach an agreement (ii) the mediator determines that it is not worth the effort to continue the mediation after consulting the parties, (iii) one of the parties declares either to the other party or to the mediator that it will withdraw from the mediation, (iv) the parties decide jointly to terminate the mediation and (v) it is determined that the dispute is not convenient for mediation or is related to a crime which does not fall within the scope of mediation pursuant to the Law on Criminal Procedure No. 5271.

At the end of the mediation, a report shall be prepared stating whether the parties agreed, or not or how the mediation process came to an end. The parties shall decide on which issues will be included in the report, except with regards to why the mediation was terminated.

If the mediation ends with an agreement, the scope of the agreement will be determined by the parties. If an agreement is prepared, the parties and the mediator shall sign this document.

Enforceability of the Agreement

If the parties come to an agreement, they may request an annotation on the enforceability of the agreement.

Where the parties resort to mediation before filing a lawsuit, they can request the annotation on enforceability of the agreement from the court as determined by jurisdictional rules. If the parties apply to mediation during a lawsuit, the annotation on enforceability of the letter of agreement can be received from the court that hears the case. The agreement with the annotation has the power of a verdict.

Giving an annotation on enforceability is an ex-parte proceeding and the relevant review may also be done on the file. However, examinations regarding family law disputes, which may be resolved with mediation, shall be conducted by court hearing. The scope of the examination of a family law dispute is limited to two subjects: whether the content of the agreement is suitable for mediation and whether it can be enforced by the state. Where an application is made to the court for an annotation on enforceability and the other party decides to appeal the decision given thereon, fixed fees shall be charged.

Evidence by Documentation and It's Exceptions under the Code of Civil Procedure [*]

Att. Alper Uzun

Introduction

"The Principle of providing evidence by documentation" set forth by the Code of Civil Procedure No. 1086 ("Former CCP") is one of the fundamental principles of our legal system. The obligation to provide evidence by document and the prohibition on providing evidence by witness against document are stipulated in the Code of Civil Procedure No. 6100 ("CCP"). Nevertheless, with the new Code some important amendments have been made to the exceptions to these rules.

The most eminent change is the regulation of the provision formerly entitled "written preliminary evidence" as "preliminary evidence" and the inclusion of the definition of what constitutes a Record. It is not necessary anymore for a record to be in writing in order for it to be considered preliminary evidence. Any means fitting into the definition of a Record and which may be deemed as proof can be regarded as preliminary evidence, on the condition that it fulfills the other two criteria. Within this perspective, electronic records may also be regarded as preliminary evidence. Under the CCP, evidential contracts revoking or seriously restricting the other party's right to provide evidence shall be void.

What is a Record?

First, the definition of "Record" shall be introduced. The CCP defines what constitutes a "Record" as follows: *"Written or printed texts or documents, certificates, drawings, plans, sketches, photographs, films, visual or audio data and electronic data and other means of collection of information, which are convenient for proving the facts related to the dispute, are records under this Act."*

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* ***Article of September 2013***

A Comparison of the Obligation to Provide Evidence by Document and It's Exceptions under the Former and Current Code

Under the principle of providing evidence by document, the document is regarded by scholars and the practice as the most valuable evidence. Documentation is the fundamental means of evidence in our legal system. Likewise, it is considered that the witness may, with or without intention, testify against the truth. These principles are conserved in the CCP. The principle of the judge's discretionary power on evaluating the evidence, which is also included in the CCP, is set forth in Article 240 of the Former CCP as follows: *"The judge is to decide at his discretion and conviction regarding the established evidence unless otherwise set forth by this Act."* According to Article 198 of the CCP: "*The judge is to decide at his discretion and conviction except stipulated otherwise by the statutory rules."* This provision set forth by the CCP has a small difference. According to said provision, Acts other than the CCP can bring restrictions on the evidence.

Article 200 of the CCP, which sets forth the "Obligation to provide evidence by Documentation", reads as follows:

"(1) Legal acts performed in order to originate, assign, modify, renew, postpone, confess and redeem a right shall be proven by documentation if their value at the time they were performed exceeds two thousand five hundred Turkish Liras. Such legal acts cannot be proven by other means than documentation even if their value or amount falls under two thousand five hundred Turkish Liras by payment or quittance.

(2)For issues that shall be proven under this provision, a witness can be heard with explicit consent of the opposing party after reminding the regulation of the first paragraph."

The statement "cannot be proven by means other than document" is preserved in the new Code. In the second paragraph of the article, the exception of hearing witnesses with explicit consent of the opposing party, which was explained in Article 289 of the former Code, is set forth. Accordingly, a witness can be heard for issues that are required to be proven by documentation with the explicit consent of the opposing party after being reminded of said provision.

The prohibition to provide evidence by witness against documentation, which is also referred to as the obligation to bring documentation against documentation by scholars and the practice, is set forth under Article 201 of the CCP:

> *"Legal acts which may be raised against any allegation stemming from the document and which may rule out or reduce the force of the document cannot be proven by witness even if they correspond to a value less than two thousand and five hundred Turkish Liras."*

As an amendment to Article 290 of the former Code, the statement "brought forward as an exception" is replaced with "brought forward". The most fundamental difference between the obligation to provide evidence by documentation and the prohibition to provide evidence by witness against documentation is that in the former rule, the establishment of evidence by documentation is mandatory and in the latter the establishment of evidence by witness is prohibited.

The provisions of the CCP related to the exceptions to the evidence rules are similar to those of the former Code. In Article 202 of CCP, "Preliminary Evidence" is set forth and the exceptions are stipulated under Article 203. Evidential Contract, which is another method used to overcome the rule to provide evidence by documentation, is set forth in detail under Article 193, before the rule to provide evidence by documentation.

Article 202, which sets forth the "Preliminary Evidence", reads as follows:

> *"(1) In cases where there is an obligation to provide evidence by documentation, witnesses may be heard if there is preliminary evidence.*
>
> *(2) Preliminary evidence is a record showing that the existence of the alleged legal act is probable and given or sent by the person against whom it was alleged, even if it is not sufficient to establish complete proof."*

Article 203 of the Code which sets forth the circumstances under which witness can be heard is as follows:

"(1) Witness may be heard under the following circumstances:

a) For transactions between lineal consanguinity, siblings, spouses, father- in-law, mother-in-law, daughter-in-law and son-in-law;

b) Legal transactions for which a document is not produced as a matter of application of the customary law;

c) Legal transactions performed in circumstances under which obtaining a document is impossible or very difficult, such as fire, marine accident or earthquake;

d) Allegations of defect of intention and lesion in transactions;

e) Allegations of simulation brought by third parties against legal transactions or documents; and

f) In circumstances under which there is strong evidence or indications which strengthen the impression that the document is lost because of an unexpected event or force majeure by the owner or the officer or the public notary to whom the document was duly entrusted."

During the period in which HUMK was in force, attempts were made to introduce some additional exceptions alongside the statutory exceptions by court decisions; and attempts have also been made to overcome the prohibition to provide evidence by witness against documentation in the presence of certain circumstances. The High Court has handed down decisions that bring exceptions to the rule to provide evidence by documentation for labor and service contracts, the incompatible filling out of a document against a contract and gambling debts. For example, there is an important jurisprudence of the Turkish High Court that asserts that the judge may decide to hear a witness in a case where it is alleged that the document is void because of immorality and in the presence of an event that is against the ordinary flow of life.

Conclusion and Summary

As explained above, the exceptions to the "Rule to Provide Evidence by Documentation" are preliminary evidence, evidential contract, consent to witness testimony and the circumstances under which witnesses can be heard which are enumerated under the six titles in Article 203 of CCP.

The provision of the Former CCP relating to torts has not been included in CCP, though the allegations of simulation of third parties against legal transactions and documents have been set forth. Evidential contracts have been regulated in more detail and the nullity of evidential contracts, which revoke or seriously restrict the other party's right to provide evidence, is explicitly included in CCP.

The most important change related to the exceptions to the rule to provide evidence by documentation is the establishment of "preliminary evidence" in place of "written preliminary evidence", which is set forth under the Former CCP. The condition that preliminary evidence be in written form is canceled and other types of records which fulfill the other two criteria are regarded as preliminary evidence under the new provisions. The following two conditions are also broadened: The records, sent by the opposing party or his representative, are set forth as acceptable and the condition of evidence is broadened with a new wording as to "show as possible" in place of to "indicate the existence of".

Account Settlement in Execution Law [*]

Att. Alper Uzun

Current account is regulated in Article No. 89 of the Turkish Commercial Code (“TCC”). According to that, it is an agreement that two persons may request the balance that drawed up at the end of a period, instead of paying the debts or requesting receivables separately.

Account settlement may be made when the current accounts of companies are being closed, checked-out or confirmed reciprocally. Companies ascertain the status of debt and credit between each other by account settlement. This settlement is usually fulfilled by issuing a confirmation letter between companies.

Issuing a confirmation letter causes some legal disputes in practice. The most important being whether a confirmation letter can be considered a valid acknowledgement of debt or not.

The Confirmation Letter

According to Article No. 94 of the TCC, a confirmation letter is issued for the purpose of closing and reciprocally confirming corporate current accounts, and also for settling or closing the commercial books.

As per Article No. 94/1 of TCC, *“The remaining amount is determined at the end of every year and the party receiving the reconciliation statement is deemed to accept it if it does not submit a written and valid notice within one month of receipt of said statement.”* According to this regulation, companies issue a confirmation letter and send it to the other company that is party to the current account agreement.

The company, which issues a confirmation letter, writes the debit and credit balance into the letter.

As it is frequently seen in practice, the company, which is a party of a current account agreement, initiates execution proceeding based on the confirmation letter, if it cannot gain their credits.

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* ***Article of May 2013***

When the debtor objects to the execution proceeding, and the creditor company applies for removal of the objection to receive the credit quickly, the question of whether or not a confirmation letter is a document that falls within the meaning of Article No. 68 of the Enforcement and Bankruptcy Code ("EBC") comes to the fore.

Confirmation Letters and Article No. 68 of the EBC

Removal of objection is a short, quick and cost effective procedure that allows a creditor to receive a claimed amount via an execution proceeding by applying to execution courts. Therefore, it is possible to apply for removal of objection if the creditor has a document that falls within the scope of documents mentioned in Articles 68 and 68/A of the EBC. At this point, the confirmation letter, which is submitted to the execution file by the creditor of the current account, must be evaluated to determine whether or not it is a document that falls within the scope of Article No. 68.

Article No.68/1 of the EBC reads as follows:

> *"The creditor, whose execution request has received an objection, may claim for removal of the objection within six months from receipt of the objection if its execution proceeding is based on a bond that includes debt acknowledgement and its signature is acknowledged or notarized, or a document or receipt, which is duly issued by a governmental or other competent authority."*

The creditor must have a document that meets the requirements mentioned in Article No. 68 of the EBC for the removal of the objection by the court of execution. The legal characterization, content and the signature in the document becomes very important.

Therefore, the signature at the confirmation letter must be evaluated. It is beyond dispute that to evaluate a document under the guise of Article No. 68, the document must be signed by the person or the authorized signatory of the debtor company in order be submitted as evidence against that debtor company.

Even though the confirmation letter is prepared by the account service of the company, this does not mean that this letter includes debt acknowledgement that meets the conditions of Article No.68.

As it is well known, for verification purposes, a list of signatures must be provided of all those persons with the authority to represent and bind a company. Court of Cassation demands that a confirmation letter must be signed by a duly authorized company representative and the courts must ascertain this issue during litigation:

> *"… It is understood that Rebii Bozdan, who signed the document entitled "Account Settlement" in the name of the company, is not an authorized representative of the company. It is not acceptable that the court made a decision without conducting proper research, rather than evaluating all the evidence and making an appropriate decision as a result."* (Decision of 19th Civil Chamber of Supreme Court dated 01.12.2005, numbered 2005/1967 E. 2005/11954 K.)

The Court of Cassation ruled that an authorized signatory of the company did not sign the letter of account settlement and made a reversal decision that it is an error of the court not to have examined this issue.

Conclusion

As a consequence, if an authorized representative does not sign a confirmation letter, it cannot be evaluated as an acknowledgement of debt, and it is not possible to gain approval when requesting the removal of an objection based upon said letter.

ENERGY LAW

The New Electricity Market Law*

Prof. Dr. H. Ercument Erdem

The new Electricity Market Law No. 6446 ("New EML") was enacted by the Turkish Grand National Assembly on 14 March 2013 and published in the Official Gazette numbered 28603 on 30 March 2013. Surprisingly, Electricity Market Law No. 4628[1] was not abrogated with the enactment of the New EML, but its title was changed to "Law on the Organization and Duties of the Energy Market Regulatory Authority" ("Previous Law" or "EMRA Law" where appropriate) and was partially amended by the new law. Accordingly, the provisions regarding the organization and duties of the Energy Market Regulatory Authority ("EMRA") remain in effect under the EMRA Law. According to the New EML, all references in the legislation to the repealed articles of the Previous Law shall be considered as references to the related articles of the New EML.

The New EML envisages some important changes and in this article those changes will be reviewed.

Activities and Licenses

Under the New EML, the licenses and the rules to be applied are based on the types of electricity market activities. In other words, the New EML is structured around types of activities rather than types of licenses. The electricity market activities which require a license are listed under Article 4 of the New EML as generation, transmission, distribution, wholesale, retail sale, market operation, export and import. The New EML does not mention retail sale service and trade activities, as did the Previous Law. However, in the New EML market operation is introduced as a new type of activity.

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* ***Article of March 2013***

1 Official Gazette 3 March 2002, No. Reiterated 24335.

Article 14 of the New EML sets forth the activities that can be conducted without a license. Whereas under the Previous Law 500 kW was the maximum installed capacity for a renewable energy plant to operate without a license, the New EML has raised that maximum to 1 mW. In addition, the Council of Ministers is authorized to increase the maximum installed capacity for a renewable energy plant to operate without a license to 5 mW.

The draft of the New EML previously announced by EMRA initially stipulated that transactions such as share transfer and change of control, which result in a change in ownership or usufruct rights, could be conducted without requiring the approval of, but by simply notifying EMRA. However, this change is not included in the New EML, and similar to the Previous Law, those transactions are still subject to EMRA's prior approval under the New Law.

EPIAS and the Activity of "Market Operation"

The New EML defines a new activity called "market operation" as the operation of organized wholesale electricity markets and financial settlement of activities conducted in such markets, along with other related financial transactions.

Currently electricity market operation activities are conducted by the Market Financial Reconciliation Center ("MFRC"), organized under the Turkish Electricity Transmission Joint Stock Company ("TEIAS"). The New EML establishes a new company to assume the role of the MFRC, the Energy Market Operation Joint Stock Company ("EPIAS"). The permanent officials and equipment of the MFRC will be transferred to EPIAS, which will be a private legal entity acting under an EMRA issued market operation license. Pursuant to the New EML, EPIAS is to be incorporated and initiate its activities, and the relevant regulations will be enacted within six months from the date the New EML enters into force.

Preliminary License for Generation

As per Article 6 of the New EML, a preliminary license is required for commencement of generation activities. EMRA will issue a preliminary license for a specified term to the legal entities who apply to conduct

electricity generation activities, during which period they must obtain the necessary permits, approvals and licenses, as well as acquire ownership or usufruct rights to the land where the generation facility is to be located. The term of the preliminary license cannot be more than twenty-four months excluding the occurrence of force majeure events. EMRA is entitled to increase the preliminary license term by half, for a maximum of thirty-six months, based on the energy source type and the facility's installed capacity.

The New EML stipulates that legal entities that could not obtain the above-mentioned documents, certify the acquisition of the property or usufruct rights, or fulfill the other legal requirements shall not be granted a generation license. In addition, before a generation license is granted, where there are any direct or indirect changes in the shareholding structure (with the exception of inheritance), share transfers or non-fulfillment of other legal requirements, the preliminary license will be cancelled. Moreover, if the preliminary license term expires or the legal entity holding the license files for or falls into bankruptcy, the preliminary license will automatically become null and void. However, there is no express provision in the new EML stating when the preliminary license becomes null and void.

Distribution License Holders and Other Market Activities

As per Article 9 of the New EML, electricity distribution companies can only operate in the territory indicated in their license, cannot conduct activities other than distribution activities and cannot directly become a shareholder in other legal active in the electricity market. Moreover, while generation companies are prohibited from becoming controlling shareholders under the Previous Law, the New EML completely prohibits legal entities active in the electricity market from becoming direct shareholders in a distribution company. As *argumentum a contrario,* indirect shareholding is not prohibited.

Supply License and Supply Companies

Wholesale and retail sale activities, which were regulated as different types of licenses, "wholesale license" and "retail sale license", under the

Previous Law, are regulated as one license type, a "supply license", under the New EML. As per Article 10 of the New EML, supply companies can conduct wholesale and/or retail sale activities without territorial limitations. In addition, it is stipulated that supply companies may also import from and export to countries with which the interconnection condition is satisfied.

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 New EML. Instead, temporary Article 7 of the New EML holds that generation licenses will be automatically issued to auto producer license holders within six months of the effective date of the New EML, and no license issuance fee shall be charged. Moreover, any applications filed to obtain an auto producer license will be treated as generation license applications.

Provisions on Total Market Share

The Previous Law set forth restrictive provisions related to total market share or total sale amounts for companies active in the electricity market. These restrictions were 10% of the previous year's total energy sales within Turkey for wholesale companies and 20% of the previous year's calculated total installed capacity within Turkey for generation companies.

The New EML also regulates market share restrictions for license holding companies. Pursuant to its provisions:

- Generation companies controlled by any real person or any private sector legal entity cannot hold a total installed capacity of more than 20% of the previous year's calculated total installed capacity within Turkey (Art.7/para.5);
- Private sector legal entities that hold supply licenses cannot purchase electricity from generation or export companies exceeding 20% of the previous year's total consumption of electricity within the country (Art.10/para.6);

– Supply companies cannot sell electricity on a wholesale or retail basis exceeding 20% of the of the previous year's total consumption of electricity in Turkey (Art.10/para.6).

Changes related to Applicable Sanctions

As per Article 16 of the New EML, the monetary sanctions applicable as a result of non-performance of duties and non-fulfillment of the requirements arising out of the law or related legislation are increased.

Moreover, as per paragraphs 3 and 4 of Article 16 of the New EML, in the event that distribution or supply companies do not conduct their activities pursuant to the legislation, impede their services, decrease their service quality to an unacceptable degree, become insolvent or are in a position to become insolvent EMRA can dismiss some or all of their board members and appoint new ones. In such an event, EMRA will be deemed as the addressee (defendant) of any claims filed against the members it appointed to the board of directors of said distribution or supply companies. Where any such aforementioned claim results in compensation due to the plaintiff, such compensation will be borne by EMRA, with a right of recourse.

Exceptional Provision regarding Environmental Requirements

Pursuant to temporary Article 8 of the New EML, the state owned generation company, EUAS (*Elektrik Üretim A.Ş. Genel Müdürlüğü)*, its subsidiaries and affiliates, as well as publicly owned companies that are to be privatized according to privatization legislation, are granted a grace period until the end of 2018 to become compliant with environmental laws and acquire the required permits. Accordingly, it is stipulated that their activities cannot be cancelled and no sanction can be applied due to non-compliance with environmental laws during the grace period and even for the period prior to the grace period. This exceptional provision is very important for generation companies that are or will be subject to privatization.

Temporary Articles and the Extension of Some Deadlines

Some deadlines set in the Previous Law are extended with the New EML. Some of them are as follows:

- The price equalization mechanism for distribution companies and supply companies, which was applied until the end of 2012, is extended until the end of 2015, and until such date the national tariff applies.
- The corporate tax and VAT exemptions, which were applied until the end of 2010 to the mergers, spin-offs and transfers of generation and distribution companies subject to privatization, are extended until the end of 2023.
- A 50% discount on system utilization fees during the investment periods and for five years as of the operation start date, and the exemptions from stamp tax and duties granted to generation facilities are extended until the end of 2015.

Further to the aforementioned, pursuant to temporary Article 12 of the New EML, within one year of the New EML's effective date, generation licenses shall be issued to the generation facilities and projects subject to existing agreements[2]. The terms of such licenses will be subject to the same rights and obligations and limited by the term in the existing agreements.

Moreover, it is regulated under paragraph 1 of temporary Article 14 that new licenses shall be issued to former generation license holders who started the construction of power plants but whose licenses were cancelled or ceased before the entry into force of the New EML; provided that the Ministry of Energy and Natural Resources ("MENR") decides the construction is irrevocable and there is public interest for continuance. However, this provision is not applicable to hydro-electric power plant facilities.

[2] Existing agreements are defined as the contracts and concession and implementation agreements signed before the enactment of Previous Law in accordance with the terms and conditions of Law no. 3096 dated 04.12.1984, no. 3996 dated 08.06.1994, no. 4283 dated 16.07.1997 and no. 4501 dated 21.01.2000 and related regulations.

Conclusion

The New EML introduces some important changes in the current electricity market system. These include: amendments to license types, framing its provisions around each type of market activity, specific provisions for certain license types (i.e. distribution, supply and generation), the introduction of a preliminary licensing mechanism and investment incentives such as extended deadlines and grace periods for environmental compliance. The New EML also introduces EPIAS which will be an independent private company authorized for the market operation activity.

The principle reason for drafting the New EML was that the Previous Law was not sufficient to follow the factual progress achieved by the market actors and regulatory authorities since 2001. The goal is that the law, as the primary legislation, shall guide the market actors in the future and constitute a legal basis for secondary legislation. Harmonization with European Union legislation and the composition of a new market with a secure supply that generates investor interest are the other reasons behind the new law.

The systematic of the New EML is based on the market activities. Therefore, one can argue that it is neatly drafted when compared with the Previous Law. On the other hand, from a legal technical point, transformation of the Previous Law to EMRA Law and the lack of succession between its articles after this transformation can be criticized.

Licensing under the New Electricity Market Law*

Att. Berna Asik Zibel

The new Electricity Market Law[1] No. 6446 entered into force on March 30, 2013 ("New EML"), with the objectives of developing a transparent and competitive electricity market, achieving stability of supply, and ensuring good quality, low cost and environmentally friendly electricity.

Similar to the former law, the New EML sets forth the basic licensing rules to enter the electricity market. In this article, we will review the licensing provisions under the New EML.

Electricity Market Activities and Market Entrance

According to the New EML, "electricity market activities" include the generation, transmission, distribution, wholesale, retail sale, market operation, export and import of electricity. In order to enter and operate in the electricity market, legal entities should obtain the relevant license for each market activity.

Based on the field of activity, the following licenses can be obtained:

(a) A generation license for generation activities including auto-production, export and import activities;

(b) A distribution license for distribution activities;

(c) A supply license for wholesale and retail sale activities including export and import.

Moreover, under the New EML, the transmission of electricity in Turkey is solely vested in TEIAS[2] and the market operation activity is solely vested in the Energy Market Operation Joint Stock Company ("EPIAS"), a new company which will assume the role held by the Market Financial Reconciliation Center ("MFRC") under the former law.

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* ***Article of April 2013***

1 Official Gazette 30 March 2013, No. 28603.

2 The abbreviation is for Turkish Electric Transmission Joint Stock Company. It is the only company in Turkey which conducts transmission activities with a transmission license.

Pursuant to Article 5 of the New EML, in the event that one legal entity is conducting market activities at different facilities, it should obtain separate licenses for each facility, even if a legal entity only engages in one type of activity at those facilities.[3] Moreover, t**he licensees engaged in market activities subject to regulated tariffs and carrying out such activities at more than one facility or region are obliged to keep separate accounts and records for each facility or each region subject to a license.**

Licensees cannot engage in any activities which are not within the scope of their licenses; however, they may engage in **activities that are complementary to and/or required within the scope of their market activity and related to the by-products produced as a result of their market activity**, on the condition that such other activities are explicitly indicated in their licenses.

Pursuant to Article 5 paragraph 2(c) of the New EML, licenses are issued for a period of up to forty-nine (49) years at once. The minimum term for generation, transmission and distribution licenses is ten (10) years.

To obtain a license, legal entities should apply to the Energy Market Regulatory Authority of Turkey ("EMRA") by submitting the required documents and by paying the necessary fees. The details of license application requirements, the licensing fees and the conditions regarding the modification, renewal, expiry and cancellation of licenses will be regulated under secondary legislation (in the form of regulations), and shall all be enacted within six months from the date on which the New EML enters into force.

Rules on Corporate Structure

Under the New EML, there are some basic rules regarding the corporate structure of the legal entities that may apply to obtain licenses;

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[3] Under Article 5 paragraph 2(f) of the New EML, an exception is set forth for generation facilities based on same type of renewable energy resources. According to this exception, renewable energy generation facilities which are located at the surface of more than one premises, can be considered under one generation license provided that they are connected to the system from the same point.

such as the types of legal entities, the types of share structures, etc. These rules are summarized below.

Type of Legal Entities

According to Article 4, paragraph 3 under the New EML, all legal entities subject to private law and carrying out activities in the electricity market, are required to be established either as joint stock or limited liability companies in accordance with the provisions of the Turkish Commercial Code.

Shares and Share Transfer

The shares of companies carrying out activities in the electricity market, excluding publicly held companies, should be registered shares. Where a joint stock company has previously issued bearer shares, it is required to convert its shares to registered shares following its application to obtain the relevant licenses in order to carry out activities in the electricity market.

According to the New EML, changes in a company's shareholding structure that amount to ten percent or more of the shares of a company conducting activities in the electricity market (five percent or more for publicly held companies) are subject to the approval of the Energy Market Regulatory Board ("Board"). Even if there is no transfer of shares at the licensee level, any transaction that leads to a change of control, or which results in a change in ownership or usufruct rights of the relevant facilities, are subject to the approval of the Board.

Further, we believe there will be additional rules under the secondary legislation on corporate structure, governance and management of the companies entering the electricity market.

Preliminary License for Generation Activities

Under the New EML, a new concept of a preliminary license is established for generation companies. Pursuant to Article 6, a preliminary license will be issued for the generation license applicant. The maximum

term of the preliminary license is twenty-four months[4], and during this term, all necessary permits, approvals to build and rights for the ownership or use of the land where the generation facility is to be located must be obtained.

The New EML stipulates that legal entities that fail to obtain the above-mentioned documents, or certify the acquisition of the property or usufruct rights, or fulfill the other legal requirements within the given term shall not be granted a generation license.

During the term of this preliminary license, there shall not be any direct or indirect changes in the shareholding structure (with the exception of inheritance). In case of a share transfer or non-fulfillment of other legal requirements, the preliminary license will be cancelled. In addition, the preliminary license will automatically become null and void upon the expiry of the term or in the event of the filing for or actual bankruptcy of the legal entity holding the preliminary license.

According to Temporary Article 10 of the New EML, generation license applications not finalized by the Board as of the effective date of the law shall be evaluated and finalized as preliminary license applications.

Conclusion

As explained above, the New EML sets forth the basic licensing rules for electricity market activities. More detailed rules with respect to the licensing will be established by secondary legislation.

Under the New EML, the most important new development regarding licensing is the granting of a preliminary license for generation license applications. This development received positive critique from the market. On the other hand, the requirement of EMRA approval in cases of share transfers or changes of control in licensee companies shows that the strict monitoring of licensee companies by EMRA will also continue under the New EML.

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4 EMRA is entitled to increase the preliminary license term by half, for a maximum of thirty-six months, based on the energy source type and the facility's installed capacity.

The Turkish Petroleum Law*

Prof. Dr. H. Ercument Erdem

Turkish Petroleum Law No. 6491 ("Turkish Petroleum Law" or "the Law") entered into force through publication in the Official Gazette dated 11 June 2013 and numbered 28674. Prior to the Law, Petroleum Law No. 6326 was in force for 59 years.

In this article, the important modifications enacted by the Turkish Petroleum Law shall be analyzed.

Purpose and Scope

The purpose and scope of the Turkish Petroleum Law is set forth under Article 1. Pursuant to said article, the purpose of the Law is to enable expedient, continuous and effective exploration, development and production of petroleum resources of the Republic of Turkey in accordance with the national interests. With this provision, the term "in accordance with the national interests", which was subject to veto and criticism previously, has been maintained. Another issue subject to criticism is that this notion is not limited to the purpose and scope provision, but can be found in the relevant law in its entirety.

Exploration License, Application and Licensing

Articles 6-8 of the Law set forth provisions related to the exploration license, application and licensing procedure and operating license. Under Article 6 of the Petroleum Law No. 6326, it was set forth that the right to obtain a permit, exploration and operating license shall be exercised by Türkiye Petrolleri Anonim Ortaklığı ("TPAO") on behalf of the state. On the other hand, the Turkish Petroleum Law does not contain such provision and abrogates TPAO's right arising from the Law. In this way, private companies will be able to file a license application under the same conditions with TPAO concerning any field.

The Petroleum Law No. 6326, under Article 6, regulated that a permit, exploration and operating license could be granted in favor of

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* ***Article of August 2013***

stock corporations, including publicly traded companies, and to private law legal entities having the quality of a stock corporation in accordance with foreign legislation. Said legal entities could be granted a license by the Council of Ministers where it was deemed to be in accordance with the national interests. In other words, private companies were able to obtain a license with a decision of the Council of Ministers, differently from TPAO. On the other hand, the Turkish Petroleum Law does not contain such a provision related to the approval of the Council of Ministers.

Pursuant to Article 18 of the Turkish Petroleum Law, individuals who claim rights as per the relevant law are under obligation to provide an address in Turkey. An investigation permit, exploration license or operating license shall not be granted to those who do not provide an address.

Pursuant to Article 19 of the Turkish Petroleum Law, the petroleum right holder is obligated to provide, to the General Directorate of Petroleum Affairs, all records, accounts, information, documents and samples related to the petroleum transaction.

Exploration License

Pursuant to Article 6/5 of the Turkish Petroleum Law, the term of the exploration license is five years on land and eight years in seas. The license period may be extended for two years and for up to three years in seas, with the condition that the license holder submit the work and investment program which includes at least the performance of one drilling, as well as providing the corresponding two percent collateral. Additionally, the term of the exploration license of a petroleum right holder who has fulfilled their drilling program within the first extension period may be extended for up to two years on land and for up to three years in seas with the condition that they submit a new drilling and investment program, and provide the corresponding two percent collateral.

The period of the exploration license may not be more than nine years in onshore regions and fourteen years in intra-territorial waters, including the extensions made after the first effective date. However, an additional period of up to two years can be granted so that commercial evaluations can be made regarding a petroleum discovery made in the explored areas upon the expiry of the term of the exploration license.

Under the Petroleum Law No. 6326, the term of the exploration license was four years. In the event the exploration activities were continued in accordance with the relevant law and in good faith, the exploration licenses in the region could be extended up to two years. In the event that the activities of the explorer gave rise to the discovery of petroleum, and under the condition that an extension request has been made with an appropriate program, the Council of Ministers could extend the period for up to two years in exchange of a collateral. In any case, the exploration license period could not be more than eight years from the first date of entry into force. These periods could have been extended by fifty percent for sea explorations. With the Turkish Petroleum Law, the periods have been extended concerning both the first exploration license period and the total periods.

Another issue worth noticing is that no requirement of investment was sought for the extension of the period of license within Petroleum Law No. 6326. This meant that a license could be used for eight years without making any investment. However, the Turkish Petroleum Law prevents this inconvenience requiring the submission of an investment program.

Operating License

Pursuant to Article 8 of the Turkish Petroleum Law, where a discovery is made within the scope of an exploration activity, an operating license will be issued so that exploration and production are carried out, and the petroleum produced is sold during the license period. An operating license shall be issued for a period of twenty years as of the date of effect of the work and financial investment program that will be received pursuant to the regulation, depending on the request of the applicant.

The fields whose operating rights have expired can be put on auction upon the approval of the Energy and Natural Resources Minister, for the purpose of obtaining an operating license. However, before putting the same on auction, the Energy and Natural Resources Ministry will ask the TPAO whether it wishes this field to be subject to an operating license. Upon request of the TPAO, the field shall not be put on auction. Such a regulation suggests that the privilege of the TPAO has been maintained.

Surface and Water Rights

Pursuant to Article 10/1 of the Turkish Petroleum Law, the petroleum right holder shall be able to obtain the utilization right to the field required for petroleum transactions, in or in the vicinity of its exploration and operation license, by agreement if the land is privately owned or by expropriation if there is a dispute. Additionally, if the land is owned by the Treasury, the relevant land may be obtained by leasing it for the relevant sum, establishing an easement right or by obtaining a utilization right and having the same registered in its license. If the utilization right based on an agreement lasts for a period of more than three years, the land-owner or petroleum right holder may request that the field under private ownership be expropriated. The expropriation shall be made in accordance with the Expropriation Law No. 2942. Urgent appropriation may also be made in accordance with Article 27 of the Expropriation Law. The ownership right of the expropriated land shall belong to the Treasury and the utilization right shall belong to the petroleum right holder who paid the expropriation fee. In this case, the Ministry of Finance shall grant an easement right to the petroleum right holder free of charge for the duration of the license period.

Pursuant to Article 10/5 of the Turkish Petroleum Law, it is possible to conduct petroleum exploration and operation activities in license and permit areas that are located in places that are deemed as forests as per the Forest Law No. 6831; the conditions are that one must obtain permission and pay the relevant fees pursuant to the relevant legislation. During the preparatory period of the Turkish Petroleum Law, it was regulated that national parks may be open to petroleum exploration activities; however, this provision has been excluded from the Law.

Taxation

Pursuant to Article 12 of the Turkish Petroleum Law, the taxes that petroleum right holders are liable to pay on their net profits and the income tax, which they are liable to withhold on behalf of their shareholders, shall not exceed fifty-five percent. This percentage was set forth as forty percent during the preparatory period of the law and was subject to criticism since it would cause tax loss. As a result of this criticism, the former percentage

has been maintained. However, as the actual percentage is below forty percent, this percentage would not cause a tax loss, on the contrary, it would be preferable in order to provide an assurance to investors.

Employment of Foreign Personnel

A petroleum right holder may employ foreign personnel who are required for the performance of the petroleum transaction for a period of at most six months. To do so, they must obtain a certificate of residence for employment purposes, to be issued by the Ministry of Internal Affairs upon the favorable opinion of the Ministry of Energy and Natural Resources. The conditions imposed are that the provisions of the special laws are reserved and the employer fulfills the liabilities arising from other laws. At this point, the provisions of the Law on Employment Permits for Foreigners No. 4817 shall not be applied. In the event the employment period exceeds six months, the permit will be obtained in accordance with the provisions of the relevant law.

Prohibitions and Special Provisions

Pursuant to Article 22/12 of the Turkish Petroleum Law, on the basis of the whole crude oil and natural gas produced by petroleum right holders in petroleum fields they discovered after January 1, 1980, petroleum right holders will be entitled to export 35 percent in onshore fields and 45 percent in offshore fields, in the form of crude petroleum or finished product. The remaining part and the whole of the crude petroleum and natural gas produced from the fields discovered before the date of January 1, 1980 and the petroleum products derived therefrom shall be set aside for country requirements. The power to re-determine these ratios and to specify the principles and procedures in this regard shall lie with the Council of Ministers.

Incentives

Pursuant to Article 26 of the Turkish Petroleum Law, the incentives that will be given for the investments that will be realized by petroleum right holders shall be determined by the Council of Ministers. This provision is a new provision, which did not exist in the Petroleum Law

No. 6326. In this way, holders of petroleum rights are granted the right to benefit from the incentives for all other investments they make.

Conclusion

With the Turkish Petroleum Law, the national interest notion has been maintained in the purpose and scope of the law. With the abolition of the provision providing that the right of permit, exploration and operation license shall be in favor of the TPAO on behalf of the state, private companies will be able to enter the relevant field. New provisions have been adopted with regard to the period for which the exploration license may be granted. With the requirement to submit an investment plan with the extension request of the licenses, the cases where the license is extended without any investment are prevented. The requirement that the TPAO must be consulted before the fields whose operation licenses have expired can be put on auction has been adopted and TPAO has been granted a priority. The income tax deduction, whose reduction to forty percent has been subject to controversy, has been maintained as fifty-five percent. All these provisions aim to incentivize the exploration and production activities in the relevant field with a low cost, simplification of the operations and provide a competitive environment.

Preliminary Licenses in the New Electricity Market Regulation *

Att. Tuna F. Colgar

Introduction

The new Electricity Market Law No. 6446 ("the new EML" or "the Law") entered into force by being approved in the Grand National Assembly of Turkey and by being published in the Official Gazette dated 30 March 2013 and numbered 28603. The waiting period occurred after the New EML has ended and the Electricity Market Licensing Regulation published in the Official Gazette, dated 4 August 2002 and numbered 24836, has been abolished by the Electricity Market Licensing Regulation (The "Regulation"), which entered into force through publication in the Official Gazette dated 2 November 2013 and numbered 28809.

In the present article, the concept of a preliminary license, which is one of the most important innovations brought by the New Electricity Market Regulation, will be examined.

The Regulation, consisting of sixty-three articles in total, includes all application, examination and evaluation, preliminary license and license processes. Furthermore, with 19 provisional articles included in the scope of the Regulation, its aim is to bring the current applications and the continuing transactions in line with the new Law.

As set forth under Article 2, this regulation covers the licenses and preliminary licenses required for operating in the electricity market, as well as key provisions, licensing procedures, and rights and obligations of license holding legal entities in relation to said licenses and preliminary licenses.

Pursuant to Article 5 of the Regulation, prior to commencing business, a legal person with intent to operate in the market has to obtain a license for each business and for each facility, if said business will conduct activities in more than one facility, with the exceptions set forth under

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* ***Article of November 2013***

this regulation. Depending on the connection point and physical state of the facility, the Energy Market Regulatory Board ("Board") may consider units subject to more than one project under a single preliminary license or license. In this scope, it will be obligatory to obtain a compatible license for production, transmission, distribution, wholesale, retailing, importation, exportation and operating activities of electric energy at the electricity market.

In addition, pursuant to Article 8 of the Regulation, generation, organized industrial zone generation, transmission, market-operating, distribution license, organized industrial zone distribution and supply licenses can be obtained from the Energy Market Regulatory Authority ("EMRA" or "the Authority") according to the activity type.

The Preliminary License and Its Application

The concept of a preliminary license, which is one of the most important innovations brought by the Electricity Market Law and the Regulation, brings essential changes and innovations to the electricity market in practice. The concept of a preliminary license was first regulated in Article 6 of the Electricity Market Law, which entered into force on 30 March 2013. However, secondary legislation was needed in order to make this concept actionable. The question of how preliminary licenses will be applied is set forth by the Regulation, which entered into force on 2 November 2013.

Pursuant to Article 5 Paragraph 2, a legal person engaging in electricity generation activities has to obtain separate preliminary licenses for each facility if it will carry out generation activities in more than one facility. However, renewable energy based generation facilities consisting of several structures and auxiliary buildings can be placed under a single preliminary license or generation license on the condition that they all connect to the system at the same point.

In Article 4/ (ff) of the Regulation, a preliminary license is defined as follows: "A time specific permit issued to legal entities intending to conduct generation activities, for the purpose of obtaining required approvals, permissions, warrants, etc., in order to commence investments in generation facilities."

Pursuant to the draft text of the Regulation, investors had to obtain all of the documents that were required to have a license before the Regulation entered into force in order to get a preliminary license. Considering said provision of the draft, the Ministry of Energy and Natural Resources expressed that this subject would lead to an incompatibility with the law; and other institutions in the sector, along with the Electricity Producers Association (EPA) which stated that such a large number of documents could not be obtained at the first step, and that the functionality sought in practice would be hindered. After giving due consideration to the aforementioned opinions, in the approved version of the Regulation, the provision on preliminary licenses was amended to make it more functional and convenient in practice. Pursuant to the Regulation, which was approved and has entered into force, it is not required to deliver all obligatory documents for a license while applying for a preliminary license; and the procedure for a preliminary license is simplified.

Therefore, production companies, which are subject to licensing and which will operate in the electricity market, will be subject to a preliminary license procedure before licensing, and will be obliged to apply for a preliminary license in accordance with the provisions foreseen in Art.12 of the Regulation.

Pursuant to Article 9 of the Regulation, the duration of a preliminary license cannot exceed twenty-four months, excluding force majeure conditions, and when a preliminary license is issued, matters regarding an extension of up to thirty-six months are regulated by the Board, depending on source type and installed capacity.

Pursuant to Article 12 paragraph 3 of the Regulation, legal entities subject to private law applying for a preliminary license with the intent to conduct activities in the electricity market have to be established as a joint stock or limited liability company as per the provisions of the Turkish Commercial Code No. 6102; or must have all of its shares other than those traded on the stock exchange according to the capital markets regulations registered if established as a joint stock company.

Also, pursuant to Paragraph 4 of the same Article, a legal entity or real or legal person(s) directly or indirectly owning a ten percent or more share, or a five percent or more share for publicly traded companies, in the

legal entity and chairmen and members of the board of directors, including ones that resigned within the one year before the license cancellation, shall not be prohibited pursuant to paragraph 8 Article 5 of the Law.

Article 12 of the Regulation stipulates that legal entities demanding to be engaged in producing activities shall apply to the Board by providing "the letter of application" and all other required documents in order to obtain a preliminary license. With this provision it is foreseen that a letter of bank guarantee shall be submitted to the Authority in the amount set by the Board for each MW of installed capacity. The upper limit of the guarantee letter calculated by this method is set by the Board and cannot exceed five percent of total investment costs projected by the Authority for the generation facility.

During the preliminary license application, the articles of association of the applicant legal entity must be submitted; they should indicate that the company's minimum capital has been raised to five percent of the total investment cost projected by the Authority for the generation facility, and to one percent for the construction of a nuclear energy based generation facility. Furthermore, there is a provision in the Regulation, which is likely to be perceived as an encouragement, which stipulates that only ten percent of the preliminary license application fee shall be collected from legal entities applying for preliminary licenses to set up generation facilities based on domestic natural resources or renewable energy sources.

Article 13 of the Regulation concerns the acceptance and review of preliminary license applications. Pursuant to this article, preliminary license applications will be reviewed within ten days, and where there is an inadequacy, it shall be required to be rectified within fifteen days. Applications deemed complete are taken under review for evaluation. Information regarding a preliminary license application under evaluation is announced on the Authority's webpage. Third parties can file a written objection to the announced application within ten business days solely on the grounds of violation of personal rights.

As per Article 15 of the Regulation, an opinion shall be requested from the TEIAS (Turkish Electricity Transmission Company) and/or the distribution license holder legal entity regarding the preliminary license

taken under review. TEIAS and/or the related distribution company, after finalizing its decision within forty-five days of the notice, presents it to the Authority, and said opinions presented to the Authority are communicated to the applicant within ten business days. If the applicant approves the opinions on the connection and system usage, it is obliged to submit the documentation regarding the approval and commitments on the opinion(s) within ten (10) business days to the Authority; or file a justified objection within ten (10) business days. Otherwise, the application is considered as approving of and committing to the opinion(s) on connection and system usage.

With respect to the works and procedures to be completed within the term of the preliminary license, which is one of the new practices stipulated by Article 17 of the Regulation, preliminary license holder legal entities have to apply to the related agencies; for example, within ninety (90) days to obtain the decision required by the Environmental Impact Assessment Regulation and within one hundred and eighty (180) days for the Technical Interaction Permit. Further, preliminary license holders, within the term of the preliminary license, shall complete transactions such as securing of property or usufruct rights, approval of zoning plans and obtaining approval for the preliminary project.

Companies that do not rectify their inadequacies within the term of the preliminary license, which cannot exceed twenty-four (24) months, will not be able to obtain licenses, provided that the exemptions are reserved. Moreover, the preliminary license becomes null automatically at the end of its duration or in case of bankruptcy of the preliminary license holder legal entity.

A preliminary licensee legal entity intending to place a generation license application can file a license application after having completed the requirements of the preliminary license. In case a preliminary license holder does not apply for a generation license before the term of the preliminary license ends, it will be deemed that the requirements for the generation license, which need to be completed within the duration of the preliminary license, have not been fulfilled.

The provision that prohibits share transfers in applicant legal entities for the duration of the preliminary license is one of the most important

innovations brought by the Regulation that shall be taken into consideration. Article 28, Paragraph 2/(b) of the Regulation prohibits share transfers during the term of a preliminary license as follows: *"Together with other requirements of applicable legislation, the preliminary licensee is obliged not to make any changes in the direct or indirect shareholding structure, transfer shares and perform other acts or transactions which may result in share transfers for the duration of the preliminary license, except in cases of bankruptcy and inheritance or other conditions set forth in this Regulation."* Where any of the transactions mentioned in this provision are carried out by the preliminary licensee legal entity, the preliminary license will be canceled.

Conclusion

Seven months after the Electricity Market Law entered into force, the Electricity Market Licensing Regulation (The "Regulation") entered into force through publication in the Official Gazette, dated 2 November 2013 and numbered 28809. The goal of the Regulation is to set legal provisions which conform to the fast growing structure of the electricity market. The preliminary license, for which the application conditions are set by the Regulation, has emerged as an innovation, which responds to the needs of the sector. Investors are now able to perform transactions required by legislation during the term of a preliminary license, before submitting a license application, to apply for required permits and to preview, before passing to the license application phase, the performance and applicability of their investments. Thus, the licensing process has become more convenient for the investor and also for the administration.

LABOR LAW

Penal Clauses in Employment Agreements [*]

Att. Suleyman Sevinc

Introduction

The penal clause is a mechanism employed to indemnify the losses which occur or may occur when one party to an agreement does not fulfill his obligations, or to enforce a negligent party to fulfill his obligations as per the agreement. Pursuant to the principle of freedom of contract accepted in Turkish legal system, a penal clause may be stipulated in agreements and its amount may be determined by the parties. However, this freedom is not unlimited and it is possible to nullify the penal clause or reduce its amount in accordance with equity.

Penal Clauses in Employment Agreements

Since there is no explicit provision in Labor Act No. 4857 ("Labor Act") on penal clauses in employment agreements, provisions of the Code of Obligations No. 6098 ("Code of Obligations") and general principles of labor law shall be considered. Within this scope, a penal clause may be, in principle, stipulated in an employment agreement as a measure in favor of both the employer and the employee against the risk of termination of said agreement.

A penal clause may be stipulated to "limit the right of the employee to terminate the agreement". Therefore, in the event the employment agreement is terminated before the determined period of time, the party who terminates the agreement unlawfully shall pay an amount as a penalty to the other party. In practice, such clauses are included mainly in agreements made with skilled employees. The purpose of such a practice is to prevent the employer from suffering a loss while seeking another skilled employee to replace the skilled employee who terminates their employment

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[*] ***Article of March 2013***

agreement. However, the termination rights which favor the employee, as stated in the Labor Act, cannot be invalidated by a penal clause.

Another type of penal clause, which may be stipulated in an employment agreement, is 'the penal clause related to employee training costs'. In order to improve employee efficiency, the employer may pay for vocational training for the employee. As a safeguard against a loss on its investment, an employer may include a penal clause in order to prevent an employee from terminating an employment contract before the employer has been able to reap the benefits of the vocational training provided. Therefore, it is possible to include a penal clause in an employment agreement which stipulates an employer's right to claim the vocational training costs from an employee where an employee terminates the agreement before the determined period of time, or where the employer terminates the agreement for just cause.

However, the Court of Cassation requires the establishment of an equivalence between 'the training provided for the employee' and 'the amount which should be paid by the employee' when determining the validity of a penal clause regarding vocational training costs. The employer may not claim an amount which exceeds the cost paid for the employee vocational training; and the employer may claim only the factual costs from the employee. Accordingly, the Court shall determine the penalty amount by taking into consideration the cost incurred by the employer. For instance, the decision of the 9th Civil Chamber of the Court of Cassation dated 16.12.2002 and numbered 2002/9301 E., 2002/23749 K. clarifies that the employer may request only the training expenses which could be proved and that any amount exceeding the proven expenses should be rejected[1].

Another type of penal clause, which may be stipulated in an employment agreement, is 'the penal clause restricting the termination rights of the employer'. The termination rights of the employer may be restricted by penal clauses within the scope of legal and reasonable grounds. Accordingly, it is ensured that the employer fulfills its obligations. Otherwise, the loss of the employee shall be compensated and the provisions with respect to job security shall be exercised.

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1 **Özdemir, Erdem**; İş Hukukunda Eğitim Karşılığı Öngörülen Cezai Şart, p. 148, fn. 23.

Validity of Penal Clauses in Employment Agreements

The Court of Cassation has adopted in its decisions some limitations with regards to penal clauses stipulated against the employee and considers penal clauses that do not respect these limitations partially or wholly null and void. The basic requirement sought by the Court of Cassation to validate penal clauses is 'reciprocity'. Reciprocity in penal clauses means: stipulating a penal clause for both parties and this penal clause should be equal or equivalent for both parties. The decision of the 9th Civil Chamber of Court of Cassation dated 07.05.2002 and numbered 2002/2161 E., 2002/7195 K.[2] states that: "*According to our Chamber's opinion, in the event it is determined that there is no equivalence in the penal clauses for the employee and the employer, in other words in case there is a more severe penal clause against the employee, the liability of the employee cannot be heavier than that of the employer's.*"

Accordingly, the lawmaker has adopted the reciprocity principle with regards to penal clauses, and Article 420 of the Code of Obligations regulating the penal clause in service agreements states that any penal clause stipulated only against the employee is null.

Another condition along with the reciprocity principle for an employment agreement containing a penal clause is that the agreement between the employer and the employee should be a fixed term employment agreement. The expiration date of an indefinite term employment agreement cannot be determined, and it is not possible to include a penal clause which is forever binding.

Conclusion

Penal clauses may be stipulated in employment agreements to limit the termination rights of both employer and employee. However, the penal clause shall remain valid unless it violates the personal rights of the debtor, law or morality. Within this scope, the purpose is to prevent working conditions from being determined solely by the employer, since the employee is economically dependent on the employer. As a result, it can be stated that the freedom of contract is restricted in favor of the employee who is economically the weakest party to the agreement.

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[2] www.kazanci.com.

The Working Time Regulation Concerning the Labor Act [*]

Att. Pelin Baydar

The Working Time Regulation Concerning the Labor Act ("Regulation"), issued by the Ministry of Labor and Social Security, sets forth the principles governing the application of working time.

Working Time

Article 3 of the aforementioned Regulation defines working time as the period of time the employee spends at the workplace. The Regulation does not contain any other provisions as to which periods should be treated as working time; for this purpose, it refers to Article 66 of the Labor Act No. 4857 ("Labor Act"). Article 66 of the Labor Act reads as follows:

"Time periods deemed as part of working time:

a. the time required for employees working in mines, stone quarries or any other underground or underwater labor to descend into the pit or workings or to the actual workplace and to return therefrom to the surface;

b. traveling time, if the employee is sent to a place outside the workplace by the employer;

c. the free time spent by the employee at the workplace by remaining at the employer's disposal;

d. the time spent by the employee during which the employee is sent to a place outside the workplace or employed by the employer in his household or office, instead of performing his own duties;

e. the time allowed to a female employee, who is a nursing mother, to enable her to feed her child; and

f. the time necessary for the normal and regular transportation of groups of employees engaged in the construction, maintenance, repair and alteration of railways, roads and bridges to and from a workplace at a distance from their place of residence.

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* ***Article of September 2013***

Time spent for transportation to and from the workplace which is provided by the employer solely as a social relief, shall not be regarded as part of working time.”

According to Article 68 of the Labor Act, rest breaks are not deemed as part of working time.

Normal Weekly Working Time

Article 4 of the Regulation regulates the normal weekly working time. In accordance with said provision, the working time shall not exceed 45 hours per week. Unless otherwise agreed, working time shall be divided equally by the days of the week worked. The working time shall not exceed 11 hours per day by any means.

Working Based on Adjustment

Article 5 of the Regulation states that the normal weekly working time can be unequally distributed between the working days of the week, without exceeding 11 hours per day by a written contract. In this case, the total working time is adjusted after the intensified work week or weeks, in a way that it does not exceed the maximum period that the employee shall work. Adjustment shall be completed within two months and this period may be increased by up to four months by collective labor contracts.

The provisions of this Regulation related to the adjustment shall also be applied for work that is paid according to base rate, piece rate or in lump sum.

The employer shall determine daily and weekly working time, and the beginning and the end of the adjustment period.

Part Time Working

Article 6 of the Regulation defines part time work. Part time work is defined as work where the employee works up to two thirds of full working time, determined pursuant to a full time labor contract.

Make Up Work

Article 7 of the Regulation sets forth the conditions under which make up work may be performed. According to this provision, make up work

may be performed if an employee misses work time due to force majeure, declaration of holiday in the workplace before or after national feasts or legal holidays, other reasons which totally interrupts or reduces the normal working time considerably in the workplace or due to additional permissions granted to the employee aside from the permissions set forth in the Labor Act, labor contracts and collective labor contracts upon his request.

An employer requesting make up work must explicitly inform the relevant employees about the reasons for and the commencement date of the make up work.

Make up work shall be performed within two months after the end of the force majeure causing the interruption and the commencement date of normal working. Make up work shall not be more than 3 hours per day and must not exceed the daily maximum working time of 11 hours. Make up work shall not be performed on holidays.

Announcement and Certification of the Daily Working Time

According to Article 8 of the Regulation, the beginning and end of the daily working time and rest breaks shall be announced to employees in the workplace. Depending on the nature of the work, the beginning and ending hours of work may be arranged differently for different employees.

According to Article 9 of the Regulation, the employer must certify the working time of employees with appropriate means.

Conclusion

The Working Time Regulation Concerning the Labor Act, issued by the Ministry of Labor and Social Security, sets forth the principles governing the application of working time and defines working time as the period of time the employee spends at the workplace.

The aforementioned Regulation stipulates that the maximum weekly working time shall not exceed 45 hours, and that, unless otherwise agreed, this period shall be divided into equal intervals for each working day of the week without exceeding 11 hours per day. According to the Regulation, the beginning and end of the workday, as well as the time allotted for rest breaks, shall be announced to employees by appropriate means.

MISCELLANEOUS

Public-Private Partnerships in the Health Sector [*]

Prof. Dr. H. Ercument Erdem

Public-private partnerships may be defined as the realization of long-term maintenance, operation and construction of public infrastructure investments by the private sector. Public services are thus provided in collaboration for a determined period of time and on the basis of mutual risk allocation through a contractual relationship between the public and private sectors.

Under this model, the public side gains an alternative source of financing for infrastructure and the provision of services, while the private sector obtains an opportunity that may be attractive with regards to risk allocation. Private sector participation is increasing in Turkey day by day in the health sector where the need for speedy and qualified infrastructure and service is dominant. The Law on the Construction and Renovation of Facilities and the Procurement of Services via Public-Private Partnerships by the Ministry of Health and the Amendment of Decrees Having the Force of Law ("Law No. 6428") entered into force with its announcement in the Official Gazette on March 9th, 2013.

Historical Development

In Turkey, the roots of the public-private partnership model in the health sector may be found in the Health Services Fundamental Law No. 3359 ("Law No. 3359"). Law No. 3359 enabled public health institutions to be converted into public corporate entities by way of a Council of Ministers decision. The first step towards public-private partnership was thereby taken with the introduction of the concept of enterprise to the health sector.

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[*] ***Article of May 2013***

The first regulation explicitly providing for the provision of health services with public-private partnerships was made with the addition of the Supplemental Article 7 to Law No. 3359. Pursuant to Supplemental Article 7, the construction of health institutions may be procured from private entities where the Higher Planning Committee deems it necessary.

The explicit regulation brought by the Supplemental Article 7 also fulfills the Constitutional requirement that public services to be procured from private entities by way of private law contracts shall be determined by way of law.

Pursuant to Supplemental Article 7 of Law No. 3359, the renovation of the facilities, procurement of medical equipment, management of the commercial areas within the facilities and the procurement of non-medical equipment of health institutions may also be realized by the private party.

The Regulation on the Construction of Health Facilities in return for Lease and the Renovation of Health Facilities in return for Management of Non-Medical Services and Areas ("Regulation") entered into force in 2006. The Regulation's goal is to aid in determining the application of the principals of Supplemental Article 7 of Law No. 3359.

Law No. 6428

Various actions of annulment were initiated against tenders realized under Supplemental Article 7 of Law No. 3359 and the Regulation, and a claim of unconstitutionality was made within this context. The Council of State found this claim to be of importance, thereby carrying the issue before the Constitutional Court. The claim of unconstitutionality was based on the fact that Supplemental Article 7 did not regulate the matter in detail and many aspects that should have been regulated by law were in fact regulated with the Regulation.

A new regulation was required in order to eliminate the criticism directed at Supplemental Article 7 of Law No. 3559 and to facilitate the financing of ongoing projects. Accordingly, Law No. 6428 was prepared and Supplemental Article 7 was abolished. The negative implications that a possible abrogation decision to be handed down by the Constitutional Court would create were thereby avoided since Constitutional Court decisions cannot be made retroactively. Since Supplemental Article 7 was

abrogated, it may even be said that claims of unconstitutionality against said article have become void.

Pursuant to Law No. 6428, legislation making reference to Supplemental Article 7 of Law No. 3359 shall be deemed to reference Law No. 6428. Projects tendered before the promulgation of Law No. 6428 shall be governed by the old legislation. However there is an exception to this. For projects tendered while Law No. 3359 was operative, project specifications regarding the commercial management by the private party of areas outside the health facilities shall not be applied.

According to Article 10 of Law No. 6428, the application principals of the law shall be regulated with a regulation to be prepared by the Ministry of Health and promulgated by the Council of Ministers. However, until the entry into force of such new regulation, the Regulation for the application of Supplemental Article 7 of Law No. 3359 shall continue to be applied.

Law No. 6428 sets forth that "*The Ministry of Health and its related institutions may, within the context of the preliminary project, preliminary feasibility report, basic standards, tender document and provisions of the agreement, and with the conditions determined with the agreement for the independent and continuous right of superficies to be established by the Ministry of Finance, have facilities constructed on immovables in the possession of the Treasury in return for a fee determined within the agreement*".

In the same context, the renovation of facilities already in use may also be realized by the private party in return for the provision of certain services in the facilities, the operation of commercial service areas and/or the payment of fees in accordance with the standards to be set by the Ministry of Health.

Tender

According to Law No. 6428, the preliminary feasibility report relating to construction works and other documents related to the project are to be prepared by the Ministry of Health. After the Higher Planning Committee has approved the relevant documentation and authorized the Ministry of Health to proceed with the project, the tender shall be held.

Projects planned under Law No. 6428 shall not be subject to the State Tender Law No. 2886 nor the Public Tender Law No. 4734. The tender authority is the highest-ranking administrator of the related unit of the central organization of the Ministry of Health and its affiliated institutions. For works that are to be conducted by local units, the tender authority shall be the highest ranking administrator of such local unit. This provides flexibility to the tender process.

The private party shall provide a bid bond and a performance bond each equal to at least 3% of the fixed investment amount (the total investment amount relating to the construction or renovation works and medical equipment requiring high financial sources as stated within the agreement) or the bid. During the operation period, the investor shall provide a bond in the amount of 1,5% of the fixed investment amount or the bid. Moreover, the private party equity allocated for construction cannot be less than 20 % of the periodic investment amount as determined within the project agreement.

Agreement

A special vehicle company to be established by the private party shall be party to the agreement to be entered into with the Administration. This agreement shall be governed by private law. Its term shall be determined by the Administration and shall not exceed 30 years.

It has been explicitly set forth that the private party shall be liable for all damages which may arise due to their defaulting in respect of their contractual obligations or causing third party damages, and that penal clauses for such circumstances shall be regulated within the project agreement.

Turkish law shall govern disputes arising in connection with the agreement. Courts of the Turkish Republic shall have jurisdiction. However, it is also possible that the dispute be resolved by arbitration in accordance with the Act on International Arbitration under the condition that the choice of law is Turkish Law.

Financing and Fee

The private party is responsible for the financing of all of the works to be realized within the scope of the project agreement.

Accordingly, the investor shall make periodic investments for such works. Payments shall be made to the investor periodically as determined within the project agreement as consideration for the works and services that are provided and the commercial areas that are operated.

Law No. 6428 provides that payment shall not be made before the completion of the construction. However it may otherwise be stipulated within the agreement that payment be received for completion at different stages and partial delivery of the facility.

The determination of the price shall be made in consideration of the characteristics of the investment, medical instruments, the immovable and whether or not the services and the operation of the commercial areas shall be assigned to the private party. The payment shall be made from the working capital of the Ministry of Health or the central budget.

Thus arises an important opportunity for the investor as works are realized without demand risk for a sum that is determined contractually. Although the assignment of the operation of the services and commercial areas is discretionary, it has been observed that lately the inclination is towards the procurement of such services from the private sector.

Law No. 6428 distinguishes between obligatory and discretionary commercial areas. Accordingly, some of the commercial areas must be included within the health facilities whereas others may or may not be, as determined within the agreement. Since health facilities are often established outside of urban areas, it is a requirement that all kinds of services be provided within the facilities. The provision, whilst responding to this need, may also be deemed advantageous for the investor.

Another provision that may be advantageous for the investor is that an increase equal to half of the Producer Price Index (“PPI”) and the Consumer Price Index (“CPI”) shall be made in the price at term end. There is also a provision regarding exchange rate disparity. Where the investor has obtained financing in a foreign currency, if a change has occurred in the foreign currency exchange rate at the end of a term which is more or less than half of the total of PPI and CPI, the exchange rate difference shall be calculated and added to or subtracted from the price. This provision is also reassuring for the investor.

Incentives, Treasury Guarantee

In line with the old regulations, tax incentives are provided in the form of exemption from the stamp duty set forth under Stamp Duty Law No. 488 and the Charge Law No. 492 for the work projects and papers executed under Law No. 6428.

One of the most important provisions of Law No. 6428 is clause 8/A. According to this provision the Treasury may assume debt for projects which are terminated before the end of the term of the agreement and which are transferred to the relevant administration. The debt assumption shall be realized by way of a Council of Ministers decision. The Treasury shall assume the debts and other financial obligations of the private party under foreign financing schemes. However, in order for this possibility to apply, the project agreement must be for investments and services:

i. to be carried out under Law No. 3996 regarding the Realization of Certain Investments and Services within the Framework of the Build Operate Transfer Model and which are of a minimum amount of one billion Turkish Lira; or

ii. to be carried out under Law No. 6428 and Decree having the Force of Law No. 652 relating the Organization and Duties of the Ministry of Education with the build-lease-transfer model and which are of a minimum amount of five hundred million Turkish Lira.

According to this provision, advice regarding debt assumption from the Undersecretariat of the Treasury shall be obtained either before the announcement of the tender specifications, or after the tender and before the signing of the agreement. Debt assumption may be partial or for the entire debt.

Termination

In cases where the private party has not performed his obligations arising from the agreement or Law No. 6428, the project agreement may be terminated by the administration.

If the private party has not fulfilled his undertakings during the designated construction period, the administration shall serve a written notice requesting that the work be completed in a reasonable amount of time. The lenders shall be informed of this situation as well. At the end

of the allotted period, if the relevant undertaking is still not performed, the financial backer is granted the right to realize the work by means of amending the shareholding structure of the private party enterprise by coming to an agreement with the administration. If this option is not realized either, the administration shall terminate the agreement.

During the operation period, the administration shall terminate the agreement directly if the private party performs poorly. In the event of failure in the provision of health services, the administration shall procure the work from a third party in the name of the private party. For works other than health services, the private party shall be informed with a written notice requesting that the work be completed in a reasonable amount of time and the lenders shall be informed of this situation as well. If the work is not completed within the given period, it shall be performed in the name of the private party and the amounts paid for these services shall be deducted from the fee of the private party.

On the other hand, if health services become unsustainable in relation to other service, research and development, consultancy or renovation agreements concluded between the public sector and the private party, such agreements shall be terminated immediately. For works other than health services, if the private party does not perform within the amount of time given in the notice of the administration, the agreement shall be terminated by the administration.

Conclusion

Law No. 6428, aims to provide a more stable legal ground for the projects which have been and will be completed as public-private partnerships.

The rules discussed in this article are in line with the old regulation, with some innovations promoting the public-private partnership model and more detailed regulations regarding the process.

It may be said that Law No. 6428 eliminates claims of unconstitutionality related to Supplemental Article 7 of Law No. 3559 and the Regulation, solves problems arising from practice and makes projects financeable for loan institutions; thereby encouraging those projects which have already been tendered and which are still in the process of tendering.

The Regulation on Private Health Insurance*

Att. Naciye Yilmaz

Introduction

The social security system encapsulates healthcare area in Turkey. Health expenses make up a large part of public expenditures. Therefore, the utilization of health services and treatment rights are limited. The importance of private health insurance has therefore increased accordingly[1].

The Regulation on Private Health Insurance ("Regulation") was published in the Official Gazette dated 23.10.2013 and numbered 28800. The purpose of the Regulation is to set forth the procedures and principles of private health insurance. Within the framework of this Newsletter Article, important aspects of the Regulation shall be examined within the context of the insurance contract.

The Concept of the Insurance Contract

The sixth book of the Turkish Commercial Code No. 6102 ("TCC") regulates insurance law. Pursuant to the Article 1401 TCC, an insurance contract is the agreement by which the insurer undertakes to compensate the damages resulting from any danger or risk harming the benefits of the person or making payment or other performances for the occurrence of certain events in the life of one or several persons in exchange for the contributions.

Regulation on Private Health Insurance

As mentioned above, the Regulation aims to regulate the procedures and principles of private health insurance. Article 17 of the Regulation shall enter into force one year after publication while the other articles shall enter into force 6 months after their publication.

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* *Article of October 2013*

1 **EROĞLU Sevilay**, Hastalık Sigortası Sözleşmesinin Kurulmasında İhbar Külfeti, May 2005, p. 1.

The Regulation covers the issues pertaining to the information and offer, types of contracts, lifetime renewal guarantee, attendance certificate, amendment of plan and transition operations, cancellation of the contract, general dispositions with regard to the treatment having place subsequent to the termination of the insurance period, tariff for the private health insurance, obligation for employment an expert for the health related issues and actuarial report, service purchase, information on health and privacy of this information and other provisions pertaining to the work principles of private health insurances and supplementary

and supportive private health products. Important provisions related to each issue are discussed below.

Information and Offer. Pursuant to Article 5 of the Regulation, insurance companies established in Turkey or local branches of foreign established insurance companies shall inform the persons requiring private health insurance as to the subjects that may affect their decisions to conclude an insurance contract. Insurance companies shall also help the relevant persons during the negotiation and conclusion of the contract to understand the technical issues related to the insurance system; provide all information on the rights and obligations of the parties in writing or verbally; and avoid any kind of misleading conduct on a *bona fide* basis.

Lifetime Renewal Guarantee. According to Article 7 of the Regulation, it is possible to renew private health insurance contracts with the same plan. Where the insurance company *"provides a product with a lifetime renewal guarantee, information and conditions related to the lifetime renewal guarantee shall be determined pursuant to the conditions of the first contract concluded"*. It should be noted that the information and evaluation requirements must not subsequently be amended to the detriment of the insured.

Insurance companies providing lifetime renewal guarantees for insurance contracts shall consider the medical condition of the insured during the term of the previous insurance contract while determining indemnities and contributions for the new contract.

Moreover, insurance companies shall not attenuate the scope of the indemnities due to the occurrence of diseases during the period following the entry into force of the lifetime renewal guarantee; shall not amend

the special conditions and technical principles of the insurance to the detriment of the insured; and shall not apply supplementary contributions due to the occurrence of diseases.

Amendment of Plan and Transaction Operations. Pursuant to Article 9 of the Regulation, it is possible to propose an amendment of plan to the insurance company. If the request for the amendment of plan is not approved by the insurance company, commitments under the current contract of insurance shall continue. Furthermore, the insured may request the transfer of all acquired rights and obligations to another insurance company and the continuation of the insurance contract with the latter. In such a case, the relevant transfer shall be realized upon approval pursuant to the terms and conditions of the new insurance company.

Cancellation of the Insurance Contract. Cancellation of the contract is addressed under Article 10 of the Regulation. As per the relevant Article, *"in case the insured or the insurer requests cancellation of the contract within the first thirty days from the conclusion of the contract and in case there is no payment of indemnities during the related period, paid contributions shall be returned without any deduction within five business days. If there is a request of cancellation after the first thirty days, unmerited contributions shall be returned according to the special conditions of the insurance contract."*

Conclusion

Consequently, it is worth mentioning that this Regulation signifies important progress and clarifies the rules for private health insurance. Particularly, the rules in the Regulation related to the lifetime renewal guarantee constitute a positive development for persons who seek private health insurance.

The New Consumer Law has Entered into Force [*]

Att. Alper Uzun

Introduction

The Law on Consumer Protection, dated 23.02.1995 and numbered 4077, was the first specific law to include provisions aimed at the protection of consumers in Turkish Law. Law No. 4077 was updated through amendments made in the year 2003. On the other hand, in order to establish coherence between the Turkish and EU legislations and to harmonize the Turkish Law of Obligations and the Turkish Commercial Law, which entered into force in 2012, the need to examine the main legislation related to consumer rights was raised, and as a consequence Law No. 6052 ("the Law"), published in the Official Gazette dated 28.11.2013, has emerged. The Law will enter into force six months after its publication. Compared to the former Law No. 4077, the new Law provides more detailed regulations and sanctions in many cases.

Important Provisions Brought by the Law

The need to protect consumers originates from various causes. The necessity to protect consumers through legal provisions arises from the fact that consumers often do not have enough knowledge when concluding legal transactions. In this case, a disproportion of knowledge exists between parties and it is only through legal measures that it can be rectified. In the Law's preamble, this aspect is specifically stressed, and it is determined that the purpose of all cases where an obligation to inform the consumer before or during the conclusion of a contract is to remove this disproportion and to provide consumers with the possibility of making informed decisions when concluding a contract. In some cases, this obligation is stipulated as a written form requirement, the lack of which would nullify a contract. In other cases it is determined that the contract will be executed despite insufficient information being provided to the consumer, but where the consumer has not been informed of certain

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[*] ***Article of November 2013***

matters, he will benefit from rights to the detriment of the party who has drafted the contract. By entering into force, the Law now regulates the issues around which, when and how a consumer should be informed.

One of the important provisions of the Law relates to the issue of consumers concluding various contracts, such as for periodic vacation, long term vacation, contracts which are closed outside the workplaces, prepaid and distance contracts, distance sales of financial and loan services, without effectively examining the terms because of the attraction of such transactions and enticing marketing tactics. In these cases, it is generally seen that consumers regret having concluded such contracts in the end. Therefore, the Law provides for a right of withdrawal, and this right shall be used within 14 days.

As well as rights provided by the Code of Obligations to protect consumers, the Law includes measures related to the supervision of the market. For example, the supervision of unfair conditions, advertisements and practices and the prohibition of all advertisements and unfair commercial practices that could mislead the free will of consumers.

Definitions and Fundamental Principles Applicable to Consumer Contracts

Definition of "consumer" in the Law is reconsidered and defined as "a natural person or legal entity acting with no commercial or professional purposes". The scope of the consumer transaction is extended. Thus, a consumer transaction may be all contracts and legal transactions including, but not limited to, work agreements, carriage contracts, brokerage contracts, insurance contracts, simple agency contracts, banking agreements et seq.

In Article 4 of the Law, fundamental principles which will be applicable to consumer contracts are specially provided. Accordingly, contacts and information which are required to be issued in written form will be issued in an understandable language, in a clear, simple and readable manner, in at least a twelve point font; and one copy shall be given to the consumer, on paper or via a memory data register. Conditions provided in the contract shall not be amended to the detriment of the consumer during the term of contract. It is stipulated that the consumer shall not incur any additional charge for performances that the consumer

should rightfully expect within the scope of the goods or services presented to him, or which are within the scope of the legal liabilities and expenditures incurred on personal benefits of the contract preparer. It is accepted that, by the reason of the transactions concluded by the consumer, only a bond to the name and separately for each installment payment can be prepared as a negotiable instrument, however bonds prepared in contravention of the provisions of this paragraph shall be invalid from the point of view of the consumer. In consumer transactions, personal guarantees received against the obligation of the consumer shall be considered as simple surety; personal guarantees with regards to the claims of consumers given by the opposing party shall be considered as joint and several (consecutive) surety, unless otherwise provided by any other laws. Hereinafter, it is prohibited to apply compound interest on consumer transactions, even in default situations.

A Consumer’s Right to Legal Remedies

A Consumer’s Right to Legal Remedies is also provided for in the Law differently than in the former Law. Several regulations concerning the Arbitral Commission for Consumers and the Consumer Courts are set forth, proving that Consumer Organizations will be able to file a lawsuit that Consumers cannot usually file separately.

In Article 73 of the law, “consumer courts” are regulated. Accordingly, consumer courts are incumbent upon lawsuits related to litigation arising from Consumer transactions and practices directed at the consumer.

In Article 68 of the law, the basis for application to the “Arbitral Commission for Consumers” and some innovations are brought. Thus, it is compulsory to apply to the district arbitral commission for consumers for under an amount of two thousand Turkish liras, the provincial arbitral commission for consumers for disputes under an amount of three thousand Turkish liras, and in provinces under the statute of the metropolitan municipality between the amounts two and three thousand Turkish liras. No application to the arbitral commission for consumers shall be for disputes exceeding the aforementioned amounts.

The decisions of the arbitral commission for consumers are made in accordance with the provisions of the Enforcement and Bankruptcy Law

related to the execution of writ. The parties can file an appeal to object to the decisions of the arbitral commission for consumers before the consumer court located at the arbitral commission for consumers within fifteen days from the date of notification. The appeal does not stop the enforcement of the decision of the arbitral commission for consumers. However, if requested, the judge may stop the enforcement of the decision of the arbitral commission for consumers with a decision of temporary injunction. The decision rendered by the consumer court upon the appeal against a decision of the arbitral commission for consumers is decisive, and does not permit any legal remedy.

Conclusion

The Law on the Protection of Consumer numbered 6052 has been published in the Official Gazette dated 28.11.2013. The Law will enter into force six months after its publication. Compared to the former Law, The new Law provides more detailed regulations and sanctions for many cases.

The Law on Consumer Protection, dated 23.02.1995 and numbered 4077, which was the first law to include provisions aimed at the protection of consumer rights in Turkish Law, will be abolished by the entering into force of the Law No. 6052.

The Law No. 6052 includes provisions harmonized with European Union legislation and parallel stipulations with the Turkish Code of Obligations and the Turkish Commercial Code, which entered into force in 2012.

Law on the Remedying of Certain Applications Lodged to the European Court of Human Rights through Payment of Compensation [*]

Att. Ceyda Buyukoral

Article 148 of the Turkish Constitution regulates the individual application to the Constitutional Court. An "individual application", which has entered into the Turkish judicial system after the Constitutional amendments of 2010, provides that any individual, claiming to be the victim of a violation by public authority of the constitutional rights and freedoms within the scope of the European Convention on Human Rights ("*Convention*") are entitled to file an application to the Constitutional Court.

The precondition for submission an individual application to the Constitutional Court is the exhaustion of domestic legal remedies. Pursuant to temporary article 1 of the Law on the Establishment and Jurisdiction Procedures of the Constitutional Court, the Constitutional Court is obliged to examine the individual applications lodged against the final decisions and acts which were finalized as of 23.09.2012.

Law No. 6384 on the Remedying of Certain Applications Lodged to the European Court of Human Rights through Payment of Compensation ("Law No. 6348") entered into force through publication in the Official Gazette dated 19.01.2013 and numbered 28533.

Law No. 6384 shall be enforceable on applications recorded before the European Court of Human Rights ("ECHR") as of 23.09.2012.

Purpose and Scope of Law No. 6384

The purpose of Law No. 6384 is to determine the principles and procedures pertaining to the remedying of certain applications lodged to the ECHR through payment of compensation**.** The scope of Law No. 6384 is applications lodged to the ECHR on the allegation of;

a) Non-conclusion of the criminal enquiries and proceedings and judgments regarding private and administrative law within a reasonable time,

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* ***Article of January 2013***

b) Delayed or deficient execution of the court decisions or non-performance.

Furthermore, it is stated that with a resolution of the Council of Ministers, the provisions of Law No. 6384 may be applicable to other breach areas concerning the rights protected by the Convention and additional protocols to which Turkey is a party. However, the provisions of this Law shall not be enforceable for applications originating from administrative inquiries.

Application Procedure and Term

A Commission consisting of 5 persons was established to rule on the applications lodged pursuant to the Law No. 6384.

According to Article 5 of Law No. 6384, which regulates the procedure and term of the application lodged to the Commission, applications to the Commission shall be made with a signed petition comprising the identity information of the applicant along with the official admission letter stating the application date and number to the ECHR, the application form and other related information and documents.

It is specified that Article 5 will enter into force as of one month following the publication of Law No. 6384; and applicants are obliged to apply to the Commission within 6 months following the entry into force of said article. Individuals who did not apply in this manner may apply to the Commission within one month following the notification of the ECHR declaring the inadmissibility of the application on the grounds of non-exhaustion of domestic legal remedies.

In the event that the scope of Law No. 6384 is broadened by a resolution of the Council of Ministers or that the period set forth under Article 9 regarding the enforcement of Law No. 6384 is extended for the applications lodged before the ECHR as of 23.09.2012 by the Council of Ministers, the individuals gaining the right of application shall use this right within six months following the publication of the resolution of the Council of Ministers in the Official Gazette.

It is possible to file applications through the chief public prosecutor's office. The Chief public prosecutor's office shall send the application

document to the Commission immediately. In this case, the date of application lodged to the chief public prosecutor's office shall be taken into consideration.

The documents issued with respect to the application are exempt from stamp tax and the transactions concluded in this respect are exempt from duties.

Decision concerning the Application and Objection to the Decision

Commission shall reject the application if it determines that:

a) the application does not fulfill the admissibility requirements apart from the condition sought by the ECHR regarding the exhaustion of domestic remedies;

b) the application has not been lodged on time;

c) the applicant does not have any legal interest;

d) the application does not fall within the scope of Law No. 6384.

The Commission is obliged to decide about the application within nine months by taking into consideration the ECHR precedents and it shall provide its decision with merits.

An objection against the decision of the Commission may be filed to the Ankara Regional Administrative Court through the Commission within fifteen days following the notification of the decision. This objection shall be assessed as priority and shall be finalized within three months. If the Court does not find the decision of the Commission suitable, it decides on the application. Decisions given on the objection are final and binding.

Execution of the Decision

Any compensation to be paid shall be paid by the Ministry within three months following the finalization of the decision. The documents issued and transactions concluded with regard to the payment are exempt from the stamp tax and duties respectively.

A copy of the finalized decisions of the Commission shall be sent to the legal or administrative authority that the application has been filed.

If the transaction subject to the application has not been finalized, the related legal or administrative authority shall finalize it promptly.

Conclusion

Any person who claims that one of the rights and freedoms guaranteed in the Constitution within the scope of the Convention was breached by a public authority may lodge an individual application to the Constitutional Court. The Constitutional Court shall examine the individual applications lodged against the final decisions and acts, which were finalized as of 23.09.2012.

As of 23.09.2012, for some applications recorded before the ECHR, provisions of the Law on the Remedying of Certain Applications Lodged to the European Court of Human Rights through Payment of Compensation No. 6384, that was published in the Official Gazette dated 19.01.2013, shall be applied. The commission comprising five persons pursuant to Law No. 6384 shall rule on the applications by giving a decision with merits.

Freedom of Settlement of Foreign Companies [*]

Att. Leyla Orak

Introduction

Globalization is one of the significant aspects that shape daily commercial life. It is possible to say that, through the globalization of production, commerce and economy, national borders disappear and establishing relationships between countries becomes easier and faster.

Commercial companies, which are the indispensable subject of our increasingly globalized commercial lives, have started to adapt and global companies have been formed. Such global companies can be defined as those which operate in the international arena without any differentiation of language, religion, race, nation, culture, custom, law, and that have a reputation and material trade capacity. Therefore, the freedom of settlement of companies with international operations has become an important issue.

This Newsletter article will briefly assess the freedom of settlement of foreign companies.

Freedom of Settlement of Foreign Companies in Turkey

Before analyzing the settlement requirements for foreign international companies in Turkey, it should be underscored that a company with legal personality should be recognized in countries other than that where it is established. Hence, whether such a company is defined and treated as a foreign company must be evaluated under Turkish law.

Within the scope of Turkish law, when a ‘foreign company’ is examined, it becomes clear that there is no concrete definition thereof. Despite the fact that the Turkish Commercial Code No. 6102 (TCC) does not explicitly define ‘foreign company’, scholars argue that a company whose headquarters is located abroad is regarded as a ‘foreign company’. Their argument hinges on TCC Art. 40, para. 4, which reads: “*Branches in Turkey of commercial enterprises whose headquarters are located*

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[*] ***Article of September 2013***

abroad shall be registered as if they are local commercial enterprises, without prejudice to the provisions of their own national laws related to the title of a company."

Moving the Headquarters of Foreign Companies to Turkey

Turkish law enables the headquarters of a company established abroad to be moved to Turkey. Pursuant to the Trade Registry Regulation issued by the Ministry of Customs and Trade, certain documents should be provided, such as: the documents required for registration of a commercial enterprise or a commercial company, a document certifying that the company which will settle in Turkey is actually a registered company in its country of origin (issued by the related foreign trade registry) and a document stating that the change of headquarters is in accordance with the relevant foreign law.

Also, an investigation must be made regarding whether the company bylaws of the foreign company moving its headquarters to Turkey are in accordance with and/or are adapted to be in compliance with Turkish law.

Establishment of Branches of Foreign Companies in Turkey

Foreign companies whose headquarters are located abroad may also establish branches in Turkey in accordance with Turkish Law. The aforementioned TCC Art. 40, para. 4 shall again be applicable. Pursuant to this article, the branches of commercial enterprises whose headquarters are located abroad shall be registered as if they were local commercial enterprises, and a fully authorized commercial representative who resides in Turkey shall be appointed for such branches.

Moreover, Art. 12 of the Code on Entry into Force and Application of the Turkish Commercial Code (Code No. 6103) also regulates the registration of Turkish branches of commercial enterprises or commercial companies whose headquarters are located abroad.

Pursuant to Code No. 6103, a number of conditions should be met in order to register a branch of a commercial enterprise or commercial company (with headquarters located abroad) in Turkey. Primarily, the conditions required by the legal system of the country of origin for registration of branches pursuant to the relevant types of commercial

enterprises and commercial companies must be fulfilled. Furthermore, all documents such as the company's articles of association and required declarations must be submitted to the relevant trade registry in Turkey for the registration and must be notified.

Moving the Headquarters of Turkish Companies Abroad

Art. 12 of Code No. 6103 pertaining to the registration of Turkish branches of commercial enterprises and commercial companies whose headquarters are located abroad also regulates Turkish companies moving their headquarters abroad.

Pursuant to the relevant article, a company residing in Turkey (whose headquarters are established within Turkey) can move abroad without being liquidated or being re-established in the country where it will relocate. However, certain conditions listed in the abovementioned article should be met. Such conditions are: having fulfilled the requisite conditions under Turkish law, the ability to continue operations in the relevant country in compliance with its legal system, providing proof that the creditors of the Turkish company are informed through notification of the address change, that the creditors are invited to pay their receivables and that their receivables are paid and secured.

Art. 116 of the Trade Registry Regulation also regulates the relocating of the headquarters of a company in Turkey abroad. This article specifies the documents required necessary for moving the headquarters of the company abroad.

Conclusion

The legislation regarding foreign companies' freedom of settlement in Turkey and also the freedom of Turkish companies to move their headquarters abroad are briefly summarized above. The freedom and right to settlement of companies abroad becomes a more significant matter that requires detailed legal norms when the number of companies operating in an international arena increases, and where global companies increasingly appear. Developments in the globalized commercial and economic arenas should be taken into consideration for the preparation of any legislation regarding foreign companies' freedom of settlement.

The Acquisition of Immovable Property by Foreign Real Persons in Turkey [*]

Att. Naciye Yılmaz

Companies with foreign capital and foreign real persons may purchase immovable property in Turkey. However, this possibility has certain legal limitations. Within the framework of this Newsletter Article, the acquisition of immovable property by foreign real persons shall be examined.

Legal Grounds

As per the Land Registry Law No. 2644 ("Land Registry Law"), it is possible for foreign real persons to acquire immovable property in Turkey. The reciprocity condition regulated under the former Article 35 of the Land Registry Law was abolished by the amendments brought by Law No. 6302. Therefore, Article 35 of the Land Registry Law reads as follows: *"in order to comply with the legal restrictions, foreign real persons, citizens of countries determined by the Council of Ministers pursuant to international relations and the country' s benefits may acquire immovable property and rights in rem in Turkey"* .

Legal Restrictions

Pursuant to Article 35 of the Land Registry Law, the total area of the real property and limited rights *in rem* that a foreign real person may purchase cannot exceed 10% of the total area of private properties within the related district and 30 hectares in Turkey. Therefore, acquisition of immovable property by foreign real persons is subject to an areal limitation.

In addition to the areal limitation, there is a territorial limitation. As per Law No. 2565 on Military Forbidden Zones and Military Security Zones, foreign real persons are obliged to obtain permission from the military authorities in order to acquire immovable property. Where the

[*] ***Article of December 2013***

area desired for purchase is within the borders of a military forbidden zone or military security zone, foreigners cannot acquire an immovable there.

Moreover, it should also be noted that Article 35/3 of the Land Registry Law states that *"in case the country's benefits necessitate, the Council of Ministers is authorized to determine the acquisition of immovable property or limited rights in rem of foreign real persons with regard to country, person, geographical area, duration, number, proportion, qualification, area meter and quantity, limit the acquisition, cease it entirely or partially or forbid it"*.

Matters to be considered by Foreign Real Persons when Acquiring Immovable Property

First, it should be emphasized that, an immovable property sale is only valid if the agreement is concluded pursuant to the official form and registered according to Article 237 of Turkish Code of Obligations No. 6098. Similarly, the official form is also required for the immovable property's sale commitment agreement, which can be defined as a pre-agreement for the sale of the immovable property.

In order to fulfill the official form requirement in a contract concluded for a sale of immovable property, the contract should be prepared as an authenticated document by the Land Registry Directorate where such immovable property is situated. The official form requirement of an immovable property's sale commitment agreement is fulfilled when it is executed before a notary public. Pursuant to Article 26 of the Land Registry Law, it is possible to annotate sale commitment agreements in land registries. Similarly, rights of easement can be also annotated. Pursuant to the same Article *"if, within five years as of the annotation, the sale is not effectuated or the right of easement is not granted and postponed by the Land Registry, this annotation shall be automatically removed by the director or other officials of the Land Registry Directorate"*.

In case the acquired immovable property is unconstructed, pursuant to Article 35 of the Land Registry Law, foreign real persons should submit their project that will be developed on the unconstructed property to the relevant Ministries for approval within two years.

Pursuant to the last paragraph of Article 35 of the Land Registry Law, immovable properties, which are acquired in violation of the stipulations of Article 35 of the Land Registry Law, which are identified by the relevant Ministries and administrations as "being used in violation of purpose of purchase", and for which no application to the relevant Ministry is made within the time prescribed or none of the committed projects are materialized on time shall be liquidated and paid to its owner if is not liquidated by the owner within the term given by the Ministry of Finance, which shall not exceed one year.

In addition to the foregoing, a guideline entitled "Buying Property in Turkey: Guide for Foreigners" has been published on the website of the Ministry of Foreign Affairs[1]. Pursuant to the relevant guideline, the documents that are required by the relevant Land Registry Directorates for immovable property acquisition by foreign real persons are the following:

Identification document or passport;

- Residence permits issued by the relevant police departments for those the acquisition of real property is conditioned such permit; and
- In case the transaction is being made through power of attorney authority issued in a foreign country, the original of the power of attorney or a duly authorized copy of it together with its translation.

Conclusion

As explained above, the acquisition of immovable property in Turkey is possible for foreign real persons, but is subject to certain limitations. In addition to these limitations, in order to avoid issues arising from the lack of knowledge of the legislation and practice in Turkey, foreigners should take into consideration the above-mentioned matters before any acquisition. The most important of these matters is compliance with the official form requirement and registration. Moreover, it is advisable for foreign real persons to check the land registries before the acquisition in order to see if there are any pre-existing mortgages or any obstacles to the sale of the immovable property.

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[1] http://www.mfa.gov.tr/guidance-for-foreigners.en.mfa.

Amendments to Law No. 4250 on the Monopoly of Alcohol and Alcoholic Beverages [*]

Att. Naciye Yilmaz

Law No. 4250, on the Monopoly of Alcohol and Alcoholic Beverages ("Law"), has been amended by Law No. 6487 Amending Certain Laws and Decree Law No. 375 ("Amending Law"). The amendments and their effects shall be the subject of this article.

Amended Provisions

The Amending Law modifies the 6th, 7th and 9th Articles of the Law, while Articles 19 and 28 have been abrogated and a temporary article has been added to the Law. Within this framework, Article 6 stipulates general regulations/limitations on the sale and promotion of alcoholic beverages. Administrative fees arising from non-compliance with Article 6 are set forth in Article 7 and Article 28 of the Law has been abrogated accordingly. Article 9 covers the license for selling alcoholic beverages and the temporary article stipulates certain regulations on the enterprises where alcoholic beverages are sold or served. Article 19 has been abrogated accordingly.

Regulations on the Promotion of Alcoholic Beverages

Pursuant to Article 6 of the Law, advertising activities and promotions aimed at consumers shall under no circumstances be conducted. Therefore, advertisements in visual or print media vehicles or on the radio are prohibited.

It should be noted that Article 24 of the Regulation Pertaining to the Procedures and Principles on the Sale and Service of the Tobacco Products and Alcoholic Beverages, published in the Official Gazette dated 07.01.2011 and numbered 27808 prohibits advertisements of alcoholic beverages on television, cable TV and the radio. However, with

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* ***Article of June 2013***

the Amending Law, the limitation now includes advertisements in printed press and internet.

Another regulation set forth by Article 6 is with regard to the promotions and events which stimulate and support the use and sale of the alcoholic beverages. Pursuant to the amendments, such events and promotions cannot be undertaken, with the exception of specific international fairs, scientific publications and activities. Within this framework, it is worth mentioning that wine tasting and grape harvesting events may not be held any more for consumers.

Moreover, subsequent to the amendments, producers, sellers and importers of alcoholic beverages cannot provide sponsorship to events by *"using their trademarks, logos or signs"*. However, it is possible to use trademarks, emblems and logos on the service materials of enterprises serving alcoholic beverages. However, the scope of "service materials" remains vague.

In addition to the foregoing, pursuant to the 2nd paragraph of Article 6, alcoholic beverages cannot be distributed gratuitously, for promotion or incentive nor as samples.

Regulations on the Sale of Alcoholic Beverages

Alcoholic beverages cannot be sold and cannot be served to people under the age of 18, as per the 3rd paragraph of Article 6. Furthermore, alcoholic beverages cannot be sold by vending machines and via press, and cannot be sent by post.

In addition to the above regulations, the sales of enterprises engaged in the retail sale of alcoholic beverages are limited with time periods. Accordingly, alcoholic beverages cannot be sold to customers between 10 p.m. and 6 a.m.

Another regulation relates to the consumption of alcoholic beverages outside of enterprises serving alcoholic beverages. Pursuant to the amendments, customers may not consume alcoholic beverages outside of these establishments. The sale of alcohol for outdoor consummation is no longer possible.

Shops selling alcoholic beverages shall be required to make certain changes in their stores. For instance, pursuant to paragraph 7 of Article 6, alcoholic beverages should not be seen from the outside of these stores.

Within the framework of the sale of alcoholic beverages, as per the last paragraph of Article 6, the sale and consumption of alcoholic beverages will not be allowed in facilities situated on highways and state roads, student residences, health-care places, stadiums and gymnasiums, any kind of educational institution, cafes, traditional coffee houses, bakeries, pinochle and bridge rooms, fuel stations, shops and restaurants.

As per the amendments to the Article 9 of the Law, with the exception of certified tourism enterprises, enterprises selling alcoholic beverages are required to be situated at least a hundred meters away from educational institutions, student dormitories and places of worship. This condition shall not be applied to the shops which already acquired their operation and sale license before the publication of this article. Moreover, this condition shall not be required for transfers to be made to first and second degree blood relatives.

Regulations on the Packaging of Alcoholic Beverages

As per the amendments to the Law, alcoholic beverages should contain warning signs on their packages as do tobacco products in Turkey. These signs should mention the harmful effects of the alcoholic beverages and may take the form of pictures or graphics. Any alcoholic beverage without these signs cannot be sold. The only exception to this rule is products for exportation.

In addition to the above-mentioned regulation, the amendments also state that any distinctive signs for alcoholic beverages cannot be used on non-alcoholic beverages and vice versa. The products for exportation are again excepted from this rule.

Conclusion

The amendments to the Law bring important limitations to the sale and promotion of alcoholic beverages. Where there is a violation of Article 6, the application of an administrative fee between TRY 5.000

and TRY 500.000 is possible pursuant to Article 7 of the Law. However, certain expressions of the Law are unclear. Despite the fact that secondary legislation is only envisaged for the 8th, 9th and 10th paragraphs of Article 6 pursuant to the temporary article 1, secondary legislation for the clear application of the Law should also be provided for the rest of the amendments.

LEGAL DEVELOPMENTS

Important International Agreements

- The Resolution of the Council of Ministers dated 12.12.2012 pertaining to the Ratification by Law dated 30.10.2012 and numbered 6357 of the Agreement between the Ministry of Agriculture and Rural Affairs of the Republic of Turkey and the Ministry of Agriculture and Food Industry of the Republic of Moldova on Economic, Scientific and Technical Collaboration in the Field of Agriculture, that was signed in Ankara on 04.06.2003, was published in the Official Gazette dated 03.01.2013 and numbered 28517.
- The Resolution of the Council of Ministers dated 17.12.2012 pertaining to the Ratification of the Protocol of the Meeting of the Turkish-Romanian Joint Committee on Road Transport that was signed in Bucharest on 03.10.2012 was published in the Official Gazette dated 05.01.2013 and numbered 28519.
- The Law on the Approval of the Ratification of the Partnership Agreement Establishing a Free Trade Zone between the Republic of Turkey and the Lebanese Republic entered into force through publication in the Official Gazette dated 24.01.2013 and numbered 28538.
- The Law on the Approval of the Ratification of the Free Trade Agreement between the Republic of Turkey and the Republic of Mauritius entered into force through publication in the Official Gazette dated 24.01.2013 and numbered 28538.
- The Resolution of the Council of Ministers, dated 22.01.2013, pertaining to the ratification of the "Economic and Financial Cooperation Protocol between the Government of the Republic of Turkey and the Turkish Republic of Northern Cyprus" that was signed in Ankara on 04.12.2012, was published in the Official Gazette dated 06.02.2013 and numbered 28551.
- The Law on the Approval of the Ratification of the "Protocol Amending the Agreement on the Double Taxation over the

Revenue Tax and Prevention of Tax Fraud between the Republic of Turkey and the Republic of Singapore", signed on 09.07.1999 in Singapore, entered into force through publication in the Official Gazette dated 01.03.2013 and numbered 28574.

- The Law on the Approval of the Ratification of the "Cooperation Agreement between the Government of the Republic of Turkey and the Government of the Republic of Slovenia in the Areas of Information and Communication Technologies", signed on 21.11.2007 in Ankara, entered into force through publication in the Official Gazette dated 01.03.2013 and numbered 28574.
- The Law on the Approval of the Ratification of the "Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Arab Republic of Egypt concerning Cooperation in the Fields of Electricity and Energy", signed on 13.09.2011 in Cairo, entered into force through publication in the Official Gazette dated 15.03.2013 and numbered 28588.
- The Law on the Approval of the Ratification of the "Economic Cooperation Agreement between the Republic of Turkey and the Republic of Bulgaria", signed on 20.03.2012 in Ankara, entered into force through publication in the Official Gazette dated 15.03.2013 and numbered 28588.
- The Law on the Approval of Participation in the "International Agreement on the Legal Liability for Oil Pollution Damages Caused by Ship Fuels", accepted on 23.03.2001, entered into force through publication in the Official Gazette dated 15.03.2013 and numbered 28588.
- The Resolution of the Council of Ministers, dated 22.02.3013, regarding Participation in the EU- EFTA Common Transit Joint Committee Decisions numbered 3/2012 and 4/2012 on the Amendment of the Annex of the "Agreement concerning the Common Transit Regime" which was established for the Shipment of Goods between the European Economic Committee and EFTA Countries, and among EFTA Countries Themselves, was published in the Official Gazette dated 17.03.2013 and numbered 28590.

- The Resolution of the Council of Ministers, dated 22.03.2012, regarding the Ratification of the "Intergovernmental Agreement between the Government of the Republic of Turkey and the Government of the Azerbaijan Republic on the Trans Anatolia Natural Gas Pipeline System", and its annex "Host Government Agreement between the Government of the Republic of Turkey and The Trans Anatolian Gas Pipeline Company B.V. on the Trans-Anatolia Natural Gas Pipeline System", was published in the Official Gazette dated 19.03.2013 and numbered 28592.
- The Resolution of the Council of Ministers, dated 22.03.2012, regarding the Ratification of the "Framework Convention Establishing a Free Trade Zone between the Republic of Turkey and the Republic of Korea", signed on 01.08.2012 in Ankara, was published in the Official Gazette dated 21.03.2013 and numbered 28594.
- The Resolution of the Council of Ministers, dated 27.04.2013, regarding the Ratification of the "Agreement on Trade Cooperation between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania", signed on 18.02.2010 in Ankara, was published in the Official Gazette dated 27.04.2013 and numbered 28630.
- The Resolution of the Council of Ministers, dated 25.03.2013, regarding the Ratification of the Joint Commission Meeting Protocol on Turkish-Russian Highway Transportation, signed on 12.12.2012 in Istanbul, was published in the Official Gazette dated 27.04.2013 and numbered 28630.
- The Resolution of the Council of Ministers, dated 25.03.2013, regarding the Ratification of the "Agreement on Trade and Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Zambia", signed on 15.12.2011 in Geneva, was published in the Official Gazette dated 27.04.2013 and numbered 28630.
- The Resolution of the Council of Ministers, dated 25.03.2013, regarding the Ratification of the "Agreement between the Republic of Turkey and the Republic of Malta for the Avoidance of Double

Taxation and the Prevention of Fiscal Evasion with respect to Tax on Income" and it's annexed "Protocol", signed on 14.07.2011 was published in the Official Gazette dated 27.04.2013 and numbered 28630.

- The Resolution of the Council of Ministers, dated 30.04.2013, regarding the Ratification of the "Association Agreement Establishing a Free Trade Area between the Republic of Turkey and the Republic of Lebanon", signed on 24.11.2010 in Beirut, was published in the Official Gazette dated 30.04.2013 and numbered 28633.
- The Resolution of the Council of Ministers, dated 04.03.2013, regarding the Ratification of the "Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments", signed on 25.10.2011 in İzmir, was published in the Official Gazette dated 02.05.2013 and numbered 28635.
- The Resolution of the Council of Ministers, dated 01.04.2013 regarding the Ratification of the "Additional Protocol between the Government of the Republic of Turkey and the Government of the Republic Croatia on Amendments to the Agreement between the Government of the Republic of Turkey and the Government of the Republic Croatia concerning the Reciprocal Promotion and Protection of Investments", signed on 18.02.2009 in Ankara, was published in the Official Gazette dated 07.05.2013 and numbered 28640.
- The Resolution of the Council of Ministers, dated 01.04.2013 regarding the Ratification of the "Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Kingdom of Denmark on Cooperation in the Areas of Energy", signed on 06.082008 in Copenhagen, was published in the Official Gazette dated 07.05.2013 and numbered 28640.
- The Resolution of the Council of Ministers, dated 22.04.2013, regarding the Ratification of the "Memorandum of Understanding

between the Government of the Republic of Turkey and the Government of the Arab Republic of Egypt on Cooperation in the Fields of Electricity and Energy", signed on 13.09.2011 in Cairo, was published in the Official Gazette dated 16.05.2013 and numbered 28649.

- The Resolution of the Council of Ministers, dated 08.04.2013, regarding the Ratification of the "Financing Agreement" between the Government of the Republic of Turkey and the European Commission concerning the "Bulgaria-Turkey IPA Cross-Border Programme" under the Instrument for Pre-Accession Assistance, signed on 06.02.2013, was published in the Reiterated Official Gazette dated 21.05.2013 and numbered 28653.
- The Global Environment Facility Trust Fund Grant Agreement (Small and Medium Enterprises Energy Efficiency Project) between the Republic of Turkey and the International Bank for Reconstruction and Development, acting as an Implementing Agency of the Global Environment Facility, was published in the Official Gazette dated 15.06.2013 and numbered 28678.
- The Resolution of the Council of Ministers dated 21.10.2013 on approval of the Addendum No. 1 to the Financial Agreement between the Government of the Republic of Turkey and the Commission of the European Communities Concerning the National Program for Turkey 2010 Under the Instrument for Pre-accession Transition Assistance – Institution Building Component Part 2, which was signed on 19.08.2013; the Notes were published in the Official Gazette dated 09.11.2013 and numbered 28816.
- The Law on the Approval of the Ratification of the Memorandum of Understanding concerning the Collaboration between the Republic of Turkey and the Republic of Tajikistan on Energy and Mining was published in the Official Gazette dated 05.12.2013 and numbered 28842.
- The Law on the Approval of the Ratification of the Memorandum of Understanding concerning the Collaboration between the Republic of Turkey and the Republic of Cameroon on Energy

and Hydrocarbons was published in the Official Gazette dated 05.12.2013 and numbered 28842.

- The Council of Ministers Resolution dated 04.11.2013 on the entry into force of the Third Party Cost Sharing Agreement between the Government of the Republic of Turkey and the United Nations Development Program was published in the Official Gazette dated 06.12.2013 and numbered 28843.
- The Council of Ministers Resolution dated 18.11.2013 on the "Ratification of the Memorandum of Understanding" signed between Turkey and the Organization for Economic Co-Operation and Development on the Implementation of the Multilateral Tax Program at the OECD-Ankara Multilateral Tax Center was published in the Official Gazette dated 08.12.2013 and numbered 28845.

Important Resolutions of the Council of Ministers

- The Resolution of the Council of Ministers dated 28.12.2012 on the Amendment of the Resolution Concerning the Benefit to be Provided in These Transactions Including the Deposit and Credit Interest Rates and Participation Accounts, Participation Rate to Profit and Loss and Private Current Accounts was published in the Official Gazette dated 01.01.2013 and numbered 28515.
- The Resolution of the Council of Ministers dated 28.12.2012 on the Extension of the Application Periods set forth in paragraph three of Article 6 of the Law No. 6292 on Supporting the Development of Forest Peasants and the Utilization of Areas Excluded from the Forest Boundaries on behalf of the Treasury and the Sale of Farm Land Belonging to the Treasury was published in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Resolution of the Council of Ministers dated 24.12.2012 on the Transfer of Turkish Petroleum International Limited Liability Company, which is a subsidiary of Turkish Petroleum Corporation, along with its Pipe Lines to Petroleum Transport Corporation entered into force through publication in the Official Gazette dated 22.01.2013 and numbered 28536.
- The Resolution of the Council of Ministers dated 11.01.2012 pertaining to the Amendment to the Resolution on the Clean Export Loan and Exemption of Taxes, Duties and Charges was published in the Official Gazette dated 23.01.2013 and numbered 28537. The Resolution entered into force through publication to be valid as of 01.01.2013.
- The Resolution of the Council of Ministers dated 19.12.2012 on the Assessment of the Companies Subject to Independent Auditing was published in the Official Gazette dated 23.01.2013 and numbered 28537. The Resolution entered into force through publication to be valid as of 01.01.2013.
- The Resolution of the Council of Ministers dated 14.02.1012 on the Privatization of the Shares of Türk Telekom A.Ş owned by the Treasury entered into force through publication in the Official Gazette dated 23.01.2013 and numbered 28537.

- The Resolution of the Council of Ministers, dated 28.01.2013, on the Urgent Expropriation by the below stated General Directorate for the substation area and immovable properties located on connection road providing transportation to this area within the scope of "380kV Tortum Transformer Station and Connection Road Project" of the Turkish Electricity Transmission Corporation General Directorate was published in the Official Gazette dated 07.02.2013 and numbered 28552.
- The Resolution on the Amendment to the Resolution of the Council of Ministers, dated 28.01.2013, on Government Aid in Investments was published in the Official Gazette dated 15.02.2013 and numbered 28560.
- The Resolution of the Council of Ministers, numbered 2013/4296, on the Expropriation of Immovable Properties Located in Certain Areas by the General Directorate of State Hydrolic Works for the purpose of constructing Bozkır Dam within the scope of Konya-Çumra III. Merhale (KOP) Project was published in the Official Gazette dated 13.03.2013 and numbered 28586.
- The Resolution of the Council of Ministers, numbered 2013/4316 on the Urgent Expropriation of Certain Immovable Properties by the Energy Market Regulatory Authority for the purpose of Registration on behalf of The Treasury for the Construction of the Atilla Regulator and Hydroelectric Power Plant to be established in Ordu Province, Çamaş and Fatsa Districts, was published in the Official Gazette dated 13.03.2013 and numbered 28586.
- The Resolution of the Council of Ministers, numbered 2013/4354, on the Urgent Expropriation of Certain Immovable Properties by the Energy Market Regulatory Authority for the purpose of Registration on behalf of The Treasury for the Construction of the Zeytineli Wind Power Plant to be established in İzmir Province, Çeşme and Urla Districts, was published in the Official Gazette dated 19.03.2013 and numbered 28592.
- The Resolution on the Amendment to the Resolution of the Council of Ministers, dated 25.03.2013, on the Principles and Procedures Regarding Treasury Support Provided to Credit

Guarantee Institutions was published in the Official Gazette dated 08.04.2013 and numbered 28612.

- The Resolution of the Council of Ministers, dated 25.03.2013, on Amendment to the Principles Pertaining To Employment of Contracted Employees was published in the Official Gazette dated 17.04.2013 and numbered 28621.
- The Resolution of the Council of Ministers numbered 2013/4523 on the Urgent Expropriation of Some Immovable Property by the Energy Market Regulatory Authority for Construction of the Çeşme Wind Power Plant to be Established in Çeşme district, İzmir province, was published in the Official Gazette dated 26.04.2013 and numbered 28629.
- The Resolution of the Council of Ministers dated 21.05.2013, on the Supplementary Resolution to the Resolution on the Import Regime was published in the Official Gazette dated 30.05.2013 and numbered 28662.
- The Resolution of the Council of Ministers dated 27.05.2013, on the Resolution Amending the Resolution Pertaining to Government Assistance in Investments was published in the Official Gazette dated 30.05.2013 and numbered 28662.
- The Resolution of the Council of Ministers dated 06.05.2013, on the Resolution Amending the Resolution on Articles of Association of the Turkish Central Bank Joint-Stock Company was published in the Official Gazette dated 06.06.2013 and numbered 28669.
- The Resolution of the Council of Ministers dated 22.05.2013 on our Participation in the 1978 Protocol regarding the 1974 International Convention for the Safety of Life at Sea (SOLAS) was published in the Official Gazette dated 27.06.3013 and numbered 28690.
- The Resolution of the Council of Ministers dated 27.05.2013, on the Status of Financial Leasing, Factoring and Finance Companies Union was published in the Official Gazette dated 25.07.2013 and numbered 28718.
- The Resolution of the Council of Ministers dated 06.06.2013, on the Determination of Certain Areas as Technology Improvement

Zones was published in the Official Gazette dated 26.07.2013 and numbered 28719.

- The Resolution of the Council of Ministers dated 05.08.2013, on approval of the Agreement between the Republic of Turkey and the Slovak Republic Concerning the Reciprocal Promotion and Protection of Investments was published in the Official Gazette dated 24.08.2013 and numbered 28745.
- The Resolution of the Council of Ministers dated 01.08.2013 on the entry into force of the Regulation Concerning the Abrogation of the Regulation on the Membership and Listing in Stock Exchanges was published in the Official Gazette dated 31.08.2013 and numbered 28751.
- The Resolution of the Council of Ministers dated 27.06.2013 on the entry into force of the Principles regarding the Price Difference to be Applied in the Construction Works Awarded In Accordance with the Public Tender Act numbered 4734 was published in the Official Gazette dated 31.08.2013 and numbered 28751.
- The Resolution of the Council of Ministers dated 27.06.2013 on the entry into force of the Principles regarding the Price Difference to be Applied in the Purchase of Goods Awarded In Accordance with the Public Tender Act numbered 4734 was published in the Official Gazette dated 31.08.2013 and numbered 28751.
- The Resolution of the Council of Ministers dated 27.06.2013 on the entry into force of the Principles regarding the Price Difference to be Applied in the Purchase of Services Awarded In Accordance with the Public Tender Act No. 4734 was published in the Official Gazette dated 31.08.2013 and numbered 28751.
- The Resolution of the Council of Ministers dated 01.08.2013 on the approval of the Joint Committee Decision No 1/2010 on the Amendment of the Annex II of the Protocol I to the Free Trade Agreement between the Republic of Turkey and Georgia was published in the Official Gazette dated 03.09.2013 and numbered 28754.

- The Resolution of the Council of Ministers dated 02.07.2013 on our participation to the Protocol of 1978 to amend the International Convention for the Prevention of Pollution from Ships, 1973, Modified by the Protocol of 1978 Relating Thereto was published in the Official Gazette dated 11.09.2013 and numbered 28762.
- The Resolution of the Council of Ministers dated 13.08.2013, on the Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority for the establishment of Gökbel I-II Hydroelectric Power Plant (Energy Transmission Line Between HES I and HES II) in the Burdur and Isparta provinces was published in the Official Gazette dated 06.10.2013 and numbered 28787.
- The Resolution of the Council of Ministers dated 13.08.2013, on the Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority for the Construction of Göktaş Hydroelectric Power Plant in the Adana and Kayseri provinces was published in the Official Gazette, dated 06.10.2013 and numbered 28787.
- The Resolution of the Council of Ministers dated 26.08.2013, on the Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority for the Construction of the Energy Transmission Line between Akıncı Hydroelectric Power Plant Production Facility to be Established in Kayseri province and between Çinkur TM was published in the Official Gazette dated 06.10.2013 and numbered 28787.
- The Resolution of the Council of Ministers dated 02.09.2013, on the Urgent Expropriation of some Immovable Properties by the Energy Market Regulatory Authority for the Establishment of a Kandil Regulator and the Construction of a Hydroelectric Power Plant in the Adıyaman province was published in the Official Gazette dated 06.10.2013 and numbered 28787.
- The Resolution of the Council of Ministers on the entry into force of the Implementation of Certain Articles of the Customs Law No. 4458 was published in the Official Gazette dated 08.11.2013 and numbered 28815.

- The Resolution of the Council of Ministers dated 05.11.2012 on the Amendment to the Resolution on the Implementation Principles and Procedures of the Law numbered 3996 on the Procurement of Certain Investments and Services within the Framework of Build-Operate-Transfer Model was published in the Official Gazette dated 05.11.2012 and numbered 28488.
- The Resolution of the Council of Ministers dated 18.11.2013 on the Enforcement of the Resolution with respect to the Prices and Durations which will be applied for the Facilities Engaged in Production Activities based on Renewable Energy and with respect to the Local Contribution was published in the Official Gazette dated 05.12.2013 and numbered 28842.

Important Changes and Developments in Laws

- The Law No. 6384 on the Resolution of the Certain Applications Filed to the European Court of Human Rights by means of Payment of Compensation was published in the Official Gazette dated 19.01.2013 and numbered 28533. Article 5 of the Law entered into force one month after the publication date and other articles of the Law entered into force through publication.
- The Law on the Approval of the Ratification of the Agreement Establishing the African Participation Bank entered into force through publication in the Official Gazette dated 30.01.2013 and numbered 28544.
- The Law on the Approval of the Ratification of the Agreement Establishing the African Development Fund entered into force through publication in the Official Gazette dated 30.01.2013 and numbered 28544.
- The Law on the Approval of the Ratification of the Board of Governors Decision pertaining to the Amendment of the Main Agreement of the International Finance Corporation entered into force through publication in the Official Gazette dated 30.01.2013 and numbered 28544.
- The Law on the Amendment to the Law on Supporting the Development of Forest Villagers and Valuing the Areas Excluded from the Forest Boundaries On Behalf of the Treasury and Sale of Farm Land Belonging to the Treasury entered into force through publication in the Official Gazette dated 04.02.2013 and numbered 28549.
- The Law on the Amendment to Customs Law No. 6455 and Certain Laws and Decree-Laws was published in the Official Gazette dated 11.04.2013 and numbered 28615.
- The Law on Foreigners and International Protection No. 6458 was published in the Official Gazette dated 11.04.2013 and numbered 28615.
- The Law No. 6456 on the Amendments to the Law on the Regulation of Public Financing and Debt Management and Certain

Laws and Decree-Laws was published in the Official Gazette dated 18.04.2013 and numbered 28622.

- The Law No. 6459 on the Amendment of Certain Laws Within the Context of Human Rights and Freedom of Expression entered into force through publication in the Official Gazette dated 30.04.2013 and numbered 28633.
- The Law No. 6460 on the Amendment of the Civil Procedure Code and Various Codes entered into force through publication in the Official Gazette dated 30.04.2013 and numbered 28633.
- The Law on the Liberalization of Railway Transport in Turkey entered into force through publication in the Official Gazette dated 01.05.2013 and numbered 28634.
- The Law No. 6471 on the Approval of Participation in the Protocol Amending the Agreement on Intellectual Property Rights related to Trade was published in the Official Gazette dated 22.05.2013 and numbered 28654.
- The Law No. 6475 on the National Postal Service entered into force through publication in the Official Gazette dated 23.05.2013 and numbered 28655.
- The Law No. 6485 on the Approval of Our Participation in the Framework Agreement No. 187 on Improving Occupational Health and Safety entered into force through publication in the Official Gazette dated 29.05.2013 and numbered 28661.
- The Law No. 6486 on the Amendment to the Law on Social Insurances and General Health Insurance and Certain Laws was published in the Official Gazette dated 29.05.2013 and numbered 28661.
- The Law No. 6487 Amending Certain Laws and Decree Law No. 375 was published in the Official Gazette dated 11.06.2013 and numbered 28674.
- The Law No. 6493 on the Payment and Security Consensus Systems, Payment Services and Electronic Money Institutions entered into force through publication in the Official Gazette dated 27.06.2013 and numbered 28690.

- The Law on the Amendment to the Certain Law and Decree-Laws was published in the Official Gazette dated 02.08.2013 and numbered 28726.
- The Law No. 6498 on the Amendment to the Law on the Conservation of Cultural and Natural Properties entered into force through publication in the Official Gazette dated 11.10.2013 and numbered 28792.
- The Law No. 6502 on Consumer Protection was published in the Official Gazette dated 28.11.2013 and numbered 28835. The Law enters into force in six months from the date of its publication.
- The Law No. 6504 on the Amendment to the Public Procurement Law entered into force through publication in the Official Gazette dated 28.11.2013 and numbered 28835.

Important Changes and Developments in Regulations

- The Regulation on the Amendment of the Procurement Regulation on Foundation Cultural Properties entered into force through publication in the Official Gazette dated 02.01.2013 and numbered 28516.
- The Regulation on the Amendment of the Road Transport Regulation entered into force through publication in the Official Gazette dated 04.01.2013 and numbered 28518.
- The Regulation on the Amendment of the Central Bank of the Republic of Turkey Audit Regulation entered into force through publication in the Official Gazette dated 09.01.2013 and numbered 28523.
- The Regulation on the Amendment of the Regulation on the Recording and Approval of Transactions of Food Enterprises entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Regulation pertaining to the Easement of Customs Transactions entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Regulation on the Amendment of the Customs Regulation entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Regulation on the Amendment of the Regulation regarding the Procedures and Principles on Forming Multiple Partnerships with More than One Media Service Provider entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Regulation pertaining to Electronically Served Notifications was published in the Official Gazette dated 19.01.2013 and numbered 28533. The first sentence of the first paragraph, the second and third paragraphs of Article 7, the seventh paragraph of Article 13 and the tenth paragraph of Article 14 of the Regulation entered into force on 19.01.2013, and other provisions entered into force through publication.

- The Regulation on the Amendment of the Regulation on Associations was published in the Official Gazette dated 23.01.2013 and numbered 28537. The Regulation enters into force on 31.01.2013.
- The Regulation on the Act on Mediation in Legal Disputes was published in the Official Gazette dated 26.01.2013 and numbered 28540. The Regulation enters into force on 22.06.2013.
- The Trade Registry Regulation entered into force through publication in the Official Gazette dated 27.01.2013 and numbered 28541.
- The Regulation on the Amendment of the Regulation on Banks' Procurement of Support Services entered into force through publication in the Official Gazette dated 29.01.2013 and numbered 28543.
- The Regulation on the Amendment of the Regulation pertaining to the Internal System of the Banks entered into force through publication in the Official Gazette dated 29.01.2013 and numbered 28543.
- The Regulation on the Amendment to the Regulation Pertaining to the Working Procedures and Principles of Internal Auditors entered into force through publication in the Official Gazette dated 07.02.2013 and numbered 28552.
- The Regulation on the Amendment of the Customs Regulation entered into force through publication in the Official Gazette dated 07.02.2013 and numbered 28552.
- The Regulation on Repealing the Common Transit Regulation entered into force through publication in the Official Gazette dated 07.02.2013 and numbered 28552.
- The Regulation on the Repealing of the Regulation on Operating Licenses entered into force through publication in the Official Gazette dated 10.02.2013 and numbered 28555.
- The Regulation on Angel Investment Capital entered into force through publication in the Official Gazette dated 15.02.2013 and numbered 28560.

- The Regulation on the Amendment of the Port Regulation entered into force through publication in the Official Gazette dated 27.02.2013 and numbered 28572.
- The Regulation on the Arrangement of the Maritime Trade Statistics entered into force through publication in the Official Gazette dated 01.03.2013 and numbered 28574.
- The Regulation on the Amendment of the Assurance Account Regulation entered into force through publication in the Official Gazette dated 05.03.2013 and numbered 28578.
- The Regulation on the Amendment of the Regulation on the Insurance Information and Supervision Center entered into force through publication in the Official Gazette dated 05.03.2013 and numbered 28578.
- The Regulation on the Amendment of the Regulation on the Principles and Procedures regarding the Preparation and Publication of Annual Activity Reports by Banks entered into force through publication in the Official Gazette dated 06.03.2013 and numbered 28579.
- The Regulation on the Amendment of the Regulation on the Activity Principles of the Intermediary Institutions of the Precious Metals Stock Exchange and the Establishment of the Intermediary Institutions of the Precious Metals Stock Exchange entered into force through publication in the Official Gazette dated 07.03.2013 and numbered 28580.
- The Radioactive Waste Management Regulation entered into force through publication in the Official Gazette dated 09.03.2013 and numbered 28582.
- The Regulation on the Clearance in Nuclear Facilities and Release of Site from Regulatory Control entered into force through publication in the Official Gazette dated 09.03.2013 and numbered 28582.
- The Regulation on the Amendment of the Regulation on Service Quality in the Electronic Communications Sector entered into force through publication in the Official Gazette dated 11.03.2013 and numbered 28584.

- The Regulation on Active Employment Resource Services entered into force through publication in the Official Gazette dated 12.03.2013 and numbered 28585.
- The Regulation on the Establishment and Operation of Pension Mutual Funds entered into force through publication in the Official Gazette dated 13.03.2013 and numbered 28586.
- The Regulation on the Amendment to the Regulation on the Implementation of Decree-Law No. 556 on the Protection of Trademarks entered into force through publication in the Official Gazette dated 30.03.2013 and numbered 28603.
- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Manner in Turkey of Convention on the Grant of European Patents entered into force through publication in the Official Gazette dated 30.03.2013 and numbered 28603.
- The Regulation on the Amendment of the Regulation Demonstrating the Implementation Manner of the Decree-Law on the Protection of Industrial Designs entered into force through publication in the Official Gazette dated 30.03.2013 and numbered 28603.
- The Regulation on the Amendment of the Regulation Demonstrating the Implementation Manner of the Decree-Law on the Protection of Patent Rights entered into force through publication in the Official Gazette dated 30.03.2013 and numbered 28603.
- The Regulation on the Amendment to the Customs Regulation entered into force through publication in the Official Gazette dated 05.04.2013 and numbered 28609.
- The Regulation on the Amendment to the Regulation on Enforcement and Bankruptcy Law entered into force through publication in the Official Gazette dated 16.04.2013 and numbered 28620.
- The Regulation on the Amendment to the Criminal Records Regulation entered into force through publication in the Official Gazette dated 20.04.2013 and numbered 28624.
- The Regulation on the Establishment and Working Procedures of Financial Leasing Companies, Factoring Companies and Financing Companies entered into force through publication in the Official Gazette dated 24.04.2013 and numbered 28627.

- The Regulation on the Amendment of the Regulation regarding Authorization within the Electronic Communications Sector entered into force through publication in the Official Gazette dated 26.04.2013 and numbered 28629.
- The Regulation on the Amendment of the Regulation on Harbors entered into force through publication in the Official Gazette dated 28.04.2013 and numbered 28631.
- The Regulation on the Amendment of the Regulation on the Credit-Transactions of Banks entered into force through publication in the Official Gazette dated 30.04.2013 and numbered 28633.
- The Regulation on the Administration of Natural Properties and Natural Protected Areas and Premises situated in Specially Protected Environment Areas under the Possession of the State entered into force through publication in the Official Gazette dated 02.05.2013 and numbered 28635.
- The Regulation on Granting New Electricity Generation Licenses to Premises whose Construction has begun entered into force through publication in the Official Gazette dated 04.05.2013 and numbered 28637.
- The Regulation on the Amendment of the Customs Regulation was published in the Official Gazette dated 15.05.2013 and numbered 28648. Articles 4 and 5 of the Regulation will enter into force 3 months after the date of publication and the other articles enter into force on the date of publication.
- The Regulation on the Amendment of the Tender Regulation for Foundation Cultural Properties entered into force through publication in the Official Gazette dated 21.05.2013 and numbered 28653.
- The Regulation on Web Sites of Corporations to be Set Up was published in the Official Gazette dated 31.05.2013 and numbered 28663. This Regulation entered into force on 01.07.2013.
- The Regulation on the Amendment to the Regulation on the Tax Inspection Board entered into force through publication in the Official Gazette dated 05.06.2013 and numbered 28668.

- The Regulation on the Investor Compensation Center entered into force through publication in the Official Gazette dated 06.06.2013 and numbered 28669.
- The Regulation on the Amendment to the Customs Regulation was published in the Official Gazette dated 12.06.2013 and numbered 28675.
- The Regulation on Emergency Situations in the Business Place entered into force through publication in the Official Gazette dated 18.06.2013 and numbered 28681.
- The Regulation on the Amendment to the Regulation on Consumer Rights in the Electronic Communications Sector entered into force through publication in the Official Gazette dated 20.06.2013 and numbered 28683.
- The Regulation on the Amendment of the Regulation on Premiums to be Collected by Savings Deposit Insurance Funds and Deposit Money subject to Insurance and Participation Funds entered into force through publication in the Official Gazette dated 26.06.2013 and numbered 28689.
- The Regulation on the Amendment of the Regulation on Market Surveillance and the Control of Products entered into force through publication in the Official Gazette dated 27.06.2013 and numbered 28690.
- The Regulation on the Amendment of the Regulation concerning the Credit Transactions of Banks entered into force through publication in the Official Gazette dated 11.07.2013 and numbered 28704.
- The Regulation on the Amendment of the Regulation concerning the Processing of Personal Data and Protection of Its Confidentiality in the Electronic Communications Sector entered into force through publication in the Official Gazette dated 11.07.2013 and numbered 28704.
- The Regulation on Amendment to the Regulation With Regards To Arbitration in Insurance was published in the Official Gazette dated 24.07.2013 and numbered 28717.

- The Regulation repealing the Regulation on the Establishment and Bodies of Stock Exchanges entered into force through publication in the Official Gazette dated 24.07.2013 and numbered 28717.
- The Regulation on the Amendment to the Regulation on Customs entered into force through publication in the Official Gazette dated 03.08.2013 and numbered 28727.
- The Regulation on the Amendment to the Ports Regulation entered into force through publication in the Official Gazette dated 06.08.2013 and numbered 28730.
- The Communiqué on Amendment to the Communiqué on Principles and Procedures of Internal and External Trade of Alcohol and Alcoholic Beverages entered into force though publication in the Official Gazette dated 11.08.2013 and numbered 28732.
- The Regulation on the Equity of Banks was published in the Official Gazette dated 05.09.2013 and numbered 28756. This Communique enters into force on 01.01.2014.
- The Regulation on the Amendment of the Regulation Concerning the Measurement and Evaluation of the Adequateness of a Bank's Capital was published in the Official Gazette dated 05.09.2013 and numbered 28756. The Regulation enters into force on 01.01.2014.
- The Ministry of Labor and Social Security Regulation on the Market Supervision and Audit entered into force through publication in the Official Gazette dated 18.09.2013 and numbered 28769.
- The Regulation on the Amendment of the Regulation Concerning Web-sites Created by Corporations entered into force through publication in the Official Gazette dated 21.09.2013 and numbered 28772.
- The Regulation on the amendment to the Tax Inspection Board Regulation was published in the Official Gazette dated 02.10.2013 and numbered 28783.
- The Environmental Inspection Regulation entered into force through publication in the Official Gazette dated 03.10.2013 and numbered 28784.

- The Regulation on the amendment to the Regulation on the Investor Compensation Center entered into force through its publication in the Official Gazette dated 08.10.2013 and numbered 28789.
- The Regulation on the amendment to the Regulation on Bank Cards and Credit Cards entered into force through publication in the Official Gazette dated 08.10.2013 and numbered 28789.
- The Regulation on the amendment to the Regulation on Determining the Credits and Qualification of its Other Receivables by Banks and Procedures and Principles With Regards To Their Reserves entered into force through its publication in the Reiterated Official Gazette dated 08.10.2013 and 28789.
- The Regulation on the amendment to the Regulation on the Evaluation and Determination of the Capital Sufficiency of Banks entered into force through its publication in the Reiterated Official Gazette dated 08.10.2013 and numbered 28789.
- The Regulation on the amendment to the Ports Regulation entered into force through publication in the Official Gazette dated 22.10.2013 and numbered 28799.
- The Private Health Insurances Regulation was published in the Official Gazette dated 23.10.2013 and numbered 28800. Article 17 of the Regulation shall enter into force 1 year after the publication and other articles shall enter into force 6 months after the publication date.
- The Regulation on the Amendment of the Regulation regarding the General Supervision and Documentation of Ships entered into force through publication in the Official Gazette dated 30.10.2013 and numbered 28806.
- The Regulation on the Amendment of the Regulation concerning the Control of Waste Batteries and Accumulators entered into force through publication in the Official Gazette dated 05.11.2013 and numbered 28812.
- The Regulation on the Amendment of the Regulation concerning the Control of Waste Oils entered into force through publication in the Official Gazette dated 05.11.2013 and numbered 28812.

- The Regulation on the Amendment of the Regulation concerning the Control of Waste Herbal Oils entered into force through publication in the Official Gazette dated 05.11.2013 and numbered 28812.
- The Regulation on the Amendment to the Regulation concerning the Control of Hazardous Waste entered into force through publication in the Official Gazette dated 05.11.2013 and numbered 28812.
- The Regulation on the Measurement and Evaluation of Bank Leverage Levels was published in the Official Gazette dated 05.11.2013 and numbered 28812. Paragraph 2 of Articles 4 and 5, and paragraph 1 of Article 8 of the Regulation shall enter into force on 01.01.2015 and the other articles on 01.01.2014.
- The Regulation on the Abrogation of the Regulation on the Principles and Procedures concerning the Functioning of the Private Fund Established in accordance with Act number 4487 entered into force through publication in the Official Gazette dated 09.11.2013 and numbered 28816.
- The Private Fund Regulation entered into force through publication in the Official Gazette dated 09.11.2013 and numbered 28816.
- The Regulation on the Amendment to the Regulation on Supervision of Port States entered into force through publication in the Official Gazette dated 14.11.2013 and numbered 28821.
- The Regulation on Commercial Air Transport Enterprises entered into force through publication in the Official Gazette dated 16.11.2013 and numbered 28823.
- The Regulation on the Amendment to the Regulation concerning the Implementation of Framework Agreement Tenders was published in the Official Gazette dated 28.11.2013 and numbered 28835. This Regulation entered into force on 29.11.2013.
- The Regulation on the Amendment to the Regulation on the Implementation of Tenders relating to the Procurement of Consultancy Services was published in the Official Gazette dated 28.11.2013 and numbered 28835. This Regulation entered into force on 29.11.2013.
- The Regulation on the Amendment to the Regulation on the Implementation of Tenders relating to Procurement of Services was

published in the Official Gazette dated 28.11.2013 and numbered 28835. This Regulation entered into force on 29.11.2013.

- The Regulation on the Amendment to the Regulation on the Implementation of Tenders relating to the Purchase of Goods was published in the Official Gazette dated 28.11.2013 and numbered 28835. This Regulation entered into force on 29.11.2013.
- The Regulation on the Amendment to the Regulation concerning the Safeguard Measures in Imports entered into force through publication in the Official Gazette dated 29.11.2013 and numbered 28836.
- The Regulation on the Amendment to the Regulation on the Principles and Procedures relating to the Sale and Display of Tobacco Products and Alcoholic Beverages was published in the Official Gazette dated 03.12.2013 and numbered 28840. This Regulation will enter into force on 01.01.2014
- The Regulation on the Procurement and Management of the Special Fund Assets entered into force through publication in the Official Gazette dated 06.12.2013 and numbered 28843.
- The Regulation on Intermediaries Conducting Purchase and Sale activities in Commodity Exchange entered into force through publication in the Official Gazette dated 06.12.2013 and numbered 28843.
- The Regulation on Insurance Supervision to be Conducted by Banks and Public Administrations and the Principles and Procedures regarding the Attainment of Information and Documents from the Institutions entered into force through publication in the Official Gazette dated 06.12.2013 and numbered 28843.
- The Regulation on the Application for Mediation and Arbitration in Collective Labor Agreements entered into force through publication in the Official Gazette dated 07.12.2013 and numbered 28844.
- The Regulation on Amendments to the Criminal Police Regulation entered into force through publication in the Official Gazette dated 21.12.2013 and numbered 28858.

Important Changes and Developments in Communiqués

- The Communiqué pertaining to the Fee Tariff to be Applied by the Turkish Patent Institute (BIK/TPI 2013/1) was published in the Official Gazette dated 03.01.2013 and numbered 28517.
- The Communiqué on the Amendment of the Communiqué Pertaining to the Implementation of Tariff Quotas on the Importation of Certain Agricultural and Cultivated Agricultural Goods Pursuant to the Bilateral Agreements was published in the Official Gazette dated 04.01.2013 and numbered 28518. This Communiqué entered into force through publication on 01.01.2013.
- The Communiqué (Export: 2013/1) on the Amendment of the Communiqué pertaining to the Inward Processing Regime (Export: 2006/12) entered into force through publication in the Official Gazette dated 07.01.2013 and numbered 28521.
- The Communiqué (Export 2013/2) on the Amendment of the Communiqué pertaining to Sales and Deliveries deemed Exports (Export 2005/2) entered into force through publication in the Official Gazette dated 07.01.2013 and numbered 28521.
- The Communiqué on Protection Measures in Importation (No: 2013/1) entered into force through publication in the Official Gazette dated 08.01.2013 and numbered 28522.
- The Abrogation of the Communiqué on the Management of Tariff Quotas in Importation (Communiqué No: 2012/1) was published in the Official Gazette dated 10.01.2013 and numbered 28524. This Communiqué entered into force through publication, to be valid as of 31.12.2012.
- The Communiqué (2010/1) on the Amendment of the Communiqué pertaining to the Supervision Implementation in Import was published in the Official Gazette dated 12.01.2013 and numbered 28526. This Communiqué enters into force on the 30th day following the publication.
- The Communiqué on the Highway Transportation of Waste Products entered into force through publication in the Official Gazette dated 18.01.2013 and numbered 28532.

- The Communiqué on the Amendment of the Communiqué (Communiqué No: 2009/8) pertaining to the Supervision Practices in Imports entered into force through publication in the Official Gazette dated 23.01.2013 and numbered 28537.
- The Communiqué (No: 2013/1) on the Amendment of the Communiqué (No: 2010/2) pertaining to the Print Form of Checkbooks and the Amount Obliged to be Paid by Banks to the Bearer and Notification and Announcement of the Decisions on the Ban of Check Issuance and the Opening of Check Accounts was published in the Official Gazette dated 23.01.2013 and numbered 28537. This Communiqué entered into force on 25.01.2013.
- The Communiqué on the Abrogation of the Communiqué (Communiqué No: 2007/36) pertaining to the Supervision Practice in Imports was published in the Official Gazette dated 28.01.2013 and numbered 28542.
- The Communiqué on the Abrogation of the Communiqué (Communiqué No: 2007/37) pertaining to the Supervision Practice in Import was published in the Official Gazette dated 28.01.2013 and numbered 28542.
- The Public Procurement Communiqué (Communiqué No: 2013/1) was published in the Official Gazette dated 30.01.2013 and numbered 28544. This Communiqué enters into force on 01.02.2013.
- The Communiqué on the Amendment of the Communiqué on the Processes and Technical Criteria Regarding Electronic Signatures entered into force through publication in the Official Gazette dated 30.01.2013 and numbered 28544.
- The Communiqué (Product Safety and Audit: 2013/25) amending the Communiqué on Commercial Quality Inspection for Import and Export of Certain Agricultural Products (Product Safety and Audit: 2013/21) entered into force through publication in the Official Gazette dated 05.02.2013 and numbered 28550.
- The Communiqué on the Amendment to the Communiqué on the Implementation of Supervision of Imports (Communiqué

No: 2006/13), (Communiqué No: 2007/30), (Communiqué No: 2007/33), (Communiqué No: 2008/19), (Communiqué No: 2011/2), (Communiqué No: 2012/1) entered into force through publication in the Official Gazette dated 05.02.2013 and numbered 28550.

- The Communiqué on the Amendment to the Communiqué pertaining to the Implementation of Supervision and Protection Measures on Imports (Communiqué No: 2004/2), (Communiqué No: 2011/9) entered into force through publication in the Official Gazette dated 05.02.2013 and numbered 28550.
- The Communiqué on the Implementation of Central Budgets for 2013 (Serial No: 5) was published in the Official Gazette dated 07.02.2013 and numbered 28552. This Communiqué entered into force through publication as of 01.01.2013.
- TFRS 7 Financial Instruments: The Communiqué (Serial No: 7) on the Amendment of the Communiqué on Turkish Financial Reporting Standards (TFRS 7) Regarding the Explanations (Serial No: 42) was published in the Official Gazette dated 11.02.2013 and numbered 28556.
- Financial Instruments: The Communiqué (Serial No: 8) on the Amendment of the Communiqué Pertaining to Turkish Accounting Standards (TAS 32) with Respect To Submission (Serial No: 40) was published in the Official Gazette dated 11.02.2013 and numbered 28556.
- Communiqué on the Amendment (No: 2013/3) to the Communiqué on Required Reserves (No: 2005/1) was published in the Official Gazette dated 20.02.2013 and numbered 28565. This Communiqué entered into force on 01.03.2013.
- The Communiqué on the Amendment (Serial: IV, No: 63) to the Communiqué on the Determination and Implementation of Corporate Governance Principles (Serial: IV, No: 56) entered into force through publication in the Official Gazette dated 22.02.2013 and numbered 28567.
- The Communiqué on the Amendment to the Communiqué Regarding the Addresses of Registered E-mail and Registered

E-mail Accounts entered into force through publication in the Official Gazette dated 06.03.2013 and numbered 28579.

- The Communiqué (Communiqué No: 2013-32/42) on the Amendment of the Communiqué regarding Resolution No. 32 on the Protection of the Value of the Turkish Currency (Communiqué No: 2008-32/35) entered into force through publication in the Official Gazette dated 07.03.2013 and numbered 28580.
- The Communiqué on the Moveable, Refillable and In Use Steel Lpg Cylinders (Ts 5306) (Communiqué No: Msg – Ms - 2013/3) was published in the Official Gazette dated 11.03.2013 and numbered 28584. This Communiqué enters into force three months after the publication date.
- The Communiqué on the International Arbitration Fees Tariff was published in the Official Gazette dated 15.03.2013 and numbered 28588. This Communiqué entered into force on the date of publication.
- The Communiqué on Monetary Limits and Ratios (No: 2013/1) entered into force through publication in the Official Gazette dated 23.03.2013 and numbered 28596.
- The Communiqué (No: 2013/5) on the Amendment to the Communiqué on Required Reserves (No: 2005/1) was published in the Official Gazette dated 28.03.2013 and numbered 28601. This Communiqué entered into force on 29.03.2013.
- The Communiqué (No: 2013/6) on the Amendment to the Communiqué on Required Reserves (No: 2005/1) was published in the Official Gazette dated 17.04.2013 and numbered 28621. This Communiqué entered into force on 26.04.2013.
- The Communiqué on the Principles and Procedures to be Followed in Prior Notification and Permission Applications Made to the Competition Authority for Legal Validation of Acquisitions by Privatization (Communiqué No: 2013/2) entered into force through publication in the Official Gazette dated 18.04.2013 and numbered 28622.
- The Communiqué (No: 2013/6) on the Amendment to the Communiqué on Required Reserves (No: 2005/1) was published

in the Official Gazette dated 17.04.2013 and numbered 28621. This Communiqué entered into force on 26.04.2013.

- The Communiqué on the Minimum Mediation Fee Tariff of 2013 was published in the Official Gazette dated 03.05.2013 and numbered 28636.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2013/9) entered into force through publication in the Official Gazette dated 05.05.2013 and numbered 28638.
- The Communiqué on the National Occupational Standards was published in the Reiterated Official Gazette dated 29.05.2013 and numbered 28661.
- The Communiqué repealing the Communiqués on the Supervision in Imports (Communiqué No: 2006/5) and (Communiqué No: 2007/35) entered into force through publication in the Official Gazette dated 01.06.2013 and numbered 28664.
- The Communiqué on the Supervision in Imports (Communiqué No: 2013/9) was published in the Official Gazette dated 04.06.2013 and numbered 28667. This Communiqué entered into force on the 30th day following its publication.
- The Communiqué on the Amendment to the Communiqué on Commercial Ledgers was published in the Official Gazette dated 06.06.2013 and numbered 28669.
- The Communiqué (Serial: 2013/9) on the Amendment to the Communiqué on the Maximum Interest Rates to be Applied for Credit Card Transactions (No: 2006/1) was published in the Official Gazette dated 13.06.2013 and numbered 28676. This Communiqué entered into force on 01.07.2013.
- The Communiqué on the Principles of Financial Reporting in Capital Markets (II-14, 1) was published in the Official Gazette dated 13.06.2013 and numbered 26676.
- The Communiqué (Export: 2013/4) on the Amendment to the Communiqué on Organizing and Considering Fairs Abroad (Export: 2015/5) entered into force through publication in the Official Gazette dated 20.06.2013 and numbered 28683.

- The Communiqué on the Sale of Capital Markets Instruments (II-5.2) was published in the Official Gazette dated 28.06.2013 and numbered 28691. This Communiqué entered into force one month after its publication.
- The Communiqué (Serial: X, No: 28) on the Amendment of the Communiqué regarding the Independent Supervision Standards under Capital Markets (Serial: X, No: 22) entered into force through publication in the Official Gazette dated 28.06.2013 and numbered 28691.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2013/11) entered into force through publication in the Official Gazette dated 29.06.2013 and numbered 28692.
- The Communiqué on the Amendment of the Communiqué regarding the Electronic General Assembly System to be Applied in the General Assemblies of Joint Stock Companies entered into force through publication in the Official Gazette dated 29.06.2013 and numbered 28692.
- The Communiqué on the Extension of the Time Required for the Harmonization of Joint-stock and Limited Liability Company Agreements with the Turkish Commercial Code entered into force through publication in the Official Gazette dated 29.06.2013 and numbered 28692.
- The Communiqué on the Principles regarding Portfolio Management Companies and their Activities (III-55.1) was published in the Official Gazette dated 02.07.2013 and numbered 28695. Subparagraph (ç) of the first paragraph of Article 5 of this Communiqué enters into force on the publication date; the other provisions shall enter into force on 01.07.2014.
- The Communiqué on the Principles regarding the Portfolio Preservation Service and the Institutions Executing this Service (III -56.1) was published in the Official Gazette dated 02.07.2013 and numbered 28695. This Communiqué entered into force on 01.01.2014.

- The Communiqué (Serial: IV, No: 65) on the Amendment of the Communiqué on the Procedures and Principles of Record Keeping of Registered Capital Markets Instruments (Serial: IV, No: 28) entered into force through publication in the Official Gazette dated 04.07.2013 and numbered 28697.
- The Communiqué on Real Estate Certificates (VII-128.2) entered into force through publication in the Official Gazette dated 05.07.2013 and numbered 28698.
- The Principle Communiqué concerning Investment Funds (III-52.1) was published in the Official Gazette dated 09.07.2013 and numbered 28702. This Communiqué entered into force on 01.07.2014.
- The Communiqué (Serial: V, No: 134) on the Amendment of the Principle Communiqué concerning the Capital of Financial Intermediaries and Capital Adequacy (Serial: V, No: 34) was published in the Official Gazette dated 11.07.2013 and numbered 28704. This Communiqué enters into force on 01.07.2014.
- The Communiqué on the Principles for Investment Services and Activities, and Ancillary Services (III-37.1) was published in the Official Gazette dated 11.07.2013 and numbered 28704. This Communiqué entered into force on 01.07.2014.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2013/13) entered into force through publication in the Official Gazette dated 16.07.2013 and numbered 28709.
- The Communiqué (Serial No: 10) on the Amendment of the Communiqués on the First Implementation of Turkish Financial Reporting Standards (TFRS 1) (Serial No: 146) was published in the Official Gazette dated 17.07.2013 and numbered 28710. This Communiqué enters into force on the publication date, to be valid for the annual reporting periods commencing after 31.12.2012.
- The Communiqué (Serial No: 11) on the Amendment of the Communiqués Concerning Turkish Accounting Standards was published in the Official Gazette dated 17.07.2013 and numbered

28710. This Communiqué enters into force on the publication date, to be valid for the annual reporting periods commencing after 31.12.2012.

- The Communiqué on the Amendment of the Communiqués Concerning Turkish Accounting Standards (Serial No: 12) was published in the Official Gazette dated 17.07.2013 and numbered 28710. This Communiqué enters into force on the publication date, and is to be valid for the annual reporting periods commencing after 31.12.2012.
- The Communiqué on the Amendment to the Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2013/11) entered into force through publication in the Official Gazette dated 23.07.2013 and numbered 28716.
- The Communiqué on Administration of Quota Contingent (No: 2013/1) was published in the Official Gazette dated 23.07.2013 and numbered 28716. This Communiqué entered into force on its publication date effective as of 03.07.2013.
- The Communiqué on Administration of Quota Contingent (No: 2013/2) was published in the Official Gazette dated 23.07.2013 and numbered 28716. This Communiqué entered into force on its publication date effective as of 02.07.2013.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2013/15) entered into force through publication in the Official Gazette dated 24.07.2013 and numbered 28717.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2013/12) and (Communiqué No: 2013/14) entered into force through publication in the Official Gazette dated 25.07.2013 and numbered 28718.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2013/16) entered into force through publication in the Official Gazette dated 26.07.2013 and numbered 28719.

- The Communiqué on the Statistics for July 2013 concerning the Number of Workers in Business Fields and the Number of Members pursuant to Law No. 6353 on Trade Unions and Collective Bargaining Agreements was published in the Official Gazette dated 30.07.2013 and numbered 28723.
- The Communiqué on Amendment to the Communiqué on Supervision in Imports (Communiqué No: 2008/9) entered into force through publication in the Official Gazette dated 01.08.2013 and numbered 28725.
- The Communiqué (Export: 2013/5) on the Amendment to the Communiqué on Goods which upon Exportation are Subject to Registration (Communiqué No: Export: 2006/7) entered into force through publication in the Official Gazette dated 01.08.2013 and numbered 28725.
- The Communiqué on Supervision in Imports (No: 2013/11) was published in the Official Gazette dated 07.08.2013 and numbered 28731. This Communiqué entered into force on the 30th day following its publication date.
- The Communiqué on Amendment to the Communiqué on Supervision in Imports (No: 2013/6) was published in the Official Gazette dated 13.08.2013 and numbered 28734. This Communiqué entered into force on the thirtieth day following its publication date.
- The Communiqué on Supervision in Imports (No: 2013/12) was published in the Official Gazette dated 13.08.2013 and numbered 28734. This Communiqué entered into force on the 30th day following its publication date.
- The Communiqué on Supervision in Imports (No: 2013/10) entered into force through publication in the Official Gazette dated 19.08.2013 and numbered 28740.
- The Communiqué (Product Security and Audit: 2013/30) on Amendment to the Communiqué on the Audit of Conformity to Standards in Imports (Product Security and Audit: 2013/1) entered into force through publication in the Official Gazette dated 19.08.2013 and numbered 28740.

- The Communiqué (Product Security and Audit: 2013/31) on Amendment to the Communiqué on the Audit of Import in Certain Products that should Carry the “CE” Sign (Product Security and Audit: 2013/9) entered into force through publication in the Official Gazette dated 19.08.2013 and numbered 28740.
- The Communiqué on the Principles Regarding the Security Investment Partnerships (III-48.2) was published in the Official Gazette dated 29.08.2013 and numbered 28750. Subparagraph (h) of first paragraph of Article 6 and paragraph one of Article 32 enters into force on 01.07.2014 and the other provisions enter into force on the publication date.
- The Communiqué on the Amendment of the Communique (Serial: VIII, No: 51) regarding the Principles of the Rating Activities and Rating Institutions in Capital Markets (Serial: VIII, No: 76) entered into force through publication in the Official Gazette dated 29.08.2013 and numbered 28750.
- The Communiqué on Warrants and Investment Establishment Certificates (VII-128.3) entered into force through publication in the Official Gazette dated 10.09.2013 and numbered 28761.
- The Communiqué (Communiqué No: 2013/1) on the Amendment of the Communiqué (Communiqué No: 2010/8) regarding the Promotion of Improvement of International Competitiveness entered into force through publication in the Official Gazette dated 14.09.2013 and numbered 28765.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2013/17) entered into force through publication in the Official Gazette dated 19.09.2013 and numbered 28770.
- The Communiqué on the Amendment of the Communiqué regarding the Arrangement of Bank Consolidated Financial Statements entered into force through publication in the Official Gazette dated 20.09.2013 and numbered 28771.
- The Communiqué on the International Inspection Companies’ Temporary Preclusion from Activity (Product Safety and Audit:

2013/33) was published in the Official Gazette dated 24.09.2013 and numbered 28775. This Communiqué entered into force within 15 days of its publication.

- The Communiqué on Revoking the Status of the International Inspection Company (Product Safety and Audit: 2013/34) was published in the Official Gazette dated 24.09.2013 and numbered 28775. This Communiqué entered into force within 15 days of its publication.
- The Communiqué (Product Safety and Audit: 2013/35) on the amendment to the Communiqué on Import Auditing of Certain Products Audited by the Ministry of Health (Product Safety and Audit: 2013/20) entered into force through publication in the Official Gazette dated 24.09.2013 and numbered 28775.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2013/21) entered into force through publication in the Official Gazette dated 26.09.2013 and numbered 28777.
- The Communiqué on Prevention of Unfair Competition in Imports (Communiqué No: 2013/18) entered into force through publication in the Official Gazette dated 28.09.2013 and numbered 28779.
- The Communiqué on Prevention of Unfair Competition in Imports (Communiqué No: 2013/20) entered into force through publication in the Official Gazette dated 02.10.2013 and numbered 28783.
- The Communiqué on the Application of the Regulation on Producing Unlicensed Electric Power in the Electricity Market entered into force through publication in the Official Gazette dated 02.10.2013 and numbered 28783.
- The Communiqué on Independent and Limited Independent Audit of Financial Statements and Other Assurance Audits and Independent Audit Institutions Executing Related Services and Quality Control Standards for Independent Auditors 1 (KKS 1), Communiqué on Audit Standards of Turkey No: 1 was published in the Official Gazette dated 02.10.2013 and numbered 28783. This Communiqué entered into force through its publication to be valid as of 01.01.2013.

- The Communiqué (Number: 2013/13) on the amendment to the Communiqué on the Required Reserves (Number: 2005/1) was published in the Official Gazette dated 04.10.2013 and numbered 28785. This Communiqué entered into force on 06.12.2013.
- The Communiqué on Prevention of Unfair Competition in Imports (Communiqué No: 2013/19) entered into force through publication in the Official Gazette dated 05.10.2013 and numbered 28786.
- The Communiqué on the International Inspection Companies' Temporary Preclusion from Activity (Product Safety and Audit: 2013/36) was published in the Official Gazette dated 05.10.2013 and numbered 28775. This Communiqué entered into force within 15 days of its publication.
- The Communiqué on Safeguard Measures in Imports (No: 2013/8) entered into force through publication in the Official Gazette dated 12.10.2013 and numbered 28793.
- The Communiqué on Foreign Capital Market Instruments and Depository Receipts and Shares of Investment Funds (VII-128.4) was published in the Official Gazette dated 23.10.2013 numbered 28800. a) Articles 14 and 15 of This Communiqué entered into force to be valid as of the termination of financial statements after 31.12.2013; b) Articles 21 to 34 of the Communiqué and paragraph 2 of Article 36, except for clauses (c) and (d) of paragraph 1 of Article 21, shall enter into force on 01.07.2014; c) Clauses (c) and (d) of paragraph 1 of Article 21 and other provisions of This Communiqué entered into force through publication in the Official Gazette.
- The Communiqué on the Amendment of the Communiqué (Communiqué No: 2007/30) on the Supervision Application on Importation was published in the Official Gazette dated 30.10.2013 numbered 28807. This Communiqué entered into force on the 30th day following its publication.
- The Communiqué on Importation Supervision of Certain Consumer Products which are Inspected by the Ministry of Customs and Trade (Product Safety and Supervision: 2013/38) entered into

force through publication in the Official Gazette dated 31.10.2013 numbered 28807.

- The Communiqué on the Amendment of the Communiqué on the Supervision Application on Importation (No: 2010/8) entered into force through publication in the Official Gazette dated 05.11.2013 and numbered 28812.
- The Communiqué on the Supervision Application on Importation (No: 2013/13) was published in the Official Gazette dated 05.11.2013 and numbered 28812. This Communiqué entered into force on the 30th day following its publication.
- The Communiqué on the Amendment of the Communiqué on Required Reserves (No: 2005/1) was published in the Official Gazette dated 11.11.2013 and numbered 28818. This Communiqué entered into force on 06.12.2013.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2013/22) entered into force through publication in the Official Gazette dated 14.11.2013 and numbered 28821.
- The Communiqué on the Agreement (IAC 210) on Conditions of Independent Auditing, Communiqué on Auditing Standards of Turkey No: 3, was published in the Official Gazette dated 14.11.2013 and numbered 28821. This Communiqué entered into force through publication to be applied as of the accounting periods starting on 01.01.2013 or afterwards.
- The Communiqué on Quality Control in the Independent Auditing of Financial Statements (IAC 220), Communiqué on Auditing Standards of Turkey No: 4, was published in the Official Gazette dated 14.11.2013 and numbered 28821. This Communiqué entered into force through publication to be applied as of the accounting periods starting on 01.01.2013 or afterwards.
- The Communiqué on the Documentation of Independent Auditing (IAC 230), Communiqué on Auditing Standards of Turkey No: 5, was published in the Official Gazette dated 14.11.2013 and numbered 28821. This Communiqué entered into force through publication to be applied as of the accounting periods starting on 01.01.2013 or afterwards.

- The Communiqué on the Management of Quota and Tariff Contingent in Importation (No: 2013/3) was published in the Official Gazette dated 17.11.2013 and numbered 28824. This Communiqué entered into force through publication, to be valid as of 01.01.2013
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2013/24) entered into force through publication in the Official Gazette dated 17.11.2013 and numbered 28824.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2013/23) entered into force through publication in the Official Gazette dated 21.11.2013 and numbered 28828.
- The Communiqué on the Principles relating to the Exchange Investment Funds (Serial: III, No 52.2) was published in the Official Gazette dated 27.11.2013 and numbered 28834. The second and sixth paragraphs of Article 9 of the Communiqué enter into force on the date of publication; other provisions will enter into force on 01.07.2014.
- The Communiqué on the Amendment to the Communiqué pertaining to the Commercial Ledgers entered into force through publication in the Official Gazette dated 01.12.2013 and numbered 28838.
- The Communiqué on the Classification of Goods and Services with respect to Trademark Registry Applications (TPI: 2013/2) was published in the Official Gazette dated 04.12.2013 and numbered 28841. This Communiqué will enter into force on 01.01.2014.
- The Communiqué on the Liabilities related to the Fraud of the Independent Auditor in the Auditing of Financial Statements (BDS 240), Communiqué on Auditing Standards of Turkey (No: 6) was published in the Official Gazette dated 10.12.2013 and numbered 28847. This Communiqué enters into force through publication to be applied as of the accounting periods starting on 01.01.2013 and afterwards.
- The Communiqué on the Consideration of the Related Legislation in the Financial Statements' Independent Auditing (BDS 250),

Communiqué on Auditing Standards of Turkey (No: 7) was published in the Official Gazette dated 10.12.2013 and numbered 28847. This Communiqué enters into force through publication to be applied as of the accounting periods starting on 01.01.2013 and afterwards.

- The Communiqué on the Communication Established with the Principal Managers (BDS 260), Communiqué on Auditing Standards of Turkey (No: 8) was published in the Official Gazette dated 10.12.2013 and numbered 28847. This Communiqué enters into force through publication to be applied as of the accounting periods starting on 01.01.2013 and afterwards.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2013/31) entered into force through publication in the Official Gazette dated 12.12.2013 and numbered 28849.
- The Communiqué (No: 9) on the Notification of the Internal Audit Deficiencies to the Management and Principal Managers (BDS 265), Communiqué on Auditing Standards of Turkey (No: 9) was published in the Official Gazette dated 12.12.2013 and numbered 28849. This Communiqué enters into force through publication to be applied as of the accounting periods starting on 01.01.2013 and afterwards.
- The Communiqué on the Payment of Net Purchase and Sale Incomes by Managers to Issuers (VI-103.1) entered into force through publication in the Official Gazette dated 12.12.2013 and numbered 28849.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2013/26) entered into force through publication in the Official Gazette dated 13.12.2013 and numbered 28850.
- The Communiqué on Safeguard Measures in Imports (No: 2013/9) and (No: 2013/10) entered into force through publication in the Official Gazette dated 14.12.2013 and numbered 28851.
- The Communiqué on Promotion of Economic Investments based on Agriculture within the scope of the Promotion Program of Investments on Rural Development (No: 2013/59) entered into

force through publication in the Official Gazette dated 14.12.2013 and numbered 28851.

- The Communiqué on the Prevention of Unfair Competition in Imports (No: 2013/25) and (No: 2013/27) entered into force through publication in the Official Gazette dated 17.12.2013 and numbered 28854.
- The Communiqué on the Establishment and Activity Principles of Investment Institutions (III-39.1) was published in the Official Gazette dated 17.12.2013 and numbered 28854. This Communiqué enters into force on 01.07.2013.
- The Communiqué on the Principles with respect to the Performance Supply, Performance Based Pricing of the Personal Portfolio, Scoring and Rating the Collective Investment Institutions (VII-128.5) was published in the Official Gazette dated 17.12.2013 and numbered 28854. This Communiqué entered into force on 01.07.2013.
- The Communiqué on the Prevention of Unfair Competition in Imports (No: 2013/28) and (No: 2013/30) entered into force through publication in the Official Gazette dated 18.12.2013 and numbered 28855.
- The Communiqué on the Prevention of Unfair Competition in Imports (No: 2013/29) entered into force through publication in the Official Gazette dated 21.12.2013 and numbered 28858.

Important Changes and Developments in General Communiqués

- The National Estate General Communiqué (Series No: 350) was published in the Official Gazette dated 04.01.2013 and numbered 28518. The National Estate General Communiqué (Serial No: 337), published in the Official Gazette dated 28.12.2011 and numbered 28156, was abrogated.
- The Communiqué on the Amendment of the General Customs Communiqué (Customs Transactions) (Serial No: 16) entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The Communiqué on the Amendment of the General Customs Communiqué concerning Customs Approved Operator Status (Serial No: 1) entered into force through publication in the Official Gazette dated 10.01.2013 and numbered 28524.
- The General Communiqué on Tax Procedural Law (Serial No: 423) was published in the Official Gazette dated 26.01.2013 and numbered 28540.
- The General Customs Communiqué (Customs Transactions) (Serial No: 102), (Serial No: 103), (Serial No: 104) entered into force through publication in the Official Gazette dated 28.01.2013 and numbered 28542.
- The General Customs Communiqué (Entering into Free Movement) (Serial No: 13) was published in the Official Gazette dated 19.02.2013 and numbered 28564. This Communiqué entered into force 15 days after its publication.
- The Tax Procedures Code General Communiqué (Serial No: 424) entered into force through publication in the Official Gazette dated 21.02.2013 and numbered 28566.
- The General Communiqué on the Value Added Tax (Serial No: 122) was published in the Official Gazette dated 26.02.2013 and numbered 28571.
- The National Estate General Communiqué (Serial No: 352) entered into force through publication in the Official Gazette dated 23.03.2013 and numbered 28596.

- The Communiqué (Serial No: 3) on the Amendment to the General Communiqué on Granting Tax Exemption to Foundations (Serial No: 1) was published in the Official Gazette dated 23.03.2013 and numbered 28596.
- The General Custom Communiqué (Intellectual Property Rights) (Serial No: 1) was published in the Official Gazette dated 26.03.2013 and numbered 28599. The Communiqué entered into force on 01.04.2013.
- The General Communiqué on Tax Procedural Law (Serial No: 425) was published in the Official Gazette dated 27.03.2013 and numbered 28600.
- The General Custom Communiqué on Facilitating Customs Transactions (Serial No: 1) was published in the Official Gazette dated 29.03.2013 and numbered 28602. The Communiqué entered into force effective as of 10.01.2013.
- The Communiqué on the Amendments to the General Communiqué on Public Procurement entered into force through publication in the Official Gazette dated 13.04.2013 and numbered 28617.
- The General Communiqué on Public Internal Control Standards entered into force through publication in the Official Gazette dated 19.04.2013 and numbered 28623.
- The General Communiqué on the Signing of Tax Declarations by Independent Accountants and Certified Public Accountants (Serial No: 6) entered into force through publication in the Official Gazette dated 04.05.2013 and numbered 28637.
- The Communiqué (Operating under the control of Customs) (Serial No: 4) on the Amendment to the General Customs Communiqué (Operating under the control of Customs) (Serial No: 3) entered into force through publication in the Official Gazette dated 06.06.2013 and numbered 28669.
- The General Communiqué on Bringing Certain Foreign Assets into Economy (Serial No: 1) was published in the Official Gazette dated 11.06.2013 and numbered 28674.

- The General Customs Communiqué (Resolutions of Tariff-Classification) (Serial No: 15) entered into force through publication in the Official Gazette dated 14.06.2013 and numbered 28667.
- The General Communiqué on the Tax Procedural Code (Serial No: 426) was published in the Official Gazette dated 15.06.2013 and numbered 28678.
- The General Communiqué on Real Estate Tax Law (Serial No: 62) was published in the Official Gazette dated 17.08.2013 and numbered 28738.
- The Communiqué on the Amendment to the Public Procurement General Communiqué entered into force through publication in the Official Gazette dated 23.08.2013 and numbered 28744.
- The Communiqué (Serial A, No: 5) on the Amendment to the Communiqué regarding the General Communique on Collection (Serial A, No: 1) was published in the Official Gazette dated 11.09.2013 and numbered 28762.
- The Communiqué on the Amendment to the Public Procurement General Communiqué entered into force through publicaiton in the Official Gazette dated 24.09.2013 and numbered 28775.
- The Communiqué (Customs Transactions) (Serial No: 107) on the amendment to the Customs General Communiqué (Customs Transactions) (Serial No: 90) entered into force through publication in the Official Gazette dated 03.10.2013 and numbered 28784.
- The Communiqué (Customs Transactions) (Serial No: 108) on the amendment to the Customs General Communiqué (Customs Transactions) (Serial No: 96) entered into force through publication in the Official Gazette dated 03.10.2013 and numbered 28784.
- The Communiqué (Customs Transactions) (Serial No: 109) on the amendment to the Customs General Communiqué (Customs Transactions) (Serial No: 105) entered into force through publication in the Official Gazette dated 03.10.2013 and numbered 28784.

- The Communiqué (Customs Transactions) (Serial No: 110) on the amendment to the Customs General Communiqué (Customs Transactions) (Serial No: 105) entered into force through publication in the Official Gazette dated 03.10.2013 and numbered 28784.
- The Communiqué on the Amendment to the General Communiqué pertaining on Public Procurement was published in the Official Gazette dated 28.11.2013 and numbered 28835. This Communiqué entered into force on 29.11.2013.

Important Changes and Developments in Other Legislation

- The Investment Program of 2013 was published in the Reiterated Official Gazette dated 12.01.2013 and numbered 28526.
- The List of Incentive Certificates for the Month of December of the Year 2012 was published in the Official Gazette dated 22.01.2013 and numbered 28536.
- The List of Incentive Certificates Cancelled in the Month of December of the Year 2012 was published in the Official Gazette dated 22.01.2013 and numbered 28536.
- The List of Incentive Certificates for the month of January of the year 2013 was published in the Official Gazette dated 03.03.2013 and numbered 28576.
- The List of Incentive Certificates Cancelled in the month of January of the year 2013 was published in the Official Gazette dated 03.03.2013 and numbered 28576.
- The Resolution of the Public Oversight Accounting and Auditing Standards Authority numbered 75935942-050.01.04 – [01/05] on the Publication of the Procedures and Principles regarding the Resolution of the Council of Ministers Determining the Companies Subject to Independent Auditing was published in the Official Gazette dated 12.03.2013 and numbered 28585. These Procedures and Principles enter into force through publication effective from 01.01.2013.
- The Decision on International Trade Companies entered into force through publication in the Official Gazette dated 31.03.2013 and numbered 28604.
- The Decisions of the Banking Regulation and Supervision Board, numbered 5261 and 5263, were published in the Official Gazette dated 04.04.2013 and numbered 28608.
- The Bylaw on the Abrogation of the Trade Registry Bylaw was published in the Official Gazette dated 26.04.2013 and numbered 28629.
- The Bylaw on the Registration and Announcement of the Foundations established in accordance with the provisions of

Turkish Civil Law entered into force through publication in the Official Gazette dated 26.04.2013 and numbered 28629.

- The List of Investment Incentives effective from the month of March 2013 was published in the Official Gazette dated 30.04.2013 and numbered 28633.
- The List of Investment Incentives Which Have Been Cancelled on March 2013 was published in the Official Gazette dated 30.04.2013 and numbered 28633
- The Resolution of the Banking Regulation and Supervision Board, dated 09.05.2013 and numbered 5314, regarding the permission granted to Intesa Sanpaolo S.p.A., Italian resident, to open a branch in Turkey was published in the Official Gazette dated 14.05.2013 and numbered 28647.
- The Resolution of the Public Oversight Accounting and Auditing Standards Authority dated 25.04.2013 and numbered 75935942-050.01.04 – [04/01] regarding Sample Financial Statements and their Guidelines for Use was published in the Official Gazette dated 20.05.2013 and numbered 28652.
- The General Conditions of Professional Liability Insurance was published in the Official Gazette dated 26.05.2013 and numbered 28658.
- The Resolution of the Banking Regulation and Supervision Board regarding the cancellation of the official activity authorization of Fortis Faktoring A.Ş. pursuant to the Financial Leasing, Factoring and Finance Companies Law, due to the merger transaction of said company, concluded with the acquisition of Fortis Faktoring A.Ş. by TEB Faktoring A.Ş. upon the decision of the Banking Regulation and Supervision Board dated 20.06.2013 and numbered 5389.
- The List of Investment Incentive Certificates for the month of May of the year 2013 was published in the Official Gazette dated 06.07.2013 and numbered 28699.
- The List of Investment Incentive Certificates Cancelled in the month of May of the year 2013 was published in the Official Gazette dated 06.07.2013 and numbered 28699.

- The Resolution on the Approval of the Tenth Development Plan was published in the Reiterated Official Gazette dated 06.07.2013 and numbered 28699.
- The Land Registry By-Law entered into force through publication in the Official Gazette dated 17.08.2013 and numbered 28738.
- The Presidency Circular numbered 2013/9 on the Open Management Partnership was published in the Official Gazette dated 23.08.2013 and numbered 28744.
- The Investment Incentive Certificates of July 2013 were published in the Official Gazette dated 04.09.2013 and numbered 28755.
- The Investment Incentive Certificates Cancelled in July 2013 were published in the Official Gazette dated 04.09.2013 and numbered 28755.
- The Expert Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 26.09.2013 and numbered 28777. This Tariff entered into force on 01.10.2013.
- The Advance of Expenses Tariff of the Civil Procedure Code was published in the Official Gazette dated 26.09.2013 and numbered 28777. This Tariff entered into force on 01.10.2013.
- The Arbitrator Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 26.09.2013 and numbered 28777. This Tariff entered into force on 01.10.2013.
- The Witness Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 26.09.2013 and numbered 28777. This Tariff entered into force on 01.10.2013.
- The List of Investment Incentive Certificates of September 2013 was published in the Official Gazette dated 01.11.2013 and numbered 28808.
- The List of Investment Incentive Certificates Cancelled in September 2013 was published in the Official Gazette dated 01.11.2013 and numbered 28808.

Important Legislation and Decisions regarding Competition

- The Competition Board ("Board") decided that an individual exemption should be granted to the "Tender Warehouse Contract" Lilly İlaç Tic. Ltd. Şti., signed separately with Beşer Ecza Deposu Tic. ve San. Ltd. Şti., Öz-sel Ecza Depoları Tic. ve Paz. A.Ş. and İmtaş Ecza Deposu ve Gereçleri San ve Tic. Ltd. Şti. (17.01.2013, 13-05/47-24)
- The Board decided that 1. the vertical relationship between BP Petrolleri A.Ş. and FSM Akaryakıt Pet. İnş. Tic. Ltd. Şti. comprised of an undated protocol, the Lease Agreement dated 03.12.2008 and the dealership agreement dated 25.06.2009 a) did not benefit from the exception provision regulated with article 5/a of the Communiqué no 2002/2, b) 2. benefited from the block exemption under the Communiqué no 2002/2 for a period of 5 years as of 03.12.2008 when tenancy rights were granted to BP Petrolleri A.Ş., but fell out of the scope of the exemption granted with the relevant Communiqué as of the same date, – The Board decided that an individual exemption could not be granted to the relevant vertical relationship under article 5 of the Act No. 4054, either. (24.01.2013, 13-07/72-41)
- The Board decided that in relation to the "Domestic Authorized Sellers Contracts" and "Industrial Customer Purchase Agreements" Trakya Cam Sanayii A.Ş. concluded with various groups of buyers, 1. individual exemptions should be granted to the relevant agreements; 2. In relation to the "Franchising Agreement on the Production and Marketing of Comprehensive or Standard Double or More Galzing Flat Glass / Coated Glass System Insulation Glass Units" a) relevant agreements did not fulfill the conditions listed in article 5 of the Act No. 4054 due to the non-compete obligations placed on the buyers concerning Isıcam branded products, b) – Therefore, under paragraph 3, article 9 of the Act No. 4054, the Presidency should be charged with rendering opinion to Trakya Cam Sanayii A.Ş., stating that the aforementioned violation in the agreements should be removed and the situation should be

certified within 60 days following the notification of the reasoned decision, and that otherwise proceeding would be started under the Act n No. 4054. (24.01.2013, 13-07/73-42)

- The Board decided to issue a certificate of negative clearance for the expansion of the existing exchange protocol between Mechanical and Chemical Industry Corporation and General Directorate of Turkish Coal in terms of quantity and scope. (24.01.2013, 13-07/74-43)
- The Board decided that individual exemption should be granted to the "Import and Distribution Agreement" signed between Efes Pazarlama ve Dağıtım Ticaret A.Ş. and Duvel Moortgat NV. (24.01.2013, 13-07/75-44)
- The Board decided to issue a certificate of negative clearance for the "Call Center and Service Agreement," signed between Bayer Türk Kimya San. Ltd. Şti. and Skills In Healthcare Sağlık Ürünleri Pazarlama ve Tanıtım Hizmetleri A.Ş. (24.01.2013, 13-07/76-45)
- The Board decided to issue a certificate of negative clearance for the agreements signed within the program with respect to the distribution of blood glucose meters branded ABBOTT and prepared by ABBOTT Laboratuarları İth. İhr. ve Tic. Ltd. Şti. (31.01.2013, 13-08/88-49)
- The Board decided that a certificate of negative clearance will not be issued to the "Migros Ticaret A.Ş. ING Bank A.Ş.Cooperation Agreement" signed between ING Bank A.Ş.and Migros Ticaret A.Ş. stating that it is in violation of article 4 of the Act No. 4054, nevetheless the Board decided that a block exemption will be granted to the said Agreement pursuant to Communiqué numbered 2002/2. (31.01.2013, 13-08/92-53)
- The Board decided that individual exemption until the date of 01.01.2016 should be granted to the "Product Development and Manufacturing Agreement" signed between Tofaş Türk Otomobil Fabrikası A.Ş., Fiat Auto S.p.A. and Peugeot Citroen Automobiles S.A. stating that the Agreement fulfills the conditions set forth under article 5 of the Act No. 4054. (31.01.2013, 13-08/93-54)

- As a result of the examination conducted in response to the request for the authorization of the establishment of a joint venture between Sumitomo Rubber Industries, Ltd. and Abdulkadir Özcan Otomotiv Lastik San. ve Tic. A.Ş., the Board decided that: 1-The relevant transaction was not a joint venture transaction within the framework of Article 7 of Act No. 4054, as well as within the "Communiqué on Mergers and Acquisition Calling for the Authorization of the Competition Board, No. 2010/4", which was issued under the aforementioned article; 2-The cooperation agreements under examination, which were concluded in the area of production and distribution, could not be issued certificates of negative clearance under Article 8 of Act No. 4054 since they include competition-restricting effects which may fall under Article 4 of the same Act; 3- The cooperation agreements examined did not benefit from block exemption under Communiqué No. 2005/4, in accordance with Articles 2 and 3 of the same Communiqué; and 4- Since they were found to fulfill the conditions set out in Article 5 of Act No. 4054: a) the relevant agreements should be granted exemption in the market for the production and distribution of tires for passenger, light commercial and heavy commercial vehicles; and b) in the market for the production and distribution of tires for agricultural machines, in light of the market shares of the parties to the cooperation, agreements in this market should be granted an exemption for a period of 5 years. (06.02.2013, 13-09/119-65)
- In response to the claim that Mey İçki San. ve Tic. A.Ş. prevents sales of rival products in points of sale of the rakı market, applies exclusivity for its products and makes the activities of its rivals difficult; the Board decided that initiating an investigation concerning the claim under Article 41 of Act No. 4054 was necessary. (18.02.2013)
- As a result of the re-evaluation of the subject matter following the 13th Chamber of the Council of State's annulment of the Board decision, dated 25.09.2008 and numbered 08-56/889-350, taken in response to the claim that Coca Cola Satış ve Dağıtım A.Ş. violated Articles 4 and 6 of Act No. 4054 by applying pressure on its dealers, the Board decided that the complaint should be rejected

and an investigation should not be initiated, that the agreements concluded between Coca Cola Satış ve Dağıtım A.Ş. and its dealers should be granted an individual exemption in relation to the "carbonated beverages" and "sports drinks" markets, and that the relevant agreements should benefit from the block exemption in relation to the markets for "fruit juice," "packaged water," "ice tea," and "energy drinks". (07.03.2013, 13-12/180-94)

- The Board decided that the exclusivity agreements concluded between the wine producer/distributor undertakings under investigation (including Kavaklıdere Şarapları A.Ş., Doluca Bağcılık ve Şarapçılık A.Ş. ve Mey İçki Sanayi ve Ticaret A.Ş./ Mey Alkollü İçkiler San. A.Ş.), and on-site consumption points, as well as other practices leading to de facto exclusivity, benefited from the block exemption provisions of the Communiqué no 2002/2. (07.03.2013, 13-12/183-97)
- The Board decided that an individual exemption should be granted to the agreement signed by the members of the Eskişehir Bilecik Kütahya Business League Association in order to purchase certain raw materials jointly; in addition, it was decided that the relevant market should be monitored for a period of 3 years, at the end of which period the developments and assessments should be reported to the Board. (13.03.2013, 13-14/201-103)
- The Board decided that an individual exemption should be granted to the establishment of a new company by the Planmeca Group with Yusuf Büyükünaldı, a member of the Büyükünaldı Family which is the owner of Planmeca Group's Turkish distributor Ünaldı Medikal Tic. San. Ltd. Şti. (13.03.2013, 13-14/206-106)
- The Board granted an individual exemption to the agreement signed between Aygaz A.Ş. and Aytemiz Gaz A.Ş. on 25.12.2012 concerning storage, filling services and LPG supply. (28.03.2013, 13-17/246-121)
- The Board decided that the notified Distribution Agreement concluded between BP Petrolleri A.Ş. and its resellers concerning the sales of BP and Castrol brand mineral and synthetic oils

benefited from the block exemption under the Communiqué no 2002/2. (11.04.2013, 13-21/282-133)

- The Board decided that the notified Distribution Agreement concluded between Roche Müstahzarları Sanayi A.Ş. and Drogsan İlaçları San. ve Tic. A.Ş. benefited from the block exemption under the Communiqué no 2002/2. (11.04.2013, 13-21/288-138)
- The Board granted a certificate of negative clearance to the "Advertisement Agreement" signed between Merck Sharp Dohme İlaçları Ltd. Şti. and Roche Müstahzarları San. A.Ş. pursuant to Article 8 of Law No. 4054. (06.05.2013, 13-25/342-159)
- As a result of the examination conducted in response to the request for the grant of an indefinite individual exemption to the ATM Bank Card Share Platform Protocol concluded for the purpose of opening the ATM networks to the services of cash withdrawal and inquiring the balance of the customers of other banks through their bank cards, the Board decided that the ATM Bank Card Share Platform Protocol is within the scope of Article 4 of Act No. 4054; however, an individual exemption could be granted to the aforementioned agreement since it fulfilled all of the conditions stipulated under paragraph 1 of Article 5 of Act No. 4054. (06.05.2013, 13-25/347-163)
- As a result of the examination conducted in response to the request for the grant of an individual exemption to the agreement on the granting of exclusive authority to Biovesta İlaçları Ltd. Şti. for the distribution, marketing, sale and promotion of certain medicine owned by Abdi İbrahim İlaç San. ve Tic. A.Ş., the Board decided that a certificate of negative clearance could not be granted to the agreement, dated 23.1.2013, which granted exclusive authority to Biovesta İlaçları Ltd. Şti. for the distribution, marketing, sale and promotion of certain medicine owned by Abdi İbrahim İlaç San. ve Tic. A.Ş, and that said agreement could not benefit from the block exemption granted by the "Block Exemption Communiqué on Vertical Agreements, No: 2002/2" since the agreement is signed between competitors; however, an individual exemption could be

granted to the aforementioned agreement since it fulfilled all of the conditions stipulated under paragraph 1 of Article 5 of Act No. 4054. (09.05.2013, 13-27/368-170)

- The Board granted an individual exemption to the Yarımca and Ankara Product Storage and Service agreement, as well as to the Yarımca and Ankara LPG Supply Agreement signed between Total Oil Türkiye A.Ş. and Shell&Turcas Petrol A.Ş. (29.05.2013, 13-32/423-187).
- The Board granted an individual exemption for 5 years to Paşabahçe Cam Sanayi ve Ticaret A.Ş.'s "Authorized Seller Agreement" concerning the distribution of glassware intended for food service for guests (20.06.2013, 13-39/493-216).
- The Board decided that the complaint concerning the claim that Atiker Metal İthalat İhracat ve İmalat Sanayi ve Ticaret A.Ş. abused its dominant position in the market for the sale, installment and after-sales services for LPG conversion systems by introducing a single brand restriction on authorized technical services should be rejected and an investigation should not be initiated; it also decided that an individual exemption cannot be granted to the "Authorized Technical Service Agreement" that Atiker Metal İthalat İhracat ve İmalat Sanayi ve Ticaret A.Ş. would sign with authorized services which included single brand restrictions (20.06.2013, 13-39/500-221).
- The Board granted an individual exemption to the life and non-life insurance agreements signed between Yapı Kredi Bankası A.Ş., Yapı Kredi Emeklilik A.Ş. and Yapı Kredi Sigorta A.Ş. (26.06.2013, 13-40/521-230)
- The Board granted an individual exemption to the sharing of production and factory sales information for the previous month, not including sub-category breakdown and model information, which were among the production data Automotive Manufacturers' Association wished to make available to the public. (26.06.2013, 13-40/522-231)
- The Board granted an individual exemption to the membership agreement to be signed between White Goods Manufacturers'

Association of Turkey Waste Management Commercial Enterprise (ELELAY) and those producers that wish to become members of ELELAY in order to fulfill their obligations under the Regulation on the Control of Waste Electrical and Electronic Equipment. (11.07.2013, 13-44/554-248)

- Regarding the Business License Contract signed between Anadolu Restoran İşletmeleri Ltd. Şti. and independent businesses, as well as the agreements attached to that contract and other practices connected to that contract; the Board decided that the contract in question benefited from block exemption under Communiqué No. 2002/2 with the exception of its article II(b), and that an individual exemption should be granted with respect to article II(b). (11.07.2013, 13-44/560-254)
- The Board granted an individual exemption to the authorized dealership agreement signed between Mercedes-Benz Türk A.Ş. and Gelecek Otomotiv Sanayi ve Ticaret A.Ş., related to the sales of Mercedes-Benz brand trucks. (13.08.2013, 13-47/644-282)
- The Board decided that the acquisition of a total of 90% of the shares of Demir Sigorta A.Ş by GroupMed International Management Holding Limited and Cynvest S.A.L. Holding was not subject to authorization. (29.08.2013, 13-49/712-BD)
- The Board granted an individual exemption to the establishment of a joint venture company with the trade name Opet-Aygaz Gayrimenkul A.Ş. by Opet Petrolcülük A.Ş. and Aygaz A.Ş. (12.09.2013, 13-52/734-307)
- The Board decided that the main Distribution Agreement concluded between Coca-Cola Satış ve Dağıtım A.Ş. and Doğadan Gıda Ürünleri Sanayi ve Pazarlama A.Ş. benefited from a block exemption under the Communiqué No. 2002/2 with regards to the “black tea products” market and granted an individual exemption to the agreement with regards to the “packed herbs and fruit tea”. (12.09.2013, 13-52/737-309)
- The Board decided that the Distributorship Agreement regarding the products with the trademark Bonviva signed between Roche

Müstahzarları San. A.Ş. and Ali Raif İlaç San. A.Ş. benefited from the block exemption pursuant to Communique No. 2002/2. (12.09.2013, 13-52/738-310)

- The Board authorized the acquisition of the shares of Bilyoner Aktif Hizmetler A.Ş. belonging to Demir Toprak İthalat ve İhracat A.Ş., Endüstri Holding A.Ş. and Sınai ve Mali Yatırımlar Holding A.Ş. by the other shareholders Intralot SA Integrated Lottery Systems and Services and Tek Elektronik Yatırım San. ve Tic. A.Ş. (12.09.2013, 13-52/741-BD)
- The Board granted an individual exemption to the BANK O CARD AXESS Credit Card Cooperation and Brand Licensing Agreement, signed between Akbank T.A.Ş. and Odea Bank A.Ş. (27.09.2013, 13-55/769-328)
- The Board did not grant an exemption to the articles of the franchising agreements to be signed between Efes Pazarlama ve Dağıtım Tic. A.Ş. and Ekomini points of sale, which included exclusivity concerning products for which exemption was previously revoked. (09.10.2013, 13-57/802-341)
- The Board decided that a certificate of negative clearance should be issued to the practice which allowed Denizbank A.Ş. to allocate Vera-Delta brand new generation POS machines manufactured by MT Bilgi Teknolojileri Dış Ticaret A.Ş. to its customers in exchange for a commitment to a certain turnover and expenditure. (09.10.2013, 13-57/806-343)
- The Board granted an exemption to the contract with uniform clauses already signed between Antis Kozmetik ve Ticaret Ürünleri A.Ş. and some of its dealers and which will be signed with the other dealers. (24.10.2013, 13-59/831-353)
- The Board decided that acquisition of all of the stock of Kavram Enerji Yatırım Üretim ve Ticaret A.Ş. by Fina Enerji Holding A.Ş. ve Fina Enerji Mühendislik Müteahhitlik Dış Ticaret Montaj ve Servis A.Ş. was not subject to authorization. (06.11.2013, 13-62/869-BD)

- The Board granted and individual exemption to the Additional Protocol signed between Yapı ve Kredi Bankası A.Ş. and Anadolubank A.Ş. (06.11.2013, 13-62/862-369)
- The Board decided that acquisition by Kipaş Mensucat İşletmeleri A.Ş. of Kipaş Denim İşletmeleri A.Ş. is out of scope. (21.11.2013, 13-64/903-383)
- The Board decided that the agreement signed between Migros Ticaret A.Ş. and Detay Elektronik and Güvenlik Teknolojileri Reklam Sanayi ve Ticaret A.Ş. on 08.01.2013 shall benefit from a block exemption under the scope of the Communiqué no 2002/2. (05.12.2013, 13-69/939-399)

Important Legislation and Decisions regarding Mergers and Acquisitions

- The acquisition of full control over Duysan Odyoloji San. Tic. A.Ş. by Siemens Aktiengesellschaft has been authorized by the Board. (03.01.2013, 13-01/1-1)
- The acquisition by LBO France Gestion SAS of all of the shares of Groupe Alvest has been authorized by the Board. (03.01.2013, 13-01/5-5)
- The establishment of a joint venture by Geforno Holding B.V. and Rönesans Gayrimenkul Yatırım A.Ş. has been authorized by the Board; the Board decided that the acquisition, by the aforementioned joint venture, of all of the shares of Özmutlu Madencilik İnşaat ve Ticaret A.Ş. was not subject to authorization. (10.01.2013, 13-03/19-11)
- The acquisition of control over Sumisho Aircraft Asset Management B.V.' by Sumitomo Mitsui Financial Group from Sumitomo Corporation has been authorized by the Board. (10.01.2013, 13-03/25-16)
- The acquisition of control over Caribou Coffee Company, Inc. by Donata Holding SE, through its subsidiary JAB Beech Inc., has been authorized by the Board. (10.01.2013, 13-03/26-17)
- The establishment of a joint venture through the establishment of joint control over Tempo Çağrı Merkezi ve İş Süreçleri Dış Kaynak Hizmetleri Tic. A.Ş. by Mitsui & Co., Ltd. and HCO İletişim ve Teknoloji Yatırımları Tic. A.Ş. has been authorized by the Board. (10.01.2013, 13-03/34-18)
- The establishment of a joint venture by SGL Carbon Beteiligung GmbH and Lindner Aktiengesellschaft Decken-Boden-, Trennwandssysteme has been authorized by the Board. (10.01.2013, 13-03/37-19)
- The acquisition of Cytec Industries Inc.'s resin coatings business by, Al Chem&CY S.C.A., which is fully owned by certain funds managed and directed by Advent International Corporation, has been authorized by the Board. (17.01.2013, 13-05/41-20)

- The acquisition of all of the shares of Wallmerk Yapı Kimyasalları İnşaat Sanayi ve Ticaret A.Ş. by Mapei SpA has been authorized by the Board. (17.01.2013, 13-05/42-21)
- The acquisition of all of the shares of Dytech-Dynamic Fluid Technologies SpA by Tokai Rubber Industries Ltd. has been authorized by the Board. (17.01.2013, 13-05/49-26)
- The acquisition of control over Aero Precision Industries LLC by Greenwich AeroGroup Inc. has been authorized by the Board. (17.01.2013, 13-05/50-27)
- The transformation of MNG Radyo TV ve Medya Hizmetleri A.Ş. and MNG Sanal Ürün Pazarlama Sanayi ve Dış Ticaret A.Ş. into a joint venture by the establishment of joint control over the relevant companies by the MNG Corporate Group and GS Home Shopping Inc., which is controlled by GS Holding, has been authorized by the Board. (24.01.2013, 13-07/63-32)
- The acquisition, by A.O. Smith Corporation, of all of the shares of MİM Isıtma Soğutma Havalandırma ve Arıtma Sistemleri Sanayi Ticaret A.Ş. has been authorized by the Board. (24.01.2013, 13-07/64-33)
- The acquisition by BASF SE of some assets related to the "toluene diisocyanate" production business currently owned by Ciech SA and Zaklady Chemiczne Zachem SA has been authorized by the Board. (24.01.2013, 13-07/66-35)
- The establishment of a joint venture company between BASF SE and CSM NV, controlled Purac Biochem BV for the production and sales of bio-based succinic acid, has been authorized by the Board. (24.01.2013, 13-07/67-36)
- The transfer of Enerjisa Enerji A.Ş. to the joint control of the Sabancı Group and E.ON SE through E.ON SE's acquisition of 50% of the shares held in Enerjisa Enerji A.Ş. by Verbund AG has been authorized by the Board. (24.01.2013, 13-07/68-37)
- The acquisition by Namet Gıda San. ve Tic. A.Ş. of the production units related to cattle fattening of Harranova Besi ve Tarım

Ürünleri A.Ş., which is under the control of Koç Holding, has been authorized by the Board. (31.01.2013, 13-08/87-48)

- The acquisition of 75% of the shares by Wells Fargo Aircraft S.â.r.l and 25% of the shares by Avolon Aerospace Leasing Limited, and joint control of the Avolon Capital Partners Limited Company to be established has been authorized by the Board. (31.01.2013, 13-08/91-52)
- The acquisition by Zhuolang Textile Machinery Co. Ltd. of all the shares of OC Oerlikon Corporation AG Pfäffikon, Switzerland's Natural Fiber and Components Business, has been authorized by the Board. (31.01.2013, 13-08/95-56)
- The Board authorized the transfer of 22.114% of the shares in Global Liman İşletmeleri A.Ş. held by Savina Holding GmbH to Global Yatırım Holding A.Ş. by sale. (06.02.2013, 13-09/118-64)
- The Board authorized the establishment of joint control over TMST Nutrition Science Partners Limited by Nestlé Health Science S.A and Hutchison MedPharma Limited. (20.02.2013, 13-11/161-83)
- The Board authorized the acquisition, by Toshiba Medical Systems Corporation, of full control over TMST Tıbbi Sistemler Pazarlama Ticaret ve Servis A.Ş. (20.02.2013, 13-11/162-84)
- The Board authorized the transfer of 80% of the shares of Geliş Madencilik Enerji İnşaat Ticaret A.Ş. to Global Enerji Hizmetleri ve İşletmeciliği Tic. A.Ş. (07.03.2013, 13-12/173-89)
- The Board authorized the transformation of Evrencik Rüzgâr Enerjisinden Elektrik Üretim Ltd. Şti. into a joint venture through STFA Yatırım Holding A.Ş.'s acquisition of 50% of the shares of Evrencik Rüzgâr Enerjisinden Elektrik Üretim Ltd. Şti. from RES Anatolia Holding A.Ş., which currently holds control over the relevant company. (07.03.2013, 13-12/174-90)
- The Board authorized the transformation of Çelebi Havacılık Holding A.Ş. into a joint venture through ZEUS Aviation Services Investments B.V.'s acquisition of 50% of the shares of Çelebi Havacılık Holding A.Ş. from the Çelebioğlu Family, which

currently holds full control over the company. (07.03.2013, 13-12/184-98)

- The Board authorized the acquisition of the majority shares in Park Bravo Dış Tic. A.Ş., currently owned by natural persons, by The Landmark Premiere Holdings Ltd. (13.03.2013, 13-14/200-102)
- The Board authorized the transformation of PT Oiltanking Karimun into a joint venture through Coral Cay Pte. Ltd.'s acquisition of 35% of the shares in PT Oiltanking Karimun, held by Oiltanking GmbH. (13.03.2013, 13-14/203-104)
- The Board authorized the establishment of a joint venture by AgustaWestland N.V. and Tata Sons Ltd. under the title Indian Rotorcraft Ltd. (13.03.2013, 13-14/208-107)
- The Board authorized the acquisition of shares in Kraft Gıda San. ve Tic. A.Ş., currently owned by Mondelez International Holdings LLC, by Doğuş Çay ve Gıda Maddeleri Üretim ve Pazarlama İthalat İhracat A.Ş. (19.03.2013, 13-15/225-110)
- The Board authorized the acquisition of control in the enterprises of Invensys plc., operating in railway signalization, by Siemens Aktiengesellschaft. (19.03.2013, 13-15/228-112)
- The Board authorized the establishment of a joint venture by Euro Taurus S.A.R.L. and Rönesans Gayrimenkul Yatırım A.Ş. through share transfer. (19.03.2013, 13-15/231-115)
- The Board authorized Fonds Stratégique d'Investissement's addition via share acquisition to the joint control of CMA CGM SA, which was previously under the joint control of Yıldırım Holding A.Ş. and Merit Corporation SAL. (28.03.2013, 13-17/250-124)
- The Board authorized the establishment of a joint venture by Robert Bosch GmbH, ZF Friedrichshafen AG and Knorr-Bremse Group to operate in the maintenance and repair of motor vehicles sector. (17.04.2013, 13-22/310-145)
- The Board authorized Shell & Turcas Petrol A.Ş.'s acquisition by the renting of 44 fuel stations currently owned by Full Group

through various agreements signed between Shell & Turcas Petrol A.Ş. and Full Group, which is under the Arista Yatırım ve Yönetim Holding A.Ş.. (17.04.2013, 13-22/321-148)

- The Board authorized the transfer of the Consumer Life-style Entertainment Activity job area embodied in Koninklijke Philips Electronics N.V. to Funai Electric Co. Ltd.. (02.05.2013, 13-25/327-149)
- The Board authorized the transfer of the textile chemicals, special paper products and emulsion activities of Clariant AG to SKCP Fund Management, LLC. (06.05.2013, 13-25/335-153)
- The Board authorized the transfer of all of the shares of Eko Hipermarketçilik İç ve Dış Tic. Ltd. Şti. held by real persons to İsmar Marketler Zinciri Gıda ve Tüketim Malları San. ve Tic. A.Ş.. (06.05.2013, 13-25/338-156)
- The Board authorized the establishment of a joint venture with the commercial title Ardent Mills S.a.r.l. by Cargill Inc., ConAgra Foods Inc. and CHS Inc.. (06.05.2013, 13-25/339-157)
- The Board authorized the transfer of 51% of the shares of Azmüsebat San. ve Tic. A.Ş. to Gözde Girişim Sermayesi Yatırım Ortaklığı and Murat Ülker.(09.05.2013, 13-27/364-168)
- The Board authorized the acquisition of the control of three hospitals owned by Çağdaş Sağlık Hiz. San. Tic. Ltd. Şti., Hastur Hastane ve Tur. İşl. Tic. A.Ş and Ege Özel Sağlık Hiz. Tur. İnş. Yön. Dan. Tic. ve San. A.Ş. by Kemer Medical Center Özel Sağlık Hizmetleri Turizm ve Ticaret A.Ş., as well as the transaction regarding the obtainment of joint control over Kemer Medical Center Özel Sağlık Hizmetleri Turizm ve Ticaret A.Ş. by said companies. (09.05.2013, 13-27/365-169)
- The Board authorized the transformation of Indeks Bilgisayar Sistemleri Mühendislik San. ve Tic. A.Ş. into a joint venture through the acquisition of 20% of its shares by MCI Ventures Projects Spółka Z Ograniczoną Odpowiedzialnością Spółka Komandytowo-Akcyjna. (15.05.2013, 13-28/388-176)

- The Board authorized the acquisition of certain assets of Koray Mağazacılık Turizm Ticaret A.Ş. and Başarı Çorap Çamaşır Turizm Ticaret Ltd. Şti. by a company to be established as a fully-owned subsidiary of Penti Çorap San. ve Tic. A.Ş.. (15.05.2013, 13-28/390-177)
- The Board authorized the acquisition of all of the shares of MNG Teknik Uçak Bakım Hizmetleri A.Ş. by Türk Hava Yolları A.O.. (15.05.2013, 13-28/391-178)
- The Board authorized the acquisition of 50% of the shares in Star Medya Ajans A.Ş., Star Medya Yayıncılık A.Ş., Star Matbaacılık Sanayi ve Ticaret A.Ş. and Dinamik Radyo Televizyon A.Ş. by Socar Turkey Medya A.Ş. (29.05.2013, 13-32/417-185).
- The Board authorized the acquisition of full control over Pet Gaz A.Ş. and Teknik Petrol Ürünleri Servis Yönetim ve Elektrik Üretim ve Dağıtım Ltd. Şti. by Infracis Holland B.V. (29.05.2013, 13-32/422-186).
- The Board authorized the acquisition of 50.10% of the shares in Sırmagrup İçecek Sanayi ve Ticaret A.Ş. by Danone S.A. (29.05.2013, 13-32/426-188).
- The Board decided that BP Petrolleri A.Ş.'s acquisition of 35 percent of the shares in Çekisan Depolama Hizmetleri Ltd. Şti. from Mobil Oil Türk A.Ş., and the conclusion of the lease contracts related to the partial transfer of ownership of the Çekisan Depolama Hizmetleri Ltd. Şti. were not subject to authorization (29.05.2013, 13-32/434-BD).
- The Board decided that the acquisition, by Superonline İletişim Hizmetleri A.Ş. and Turktell Bilişim Servisleri A.Ş., of all of the shares of Deksarnet Telekomünikasyon A.Ş. owned by Vestel Elektronik San. ve Tic. A.Ş. and natural person shareholders was not subject to authorization (29.05.2013, 13-32/435-BD).
- The Board decided that the transformation of PS Yandex.Money, LLC into a joint venture through Sberbank of Russia's acquisition of a certain portion of the right of participation from Yandex N.V. was not subject to authorization (29.05.2013, 13-32/436-BD).

- The Board authorized Aras Holding A.Ş.'s acquisition of all of the shares currently held by Aras Kargo Yurtiçi Yurtdışı Taşımacılık A.Ş. in Fillo Kargo A.Ş. (29.05.2013, 13-32/431-191).
- The Board decided that the acquisition of control over Gardner Denver Inc. by KKR&Co. L.P. was not subject to authorization (06.06.2013, 13-34/453-BD).
- The Board decided that the acquisition of Citibank A.Ş.'s consumer banking department by Denizbank A.Ş. was not subject to authorization (06.06.2013, 13-34/454-BD).
- The Board decided that the acquisition of the Show Radyo Commercial and Economic Entity by Planet Yerli Televizyon Yayıncılığı A.Ş. was not subject to authorization. (13.06.2013, 13-36/484-209)
- The Board authorized the acquisition of all of the shares of DiaSA Dia Sabancı Süpermarketler Ticaret A.Ş. by Yıldız Holding A.Ş. and Şok Marketler Ticaret A.Ş. from Distribuidora Internacional de Alimentación S.A., Dia Portugal Supermercados Sociedade Unipessoal Lda, Twins Alimentación S.A.U., Pe-Tra Servicios a la Distribución S.L.U. and Hacı Ömer Sabancı Holding A.Ş. (26.06.2013, 13-40/513-223)
- The Board authorized the transformation of Noble Plantations Pte. Ltd. into a joint venture through the acquisition of 53.74% of its shares of Noble Resources Pte. Ltd. by Wilmar International Limited subsidiary Newbloom Pte. Ltd. (26.06.2013, 13-40/514-224)
- The Board authorized the transfer of Behr GmbH & Co. KG from the joint control of the MAHLE Group and BWK GmbH into the full control of the MAHLE Group. (26.06.2013, 13-40/516-225)
- The Board authorized the transformation of some subsidiaries of Gestamp Automoción S.A. in North America and South America into joint ventures of Mitsui & Co, Ltd. and Gestamp Automoción S.A. (26.06.2013, 13-40/517-226)
- The Board authorized the Commercial Bank of Qatar's acquisition of 70.84% of the shares in Alternatifbank A.Ş. from Anadolu

Endüstri Holding A.Ş. and its group companies. (26.06.2013, 13-40/518-227)

- The Board authorized the acquisition of all of the shares of Kamil Koç Otobüsleri A.Ş. and Kamil Koç Sigorta Aracılık Hizmetleri A.Ş. as well as 70% of the shares of Batı Anadolu Terminal İşletmeciliği Ltd. Şti. by bulunan Kronos S.a.r.l., controlled by the ACTERA Group, (26.06.2013, 13-40/519-228)
- The Board authorized Allianz SE's acquisition of all of the shares of Yapı Kredi Sigorta A.Ş. ve Yapı Kredi Emeklilik A.Ş. from Yapı Kredi Bankası A.Ş., Yapı Kredi Yatırım Menkul Değerler A.Ş. and Yapı Kredi Faktoring A.Ş. (26.06.2013, 13-40/520-229)
- The Board authorized Still GmbH's acquisition of 51% of the shares in Arser A.Ş. from Arkas Holding A.Ş. (26.06.2013, 13-40/525-232)
- The Board authorized the acquisition of all of the shares in Aks Televizyon Reklamcılık ve Filmcilik A.Ş. and Show affiliated assets by Ciner Görsel Televizyon Prodüksiyon A.Ş. (26.06.2013, 13-40/526-233)
- The Board authorized the acquisition of 58.34% of the Group A shares in Multi Corporation B.V. by Blackstone Group L.P. via Medea Holding S.a.r.l. (11.07.2013, 13-44/548-243)
- The Board authorized the establishment of a joint venture by Lotte Chemical Corporation and Versalis SpA. (11.07.2013, 13-44/551-245)
- The Board authorized the acquisition of control over Bausch&Lomb Holdings Incorporated by Valeant Pharmaceuticals International. (11.07.2013, 13-44/552-246)
- The Board authorized the acquisition of 25% of the shares in Aras Kargo Yurt İçi ve Yurt Dışı Taşımacılık A.Ş. by Österreichische Post AG from İş Girişim Sermayesi Yatırım Ortaklığı A.Ş. and Evrim Zühal ARAS, Barış Baran ARAS and Meral ARAS. (11.07.2013; 13-44/555-249)
- The Board authorized the Chr. Hansen A/S's acquisition of full control over Peyma Chr- Hansen's Peynir Mayası San. ve Tic.

A.Ş., over which it currently has joint control with 50% of the shares. (11.07.2013; 13-44/561-255)

- The Board authorized the acquisition of control over Oto S.P.A. and its affiliate Oto Automation S.R.L. by Fives Group. (13.08.2013, 13-47/627-271)
- The Board authorized the acquisition of all of the shares of Shaya Park Bravo Mağazacılık A.Ş. by Shaya Mağazacılık A.Ş.. (13.08.2013, 13-47/630-272)
- The Board authorized the acquisition of all of the shares of Onur Ekspres Marketçilik A.Ş. by Şok Marketler Ticaret A.Ş. (13.08.2013, 13-47/635-274)
- The Board authorized the acquisition, by Smith&Nephew plc, via Smith ve Nephew Medikal Cihazlar Ticaret Ltd. Şti., of Plato Medikal Sistemleri San. ve Tic. Ltd. Şti., Plato Sağlık Ürünleri San. ve Tic. Ltd. Şti. and certain of Sinerji Medikal Tıbbi Cihazlar San. ve Tic. Paz. A.Ş.'s assets, employees and relationships with main sub-distributors related to their orthopedic reconstruction, trauma and sports medicine products, as well as related to the Turkish distribution of their arthroscopy technologies. (13.08.2013, 13-47/636-275)
- The Board authorized the acquisition of all of the shares of Antoil Akaryakıt Dağıtım Sanayi ve Ticaret A.Ş. by Delta Yakıt Yatırım Sanayi ve Ticaret A.Ş. (21.08.2013, 13-48/666-284)
- The Board authorized the acquisition of a portion of the shares of Pozitif Müzik A.Ş., Pozitif Müzik Yapım A.Ş. and Pozitif Arena Konser Salon İşletmeciliği A.Ş. by Doğuş Holding A.Ş. (21.08.2013, 13-48/679-290)
- The Board authorized the acquisition of the assets related to the industrial oil and margarines business of Unipro Gıda San. ve Tic. A.Ş. by AarhusKarlshamn AB. (21.08.2013, 13-48/690-291)
- The Board decided that the acquisition of all of the shares of Netsis Yazılım Sanayi ve Ticaret A.Ş. by Logo Yazılım Sanayi ve Ticaret A.Ş. was not subject to authorization. (21.08.2013, 13-48/680-BD)

- The Board authorized the acquisition of all of the shares of Korda Kağıt Pazarlama Ticaret A.Ş. by Inapa-Investimentos, Participações e Gestão, SA. (29.08.2013; 13-49/695-294)
- The Board authorized the acquisition of 51% of the shares of Mars Lojistik Grup A.Ş. by Hitachi Transport System Ltd. (05.09.2013, 13-50/715-302)
- The Board authorized DSG European Investment Limited's acquisition of 40% of the shares of Electro World İç ve Dış Tic. A.Ş., currently under the joint control of DSG European Investment Limited, Esas Holding A.Ş., Odea İnş. Tur. Yatırımları ve Dış Tic. A.Ş. and Odesa Geliştirilmiş Polimer Yatırımları ve Dış Tic. A.Ş., and the resulting establishment of full control over the company. (05.09.2013, 13-50/717-304)
- The Board authorized the acquisition of all the shares of ISG Holdings 1 Ltd by The Bregal Fund III L.P. (16.09.2013, 13-52/739-311)
- The Board authorized the establishment of a joint venture by Doğuş Holding A.Ş. and Avenu Dış Ticaret A.Ş. (27.09.2013, 13-55/757-317)
- The Board authorized the acquisition of control over Alternatif Finansal Kiralama A.Ş. from Anadolu Endüstri Holding A.Ş. by Commercial Bank of Quatar. (27.09.2013, 13-55/763-322)
- The Board authorized the conversion of National Power International Holdings BV into a joint venture through the acquisition of 50% of its shares by Marubeni Corporation from International Holdings United Kingdom. (03.10.2013, 13-56/777-330)
- The Board authorized the conversion of Assan Liman İşletmeleri A.Ş. into a joint venture by Kibar Holding A.Ş. and Terminal Investment Limited SA through the acquisition of 50% of its shares by United Investment Limited SA and Galata Liman İşletmeleri A.Ş. from Assan Panel Sanayi ve Ticaret A.Ş. (03.10.2013, 13-56/781-333)

- The Board authorized the acquisition of all of the shares of Electro World İç ve Dış Ticaret A.Ş. by Bimeks Bilgi İşlem ve Dış Ticaret A.Ş. from DSG European Investment Limited. (03.10.2013, 13-56/782-334)
- The Board authorized the acquisition of 90% of the stock of Acıbadem Sağlık ve Hayat Sigorta A.Ş., which is under the joint control of Mehmet Ali Aydınlar and Walnut Holding Cooperative UA, by Burau Ventures Sdn Bhd, which is under the control of Khazanah Nasional Berhad. (09.10.2013, 13-57/805-342)
- The Board authorized the merger of Omnicom Group, Inc. and Publicis Groupe S.A. under the Publics Omnicom Group N.V. (24.10.2013, 13-59/822-347)
- The Board authorized the transformation of Ravaber Yapı Ürünleri San. ve Tic. A.Ş. into a joint venture through the acquisition of 50% of its stock by Enplast Plastik Kimya San. ve Tic. A.Ş. (24.10.2013, 13-59/824-349)
- The Board authorized the acquisition of 98.79% of the stock of Adapazarı Şeker Fabrikası A.Ş. by Yıldız Holding A.Ş. from Asya Katılım Bankası A.Ş. (24.10.2013, 13-59/832-354)
- The Board authorized the acquisition of all of the stock of Ekip Elektronik A.Ş. ve Beyaz İletişim Sistemleri Dış Tic. ve San. Ltd. Şti. by Penta Teknoloji Ürünleri Dağıtım Tic. A.Ş. (24.10.2013, 13-59/845-356)
- The Board authorized Çalık Holding A.Ş.'s acquisition of the shares held by Lusail International Media Company in Turkuvaz Aktif Televizyon ve Prodüksiyon A.Ş. and Turkuvaz Radyo Televizyon Haberleşme ve Yayıncılık A.Ş. (24.10.2013, 13-59/846-357)
- The Board authorized the acquisition of 75% of the shares in Aytaç Gıda Yatırım San. ve Tic. A.Ş. from Yimpaş Yozgat İhtiyaç Maddeleri Paz. ve Tic. A.Ş., Yimpaş Gıda San. ve Tic. A.Ş. and Yimpaş Holding A.Ş. by Ak Gıda San. ve Tic. A.Ş. and Yıldız Holding A.Ş. through a company they will establish. (24.10.2013, 13-59/848-358)

- The Board authorized the acquisition by Koch Industries, Inc. of the control of Molex Incorporated through the mediation of Koch Connectors Inc. (06.11.2013, 13-62/852-360).
- The Board authorized the transfer of Mobil Oil Türk A.Ş.'s property rights on assets that are the subject of the agreement about storage and refueling of aircrafts in airports, as well as its contractual rights and obligations to Socar Turkey Petrol Enerji Dağıtım San. ve Tic. A.Ş. (06.11.2013, 13-62/853-361)
- The Board authorized the transformation of ÇEPAŞ Galvaniz Demir Çelik Madencilik İnş. Tic. ve San. A.Ş. into a joint venture through the acquisition of 51% of its stock by Gonvarri MS Corporate S.L. (06.11.2013, 13-62/879-374)
- The Board authorized the establishment of a joint venture by Mitsubishi Heavy Industries Limited and Hitachi Limited concerning thermal power production system activities. (12.11.2013, 13-63/881-375)
- The Board authorized the transfer of Rothesay Life Limited and Rothesay Pensions Management Limited into a joint venture after acquisition of some of their stock by the Blackstone Group L.P. from Goldman Sachs Group, Inc.. (12.11.2013, 13-63/887-378)
- The Board authorized the acquisition by Microsoft Corporation of Nokia Corporation's business line related to mobile phone devices and services in a manner to cover some of Nokia Corporation's assets as well. (12.11.2013, 13-63/888-379)
- The Board authorized the establishment of a joint venture concerning activities in the fields of pelagic fish, fish oil and fish meal between Austevoll Seafood ASA and Kvefi AS, which are controlled by Laco Group and Kverva Group, respectively. (21.11.2013, 13-64/900-380)
- The Board authorized the acquisition of all of the capital of Mutlu Holding A.Ş. and its subsidiaries by Metair International Holdings Cooperatief U.A. (21.11.2013, 13-64/901-381)
- The Board authorized the acquisition by Investcorp Bank B.S.C. of the joint control of Namet Gıda Sanayi ve Ticaret A.Ş. via Gulf Delicatessen Investors S.a.r.l. (05.12.2013, 13-69/931-392)

- The Board authorized the acquisition of 50% of the shares of Kükre Gıda ve İhtiyaç Maddeleri Nakliyat ve Özel Eğitim Hizmetleri Ticaret ve Sanayi A.Ş.'s by Ajinotomo Co. Inc. and thereby its transformation into a joint venture. (05.12.2013, 13-69/932-393)
- The Board authorized the acquisition by Panasonic Corporation of 90% of the shares of Viko Elektrik ve Elektronik End. San. and Tic. A.Ş.'s from real person shareholders. (05.12.2013, 13-69/936-396)
- The Board authorized the acquisition by SDA International S.a.r.l. of 49% of the shares of Arzum Elektrikli Ev Aletleri San. and Tic. A.Ş.'s. (05.12.2013, 3-69/937-397)
- The Board authorized the acquisition of 27% of the shares in Flo Mağazacılık Hizmetleri ve Pazarlama A.Ş., Polaris Pazarlama ve Mümessillik A.Ş. and Uğur İç ve Dış Ticaret A.Ş.'s by Mater Footware B.V., 11.5% of the shares by BİM Birleşik Mağazalar A.Ş. and 11.5% of the shares by Gözde Venture Capital Investment Trust. (05.12.2013, 13-69/944-400)
- The Board authorized the acquisition by Trenkwalder Grup Yönetim Hizmetleri A.Ş. of 5% of the shares in Trenkwalder Ebru Medikal ve Temz. Gıda Peyz. Taş. A.Ş.'s. (05.12.2013, 13-69/948-401)
- The Board authorized the acquisition by Fondo Strategico Italiano S.p.A. of Ansaldo Energia S.p.A's majority shares that are held by Finmeccanica S.p.A. and First Reserve Power Limited. (05.12.2013, 13-69/950-402)
- The Board decided that the establishment of Gaziantep Hastane Sağlık Hizmetleri İşletme A.Ş. by Samsung C&T Corporation, Simed International B.V., Kayı İnşaat Sanayi ve Ticaret A.Ş. and Salini S.p.A was out the examination scope of the Competition Board. (05.12.2013, 13-69/940-BD)
- The Board authorized the acquisition of 90% of the shares in MNG TV Yayıncılık A.Ş., MNG Reklam Pazarlama ve Prodüksiyon A.Ş., MNG Medya ve TV Yayıncılık A.Ş., Onsekiz Reklam Prodüksiyon Medya Yapımevi A.Ş.'s by Sekiz Medya Holding

A.Ş. and 10% of the shares by Sekiz Prodüksiyon ve Reklam A.Ş. (19.12.2013, 13-71/956-404)

- The Board authorized the acquisition of %99.99 of the shares in Provus Bilişim Hizmetleri A.Ş.'s by MasterCard/Europay UK Limited. (19.12.2013, 13-71/957-405)
- The Board authorized the acquisition of Turkuvaz Group of Companies' various shares from Çalık Holding A.Ş., Çalık Turizm Kültür İnş. San. ve Tic. A.Ş., Gapyapı İnşaat A.Ş. and Ahmet Çalık. (19.12.2013, 13-71/990-421)

Important Publications and Decisions regarding Privatization

- The Board did not find the approval of the acquisition of 100% of Boğaziçi Elektrik Dağıtım A.Ş. shares by the bidders – Cengiz-Kolin-Limak Joint Venture Group or Elsan-Tümaş-Karaçay Joint Venture Group or Park Holding A.Ş. within their privatization by means of block sale of its 100% shares inconvenient. (10.01.2013, 13-03/21-13)
- The Board did not find the approval of the acquisition of 100% of Gediz Elektrik Dağıtım A.Ş. shares by the bidders Elsan-Tümaş-Karaçay Joint Venture Group or Enerjisa Elektrik Dağıtım A.Ş. or Park Holding A.Ş. within their privatization by means of block sale of its 100% shares inconvenient. (10.01.2013, 13-03/22-14)
- The Board decided that the acquisition transaction of shares by the bidders Kayseri Şeker Fabrikası A.Ş or Ak-Can Şeker San. ve Tic. A.Ş. in the proportion of 9,9993 % of Kayseri Şeker Fabrikası AŞ belonging to the Directorate of Privatization Administration within their privatization by means of "restricted procedures" and with the method of "sale" as a block is out of the scope. (10.01.2013, 13-03/24-15)
- The Board decided that, within the framework of the privatization of the Seyitömer Thermal Power Plant, the acquisition of the relevant plant and various assets by – Çelikler Taahhüt İnşaat ve Sanayi A.Ş., or – Eti Bakır A.Ş., or – Aksa Enerji Üretim A.Ş. could be authorized. (24.01.2013, 13-07/69-38)
- Concerning the privatization of Arpaçay-Telek and Kiti hydroelectric power plants though the transfer of operating rights as part of the 9th Group among the power plants owned by Elektrik Üretim A.Ş., the Board decided that: 1- The acquisition of the aforementioned power plants by Metek Hidro Enerji San. ve Tic. A.Ş., to be established by Metaltek Metalurji Kimya Gıda San. ve Tic. Ltd. Şti. and Ekmekçioğlu Metal ve Kimya San. ve Tic. A.Ş. with a share ratio of 51% and 49%, was subject to authorization in accordance with Article 7 of the Act No. 4054 and "Communiqué No. 1998/4 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the

Competition Authority in order for Acquisitions via Privatization to Become Legally Valid"; and 2- The aforementioned acquisition would not result in the creation or strengthening of a dominant position as described under the same article of the Act, and thus in a significant lessening of competition, therefore the notified transaction could be authorized. (06.02.2013, 13-09/116-62)

- Within the framework of the privatization of all of the shares of Başkent Doğalgaz Dağıtım A.Ş. via block sales, the Board decided that there were no drawbacks to the acquisition of the relevant shares by any of the following bidders: Torunlar Sanayi ve Ticaret A.Ş., Akfen Holding A.Ş. – STFA Yatırım Holding A.Ş. Joint Venture Group, Fernas İnşaat A.Ş., or Türkerler İnşaat Tur. Mad. Ener. Üretim Tic. ve San. A.Ş. – Gama Holding A.Ş. Joint Venture Group. (07.03.2013, 13-12/176-92)
- Within the framework of the privatization of the Kangal Thermal Power Plant, together with certain immovable and mine sites used/operated by this power plant, the Board decided that there were no drawbacks to the acquisition of the relevant assets by any of the following bidders: Konya Şeker Sanayi ve Ticaret A.Ş. – Siyahkalem Mühendislik İnşaat Sanayi ve Ticaret Limited Şirketi Joint Venture Group, or Limak İnşaat Sanayi ve Ticaret A.Ş., or IC İçtaş Enerji Üretim ve Ticaret A.Ş. – Fernas İnşaat A.Ş. Joint Venture Group. (07.03.2013, 13-12/177-93)
- The Decision of the Privatization Board, dated 15.03.2013 and numbered 2013/56, regarding the inclusion of Çatalağzı Thermal Plant and the immovables used by the Plant in the privatization program, and the privatization of the Plant and the immovables by way of "Asset Sale" and conclusion of the Privatization transactions as of 31.12.2015, was published in the Official Gazette dated 19.03.2013 and numbered 28592.
- Within the framework of the privatization of 100% of the shares of Dicle Elektrik Dağıtım A.Ş. via block sales, the Board decided that the acquisition of the aforementioned shares by - İş-kaya İnş. San. ve Tic. A.Ş.- Doğu Hattı Enerji Yatırım San. ve Tic. A.Ş. Joint Venture Group, or - Çalık Enerji San. ve Tic. A.Ş, or - Mes

Yağ ve Gıda San. ve Tic. A.Ş. – İskur Tekstil Enerji Tic. ve San. A.Ş. Joint Venture Group could be authorized. (11.04.2013, 13-21/285-136)

- In light of the fact that the High Board of Privatization approved the acquisition of Gediz Elektrik Dağıtım A.Ş. by the first bidder; within the framework of the privatization of 100% of the shares of Anadolu Yakası Elektrik Dağıtım A.Ş. via block sales, the Board decided that the acquisition of all of the aforementioned shares by - Enerjisa Elektrik Dağıtım A.Ş., or - Aksa Elektrik Perakende Satış A.Ş., or - Fina Enerji Holding A.Ş.-Fina Limancılık Lojistik Holding A.Ş. Joint Venture Group could be authorized. (11.04.2013, 13-21/286-137)
- The decision of the High Board of Privatization, dated 03.05.2013 and numbered 2013/75, on the Amendment of the first article of the decision of the High Board of Privatization, dated 07.03.2011 and numbered 2011/17, in order to include Fenerbahçe Kalamış marina in the scope of privatization was published in the Official Gazette dated 09.05.2013 and numbered 28612.
- The Board authorized, within the framework of the privatization of Aras Elektrik Dağıtım A.Ş., the acquisition of all of its shares by Doğu Aras Enerji Yatırımları A.Ş., controlled by Kiler Alışveriş Hizmetleri Sanayi ve Ticaret A.Ş and ÇEDAŞ Elektrik Dağıtım Yatırımları A.Ş. (20.06.2013, 13-39/492-215).
- Within the framework of the privatization of the Kangal Thermal Power Plant and certain immovable and mine sites utilized/ operated by such plant as a whole, the Board decided that Kangal Termik Santral Elektrik Üretim A.Ş.'s acquisition of the assets in question could be authorized. (13.08.2013, 13-47/636-273)

Important Changes and Development regarding Energy Law

- The Regulation on the Amendment of the Electricity Transmission System Supply, Reliability and Quality Regulation entered into force through publication in the Official Gazette dated 03.01.2013 and numbered 28517.
- The Regulation on the Amendment of the Electricity Market Network Regulation entered into force through publication in the Official Gazette dated 03.01.2013 and numbered 28517.
- The Regulation on the Amendment of the Regulation pertaining to the Audits Conducted and the Procedures and Principles to be Followed in the Preliminary Investigation and Inquiries in the Liquefied Petroleum Gases (LPG) Market entered into force through publication in the Official Gazette dated 03.01.2013 and numbered 28517.
- The Regulation Amending the Electricity Market Balancing and Reconciliation Regulation entered into force through publication in the Official Gazette dated 05.01.2013 and numbered 28519.
- The Communiqué (Serial No: 2013/1) on the Amendment of the Communiqué on Procurement of Authority Certificate to the Agencies and Establishments Providing Energy Efficiency Services (Serial No: 2012/4) entered into force through publication in the Official Gazette dated 05.01.2013 and numbered 28519.
- Resolution numbered 4170-5 pertaining to the Permission granted to the Holders of a Distribution license by the Energy Market Regulation Board on the Fuel Trade between the distributors between the dates 01.01.2013-31.12.2015 in line with the applicable legislation of the Authority, and the Board Decision dated 22.04.2009 and numbered 2073 and the issues in the Oil Market Information System Regulation was published in the Official Gazette dated 05.01.2013 and dated 28519.
- The Regulation on the Amendment to the Electricity Market License Regulation was published in the Official Gazette dated 10.01.2013 and numbered 28524. The Regulation enters into force

through publication in the Official Gazette; Article 1 to be valid as of 01.01.2014 and other articles valid as of 01.01.2013.

- The Regulation on the Amendment to the Oil Market Information System Regulation entered into force through publication in the Official Gazette dated 12.01.2013 and numbered 28526.
- The Sector Report on the Oil Market of November 2012 was published on the website of the Energy Market Regulatory Authority on 14.01.2012.
- The Regulation on the Amendment to the Regulation on the Distribution and Customer Services of the Natural Gas Market entered into force through publication in the Official Gazette dated 13.02.2013 and numbered 28558.
- The Communiqué on Administrative Fines to be Implemented in 2013 pursuant to Article 10 of the Energy Efficiency Law numbered 5627 (Serial No: 2013/3) was published in the Official Gazette dated 13.02.2013 and numbered 28558. The Communiqué entered into force on 01.01.2013.
- The Regulation on the Amendment to the Regulation on Supporting the Energy Industry Research-Development Project Program entered into force through publication in the Official Gazette dated 21.02.2013 and numbered 28566.
- The Liquefied Petroleum Gases Market Sector Report of December 2012 was published on web site of the Energy Market Regulatory Authortity ("EMRA").
- The Communiqué on the Price Equalizing Mechanism to be Applied in the Electricity Market was published in the Official Gazette dated 06.03.2013 and numbered 28579. This Regulation enters into force through publication effective from 01.01.2013.
- The Correction of the Erroneous Formula in the Communiqué on the Price Equalizing Mechanism to be Applied in the Electricity Market was published in the Official Gazette dated 10.03.2013 and numbered 28583.
- The Regulation on the Amendment of the Regulation on Electric Energy Demand Forecasting entered into force through publication in the Official Gazette dated 15.03.2013 and numbered 28588.

- The Regulation on the Amendment of the Electricity Market Eligible Consumer Regulation entered into force through publication in the Official Gazette dated 16.03.2013 and numbered 28589.
- Electricity Market Law No. 6446 entered into force through publication in the Official Gazette dated 30.03.2012 and numbered 28603.
- The Regulation on the Auditing and Supervision of the Activities of Electricity Distribution Companies entered into force through publication in the Official Gazette dated 13.04.2013 and numbered 28617.
- The Regulation on the Amendment of the Oil Market License Regulation was published in the Official Gazette dated 24.04.2013 and numbered 28627. The regulation will enter into force on 01.07.2013
- The Communiqué on the Principles and Procedures of Procurement of oil products, except fuel oil, from Domestic and Foreign Sources was published in the Official Gazette dated 24.04.2013 and numbered 28627. The Communiqué will enter into force on 01.07.2013.
- The Liquefied Petroleum Gases Market Sector Report of 2012 was published on web site of the EMRA.
- The Oil Market Sector Report of March 2013 was published on web site of the EMRA.
- The Regulation on Amendment to the Implementation Regulation with respect to 1 (A) Group Mines of the Mining Law entered into force through publication in the Official Gazette dated 29.05.2013 and numbered 28661.
- Turkish Petroleum Law No. 6491 entered into force through publication in the Official Gazette dated 11.06.2013 and numbered 28674.
- The Communiqué on the Procedures and Principles for the Procurement of Petrolum Products, Except Fuel Oil, from Domestic

and International Sources entered into force through publication in the Official Gazette dated 29.06.2013 and numbered 28692.

- The Liquefied Petroleum Gases Market Sector Report of April 2013 was published on web site of the EMRA.
- The Oil Market Sector Report of May 2013 was published on web site of the EMRA.
- The Regulation on Measures regarding Distribution and Procurement Licenses in the Electricity Market entered into force through publication in the Official Gazette dated 02.08.2013 and numbered 28726.
- The Regulation on Amendment to the Regulation on Good and Service Procurement by the Petroleum Pipeline Corporation entered into force through publication in the Official Gazette dated 06.08.2013 and numbered 28730.
- The 2012 Activity Report of the Energy Market Regulation Board was published on website of the EMRA on 22.08.2013.
- The Regulation on the Amendment of the Regulation Concerning the Domestic Production of Accessories Used in Facilities Producing Electrical Energy from Renewable Energy Sources entered into force through publication in the Official Gazette dated 04.09.2013 and numbered 28755.
- The Liquefied Petroleum Gases Market Sector Report of June 2013 was published on the web site of the EMRA on 05.09.2013.
- The Oil Market Sector Report of July 2013 was published on web site of the EMRA on 16.09.2013.
- The Regulation on Certification and Support of Renewable Energy Sources entered into force through publication in the Official Gazette dated 01.10.2013 and numbered 28787.
- The Regulation on Producing Unlicensed Electric Power in the Electricity Market entered into force through publication in the Official Gazette dated 02.10.2013 and numbered 28783.
- The Communiqué on the Petroleum and Natural Gas Industry – Steel Drilling Pipes was published in the Official Gazette dated

03.10.2013 and numbered 28784. This Communiqué entered into force after three months as of its publication.

- The Regulation on the amendment to the Petroleum Market License Regulation entered into force through its publication in the Official Gazette dated 05.10.2013 and numbered 28786.
- The Regulation on the amendment to the Regulation on Service Quality With Regards To Electricity Distribution and Retail Sale entered into force through publication in the Official Gazette dated 09.10.2013 and numbered 28790.
- The Regulation on Sale of Electric Power and Electric Capacity of the Electricity Generation Company entered into force through publication in the Official Gazette dated 12.10.2013 and numbered 28793.
- The Oil Market Sector Report of August 2013 was published on web site of the EMRA on 22.10.2013.
- The Liquefied Petroleum Gases Market Sector Report of August 2013 was published on web site of the EMRA on 25.10.2013.
- The Communiqué on Tube-Liquefied Petroleum Gas (LGP) (TS EN 1442+A1) (No: MSG-MS-2013/26) was published in the Official Gazette dated 26.10.2013 and numbered 28803. This Communiqué shall enter into force 6 months after its publication.
- The Principles and Procedures fort he Determination of Revenue Ceiling Principal fort he Tariffs of Companies Owning Natural Gas Transmission License was published on web site of the EMRA on 01.11.2013.
- Electricity Market License Regulation entered into force through publication in the Official Gazette dated 02.11.2013 and numbered 28809.
- The Regulation on the Amendment of the Petroleum Market License Regulation entered into force through publication in the Official Gazette dated 07.11.2013 and numbered 28814.
- The Natural Gas Market Sector Report of September 2012 was published on web site of the EMRA.

- The Oil Market Sector Report of September 2013 was published on web site of the EMRA.
- The Liquefied Petroleum Gases Market Sector Report of September 2013 was published on web site of the EMRA.
- The Regulation on the Principles and Procedures relating to the Determination, Grading, Protection and Usage of the Resource Areas of Renewable Energy intended for the Production of Electric Energy entered into force through publication in the Official Gazette dated 27.11.2013 and numbered 28834.
- The Regulation on the Principles and Procedures To Be Followed During the Inspections, Preliminary Investigations and the Investigations in the Oil Market entered into force through publication in the Official Gazette dated 27.11.2013 and numbered 28834.
- The Communiqué Repealing the Measurement Standard Communiqué relating to License Applications based on Wind and Solar Energy entered into force through publication in the Official Gazette dated 04.12.2013 and numbered 28841.
- The Resolution of the Council of Ministers, dated 18.11.2013, on the Promulgation of the Resolution on the Prices and Durations to be applied for Facilities running Production Activities based on Renewable Energy and Addition of Domestic Contribution was published in the Official Gazette dated 05.12.2013 and numbered 28842.
- The Competition Regulation regarding the Preliminary License Application to Build Production Facilities of Wind and Solar Energy entered into force through publication in the Official Gazette dated 06.12.2013 and numbered 28843.

Important Case Law

- The Judgment of the Constitutional Court dated 22.03.2013 numbered E: 2011/125, K: 2012/46, regarding annulment of the phrase “The parties shall not submit the rejoinder and second bill of answer.” included in paragraph (3) of Article 317 of the Civil Procedure Code dated 12.01.2011 and numbered 6100 was published in the Official Gazette dated 13.02.2013 and numbered 28558 and the Court declined the request.
- The Judgment of the Constitutional Court, dated 24.05.2012 numbered E: 2011/134, K: 2012/83, regarding annulment of the phrase “The partial lawsuit shall not be filed where the amount of the claim is beyond dispute and definite.” included in paragraph (2) of Article 109 of the Civil Procedure Code dated 12.01.2011 and numbered 6100 was published in the Official Gazette dated 13.02.2013 and numbered 28558 and the Court declined the request.
- The Judgment of the Constitutional Court, dated 27.09.2012 numbered E: 2012/6, K: 2012/131, regarding annulment of the phrase “… or it is provided that it will be made by authorized auditing companies when requested. Procedures and principles for implementation regarding auditing companies shall be regulated with a regulation to be prepared by State Hydraulic Works provided that related ministries’ opinions are obtained.”included in subparagraph (f) of Article 204 of the Law dated 13.02.2011 and numbered 6111, which was added to the first paragraph of temporary Article 14 of the Electricity Market Law, dated 20.02.2001 and numbered 4628, was published in the Official Gazette dated 13.02.2013 and numbered 28558.
- Judgment of the Constitutional Court, dated 18.10.2012 numbered E: 2012/70, K: 2012/157, regarding annulment of the phrase “….as of the date of the decision…” included in the first sentence of subparagraph (a) of paragraph 1 of Article 28 of the Fees Act, dated 02.07.1964 and numbered 492, which was amended by the Income Tax Law dated 23.07.2010 numbered 6009 and Article 18 of the Code on Amending Some Laws and Statutory Decrees, was

published in the Official Gazette dated 13.02.2013 and numbered 28558 and the Court annulled the phrase.

- The Judgment of the Council of State General Directorate on the Unification of Conflicting Judgments, numbered E: 2009/1, K: 2012/2, regarding the unification of decisions pursuant to Article 39 of Act No. 2575 in order to procure unified implementation with respect to the request concerning the unification of decisions as a result of the conflict between the decisions of the 7th Chamber of the Council of State, dated 06.02.2006 and E: 2003/1573, K: 2006/366, and the Council of State Assembly of Tax Courts, dated 14.04.2006 and E: 2006/26, K: 2006/93, on the issue of whether a lawsuit may be filed by the awarded company on the grounds of return of the stamp duty paid by the contracting authority to the tax office, which was calculated by the contracting authority pursuant to the Stamp Duty Act No. 488 and taken or cut from the awarded company upon the tender decision, and regarding the possibility to file a lawsuit before the tax courts by the awarded company on the grounds of annulment or return of the collection of stamp duty paid to the tax office by the contracting authority, which was calculated pursuant to Act No. 488 and taken or cut from the awarded company upon the tender decision, was published in the Official Gazette dated 26.02.2013 and numbered 28571.
- Judgment of the Constitutional Court numbered E: 2012/20, K: 2012/132, pertaining to the unconstitutionality and voiding of the provision “the seventh day following the mailing of the letter … is considered the date of notification of the decision to the applicant where notifications are sent via registered and reply-paid letter”, of Public Procurement Law No. 4734 Art. 65/(a) was published in the Official Gazette dated 26.07.2013 and numbered 28719.
- Judgment of the Constitutional Court numbered E: 2012/132, K: 2012/179, pertaining to the unconstitutionality and voiding of the provision “the seventh day following the mailing of the letter is considered the date of notification of the decision to the applicant”, of the Public Procurement Law Art. 42/1, second sentence was published in the Official Gazette dated 26.07.2013 and numbered 28719.

- Judgment of the Constitutional Court numbered E: 2013/71, K: 2013/77, pertaining to the unconstitutionality and voiding of the provision "the seventh day following the mailing of the letter is considered the date of notification of the decision to the applicant", of the State Procurement Law Art. 32/1, second sentence was published in the Official Gazette dated 26.07.2013 and numbered 28719.
- Judgment of the Constitutional Court numbered E: 2012/116, K: 2013/32, pertaining to the unconstitutionality of Articles 5, 13 and 48 of the Constitution, and the voiding of Article 5/1/c of the Attorneys' Act No. 1136 was published in the Official Gazette dated 13.08.2013 and numbered 28734.

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