PROF. DR. H. ERCÜMENT ERDEM
Editor

NEWSLETTER
2015

ERDEM & ERDEM
LAW OFFICE

Editor

Prof. Dr. H. Ercüment ERDEM

GALATASARAY UNIVERSITY SCHOOL OF LAW

EMERITUS PROFESSOR OF COMMERCIAL LAW

NEWSLETTER
2015

ERDEM & ERDEM Law Office

Valikonağı Caddesi Başaran Apartmanı No: 21/1

Nişantaşı 34367 İstanbul

ERDEM-ERDEM
Legal Series - 12

NEWSLETTER 2015
Editor: Prof. Dr. H. Ercüment Erdem

Book Design: Gülgonca Çarpık
Typesetting: Sami Abbas

Edition - Volume
ALTAN BASIM SAN. TİC. LTD. ŞTİ.
Yüzyıl Mah. Matbaacılar Sit. 222 34200 Bağcılar/İstanbul
(Certificate No. 11968)
(0-212) 629 03 74

1. Edition – March 2016 – İSTANBUL

ISBN 978 - 605 - 83695 - 1 - 1

ERDEM & ERDEM Law Office
Valikonağı Caddesi Başaran Apartmanı No: 21/1
Nişantaşı 34367 İstanbul
Tel: 0212 291 73 83
www.erdem-erdem.av.tr

PREFACE

We are honored to bring to you our new book “Newsletter 2015”.

Since 2010, at the end of each year we compiled the articles that are posted monthly on our website in a book to allow our readers an outlook on the year’s key legal developments. This book of articles now published for the sixth year, has attracted growing attention from our clients, business partners and fellow practitioners over the years. While the book was well received by many of the readers, we are highly encouraged to keep the impetus and further develop and expand our work. It is a pleasure to see that the articles are frequently cited in a number of scientific studies and they are now considered reliable academic resources. This gives us pride and even greater motivation.

We continued the tradition of the past years for this publication of Newsletter 2015. In 2015, our team wrote on a wide variety of legal disciplines some of which are in new areas of law developed in parallel to meet the needs of the today’s business. Further we did not leave out the importance of comparative law and our team researched on the developments in foreign legislations including the European Union. This book compiles articles some of which addresses key issues under the Draft Bill on Swiss Corporate Law, the Law on Regulation of Retail Trade, the Law on the Regulation of Electronic Commerce, regulations with respect to Payment Institutions, Principles and Procedures of Factoring Transactions, Sports Arbitration, Third Party Financing in Arbitration, Emotional Abuse in the Workplace (Mobbing), Distance Contracts in terms of Consumer Law, and Protection of Personal Data. The chapter on Legal Developments provides a global insight into material developments in international agreements, laws, regulations, communiqués as well as a synopsis of the decisions of the Turkish Competition Board and the Privatization Authority, and a list of energy legislation made effective in 2015 and extracts of key court precedence. We believe that this last chapter portrays an executive look on legal developments of 2015.

This book is the accomplishment of Erdem&Erdem's legal team who dedicate themselves to this publication from the very beginning. Our team worked with extraordinary devotion and dedication as they believed in the importance of keeping up with the legal developments in Turkey and abroad. They aimed to reflect this body of knowledge to the readers through vigorous scientific research. We are sincerely grateful to and truly appreciate the great efforts each and every author of these articles, as well as other members of our team who edited, proofread, translated and uploaded the articles to our website.

Meanwhile you may access to Newsletter 2015 as an e-book from our website.

We trust that this publication will prove to be a useful resource and guidance for our clients and business partners. Finally we wish 2016 brings peace, prosperity, joy and contentment to the world and to our region.

Nisantasi, January 2016

Att. Piraye Erdem
Founder and Managing Partner

Prof. Dr. H. Ercüment Erdem
Founding Partner

CONTRIBUTORS

Prof. Dr. H. Ercument Erdem

Att. Piraye Erdem

Assoc. Prof. Dr. H. Murat Develioglu

Att. Ozgur Kocabasoglu

Att. Suleyman Sevinc

Att. Tuna Colgar, LLM

Gaye Spolitis, LLM

Att. Ali Sami Er, LLM

Att. Nilay Celebi, LLM

Att. Alper Uzun

Att. Ozen Odev

Att. Ezgi Babur, LLM

Att. Naciye Yilmaz

Att. Leyla Orak Celikboya

Att. Fatih Isik, LLM

Att. Selen Ozturk

Att. Ecem Susoy Uygun

Att. Ecem Cetinyilmaz

Att. Yesim Tokgoz

Att. Kerem Tayhac Sagocak, LLM

Att. Mehves Erdem

Att. Ece Yilmaz

Att. Nilsun Gursoy

Att. Eda Uludere

Derya Akyuz

Arzu Taghan

SUMMARY OF CONTENTS

LIST OF ABBREVIATIONS*

Art.	:	Article
BRSA	:	Banking Regulation and Supervision Agency
CC	:	Civil Chamber
CMB	:	Capital Markets Board
E.	:	File
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

Draft Bill on Swiss Corporate Law Reform*

Prof. Dr. H. Ercument Erdem

The process for revision of the Swiss corporate law was initiated in 2007, and the process continued for some time[1]. During this process, the reform on accounting law and excessive compensation of managers, separately, entered into force, and the corporate law reform was delayed. On 28 November 2014, the Federal Council published a new draft bill on the Swiss corporate law reform, and the Draft Bill on Corporate Law Reform[2] ("Draft") was submitted for consultation on 15 March 2015.

The draft makes provisions in different areas. In general, the Draft covers revision on capital structure, shareholders' rights, excessive compensation of managers, and other provisions that are not directly relating to corporate law. This newsletter addresses the substantial revisions proposed by the Draft, and comparison of these revisions with the Turkish Commercial Code ("TCC").

Provisions on Capital Structure

Art. 621 of the Draft allows for share capital to be in foreign currency. Accordingly, actions concerned with the share capital, such as the formation of legal reserves, distribution of dividends, and determination of over-indebtedness, may be determined in foreign currency. The purpose of these provisions is to eliminate the inconsistencies

---

* ***Article of May 2015***

1 For detailed information, please see: Rapport explicatif relatif à la modification du code des obligations (droit de la société anonyme).

Please see: https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/aktienrechtsrevision14/vn-ber-f.pdf.

2 Please see: https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/aktienrechtsrevision14/vorentw-f.pdf.

between corporate law and accounting rules that already allow for accounting in foreign currency. In accordance with Art. 332/1 of the TCC, the minimum amount of share capital is stipulated in Turkish Liras. Additionally, Art. 70/1 of the TCC provides that financial statements shall be prepared in Turkish, and using Turkish Lira. The Tax Procedural Law ("TPL") provides an exemption regarding bookkeeping in foreign currency for certain companies (Art. 251/1 and 2 of TPL). Except for those as stated, there are no provisions in Turkish Law that allow accounting and capital denomination in foreign currency.

Another provision proposing an amendment of capital structures is Art. 632 of the Draft that sets forth an obligation to pay the total share price at the time of the capital increase and the foundation. The relevant provision aims to prevent the issuance of bearer share certificates before payment of the total amount of the share price, and to comply with the practice to pay the total share price prior to registration. Pursuant to Art. 344/1 of the TCC, 25% of the price of the shares subscribed in cash shall be paid prior to registration, and the remaining amount shall be paid within 24 months. Considering the provisions on protection of the capital provided by the TCC (for example Art.(s) 349, 358, 480/3, 482, 483, 484 etc. of TCC) and the special provisions regarding certain types of companies (provided by the Capital Markets Law ("CML"), the Banking Law, etc.), adoption of such amendment may deter shareholders from establishing joint stock companies due to the high amounts that must be paid prior to the registration.

Furthermore, the Draft abolishes the minimum nominal value of one centime (*100 centime=1 Franc*), and provides that the shares may have any value greater than zero centime (Art. 622/4 of Draft). The relevant provisions aim to liquidate the shares by splitting them when necessary. However, the Draft does not abolish the system of the nominal value; therefore, all shares shall have a nominal value. The TCC also adopts the system of a nominal value, but it provides that a minimum nominal value of the shares shall be 1 kuruş (*100 kuruş=1 TRY*) and its multiples (Art. 476/1 of TCC). Moreover, it is not permitted to issue shares under this minimum nominal value even if that the company's economic conditions require such issuance (Art. 476/3). Exceptionally, public companies may issue shares at the price deter-

mined on the stock exchange 30 days prior to the public disclosure of the resolution on a capital increase if such amount is below the nominal value (Art. 18/1 of the Communiqué on Shares VII-128.1).

In addition, the Draft abolishes the provisions on the acquisition of assets. It is stated that such provisions were incompatible with the principle of legal certainty, and similar consequences may be attained through the provisions on protection of capital, and responsibilities of the managers. Art. 356/1 of the TCC provides a detailed provision on the acquisition of assets. The fact that the provision of the TCC is restrictive and definite, as well as similar to the provision set forth by the European Union ("EU") Directives, renders this provision compatible with the principle of legal certainty. However, it should be noted that the scope of Art. 356/1 may be amended in such a way to limit the transaction with shareholders and related persons instead of all transactions in order to promote legal certainty.

Another significant reform provided by the Draft is the adoption of the system of capital band (*fluctuation du capital*). Accordingly, the general assembly may authorize the board of directors to increase or decrease the share capital for a maximum period of 5 years (Art. 653(s) of Draft). The purpose of this reform is to render the capital changes more flexible and overcome the procedures provided in order to protect the creditors. As the system of capital band is similar to the system of registered capital, the provisions regarding registered capital are abolished. Pursuant to Turkish law, the decrease of capital falls under the authority of the general assembly, and shall not be conferred to any other body (Art. 408/1/a of TCC). The provision setting forth that the provisions regarding the decrease of share capital shall apply to the decrease of registered capital (Art. 473/6 of TCC), triggered different opinions from amongst scholars. However, the prevailing opinion accepts that an explicit provision is required in order for the board of directors to be authorized to decrease the registered capital. Therefore, the relevant provision does not authorize the board of directors to decrease the capital[3]. As a result, including the registered capital sys-

[3] Please see: **Tekinalp Ü**., Sermaye Ortaklıklarının Yeni Hukuku, Istanbul 201, p. 119; **Tanrıverdi A.,** Sermaye Azaltılmasına İlişkin Güncel Sorunlar, TBB Dergisi, Ocak-Şubat 2015, Year: 27, No: 116, p. 312; **Manavgat Ç. (Kırca/Şehirali Çelik)**, Anonim Şirketler Hukuku, Cilt I, Ankara 2013, p. 337-338.

tem, the general assembly resolution is required in Turkish Law in order to decrease the capital.

Except for those stated, the Draft includes certain provisions on facilitating the distribution of legal reserves (Art. 671 of Draft) and allowing the distribution of interim dividends (Art. 675 of Draft).

Provisions on Shareholding

The draft includes provisions on the controversial issue of dispo shares (actions dispo) that signify the problem regarding the holders of the nominative shares which are not registered in the company's share register. The owners of the shares shall not be registered automatically to the company's share register unless they request to be registered, and shareholders who are not registered in the share register shall not exercise their right to vote. By reason of dispo shares, the quora may not be attained in the general assembly, a lower majority may control the company, or other similar problems may appear. In order to overcome such problems, certain solutions are already adopted, such as a presumption that the depositor is deemed to be the shareholder in terms of exercising the rights that arise from the shares; however, the solutions resulted in new discussions. The Draft also provides for the general assembly to resolve that shareholders who exercise their right to vote be entitled to benefit from up to 20% higher dividends (Art. 661 of Draft). In addition, the Draft obliges the listed companies to provide an electronic means for shareholders to request registration in the share register (Art. 686b of Draft). Pursuant to Turkish Law, the shareholders shall be registered in the company's share register upon their request, and only the holders of the nominative shares registered in the share register may exercise their right to vote in the general assembly (Art. 417/2 of TCC). However, the transfer of the shares registered to the Central Registry Agency ("CRA") shall be registered in the company's share register in accordance with the records of the CRA without any request (Art. 13/6 of CML). The interpretation of this provision is controversial among scholars, and various of them state that the relevant provision does not allow for automatic registration by the company in the share register.

Furthermore, the Draft provides a right to demand written information from the board of directors for the shareholders of the unlisted

companies. The board of directors shall respond such requests at least twice a year. In addition, the information provided by the board of directors shall be disclosed at the first general assembly meeting and immediately at the electronic media (Art. 697/2 and 3 of Draft). Pursuant to Turkish Law, shareholders do not have any right to demand information apart from the one which can be exercised during the general assembly meeting. Additionally, contrary to the provisions of Swiss Law, Turkish Law does not require the exercise of the right to demand information to be necessary to exercise other rights arising from shareholding.

The Draft aims to eliminate difficulties caused by the procedures to exercise the shareholding rights and reduce the thresholds in order for the shareholders to exercise their rights without any hindrance. In this respect, the Draft reduces the thresholds regarding the right to request special audits, convene the general assembly, add items to the agenda, and propose motions on the items on the agenda. However, the TCC sets forth higher thresholds to exercise the above-stated rights of the minority shareholders. The most significant reform regarding the procedure is that shareholders may request from the court to rule for payment of expenses that arise from claims regarding the liability of, or restitution by, the company. Pursuant to the TCC, the court shall decide for the distribution of the litigation expenses and attorney's fee between the company and the shareholders in the event that the factual and legal causes, as well as equity principles, justify such distribution (Art. 555/2 of TCC). However, Turkish Law does not provide for any procedure whereby the company may be held liable for expenses incurred prior to the initiation of the relevant lawsuits.

Except for as stated above, Art. 701c of the Draft allows for electronic general assembly meetings, which is also provided by Art. 1527 of the TCC.

Excessive Compensation of Managers

As above-mentioned, the process regarding corporate law reform was initiated in 2007; however, the reform concerning the excessive compensation of managers took priority. After the referendum, in January, 2014, the Ordonnance contre les rémunérations abusives dans

les sociétés anonymes cotées en bourse[4] (Ordinance Regarding the Excessive Compensation of the Managers in Listed Companies) ("ORAb") entered into force. The Draft legislates regulations introduced by the ORAb, and also adopts certain new provisions.

In this respect, the general assembly shall determine direct or indirect compensation paid to the board of directors' members and other managers. The general assembly shall adopt a resolution on compensation (*indimnité*) every year, and such resolutions shall be binding upon the company. In addition, the Draft determines certain types of compensation that are prohibited, per se, or under certain circumstances (Art. 735c of Draft). Sign-on bonuses and non-compete covenants are accepted by the Draft, provided that they fulfill certain conditions provided by the Draft. Furthermore, the Draft and the ORAb provide that compensation of managers in listed companies shall be presented in the compensation report.

Pursuant to the TCC, financial benefits of the boards of directors' members, such as attendance fees, remuneration, and premiums shall be determined by the articles of association or General Assembly (Art. 394/1 of TCC), and the authority to determine such financial benefits shall not be transferred (Art. 408/2/b of TCC). However, if such decision endangers the financial situation of the company, the minority shareholders have only a small chance to prevent such decision from being adopted. In addition, pursuant to the corporate governance principles, compensation policies of the company shall be presented on the website of the company (4.6.2 of Annex-1 of the Communiqué on Corporate Governance). It is also provided that the remuneration and all other financial benefits granted to the board of directors' members and executive managers shall be publicly disclosed via annual activity report (4.6.5 of Annex-1 of the Communiqué on Corporate Governance). However, beyond those stated, there are no other provisions in Turkish Law stipulating any obligation to disclose the compensation of managers, or to control excessive compensation. It should be noted that

---

4 For the text in German, please see: https://www.admin.ch/opc/de/classified-compilation/20132519/ index.html.

For the text in French, please see https://www.admin.ch/opc/fr/classified-compilation/20132519/index.html.

financial benefits granted to managers that may affect the financial stability of the company shall be controlled more strictly.

Other Provisions

The Draft also includes certain reforms on arrangement with creditors and over-indebtedness. Accordingly, liquidity shortage of the company, the fact that company's assets do not cover two-thirds of the aggregate of capital and legal reserves, the fact that losses of the previous activity year exceed one-half of the capital pursuant to the balance sheet of the relevant activity year, the company's loss in three consecutive years, and serious concerns with respect to over-indebtedness of the company, are considered to be signals of over-indebtedness (Art. 725a and 725b of Draft). Art. 376 of the TCC is an adaptation of the relevant provision of the Swiss Code of Obligations; however, because of the changes at the phase of adoption of the relevant provision, Art. 376 causes certain issues amongst scholars.

In addition, the Draft includes provisions regarding limitations of the companies that are subject to the obligation of consolidated accounting, gender quota of 30% in management, and the obligation of disclosure by companies exploiting natural resources.

Conclusion

The reform on Swiss corporate law was reconsidered on 29 November 2014 with the Draft. The Draft includes various reforms in different fields. The reform on the capital structure of companies aims to harmonize the provisions on capital structure with other rules, and to harmonize such provisions with current necessities. Additionally, the reform on shareholding facilitates the exercise of the rights of shareholders. The Draft also includes several provisions on excessive compensation of managers, which offers a legislative base to the ORAb. The Draft reinforces financial stability of companies by proposing a more effective system of notice of over-indebtedness. Furthermore, provisions on gender quotas, as well as companies that exploit natural resources are also included in the Draft. Due to the scope of the Draft, it is not expected for these amendments to enter into force prior to 2017.

Loss of Capital in Joint Stock Companies*

Att. Tuna Colgar

Introduction

Situation of the capital, namely, the effect of losses on a company's equity, carries vital importance in the deterioration of a joint stock company's financial structure. Worsening of the financial structure, losses due to incompetency, in other words, loss of equity, or superiority in the ratio of assets versus debts, may lead to over-indebtedness.

The essential objective underlying the provisions of Turkish Commercial Code numbered 6102 ("TCC" or "Law"), governing the precautions to be taken upon the loss of capital and over-indebtedness of joint stock companies, is to maintain the organization and protection of the company capital that constitutes the main assurance for creditors of joint stock companies.

TCC Art. 376/1 and TCC Art. 376/2 are two of the primarily debated, and most significant, provisions of the TCC, aiming to maintain protection of the capital until termination of the company. TCC Art. 376 regulates the precautions that are to be taken in the event of deterioration of the company's financial structure. Due to the fact that the first two paragraphs of such provision govern the duties of the board of directors in the event of capital loss, those two paragraphs pertain solely to the protection of the equity. The third paragraph, on the other hand, designates over-indebtedness of the company, namely, if a company's debts exceed its assets.

The actions to be performed in both the events of loss of capital and over-indebtedness have been designated as obligations of the board of directors. Moreover, the duty to notify the competent court in the event of over-indebtedness has been stipulated under the TCC as

---

* ***Article of September 2015***

one of the non-transferable duties and authorities of the board of directors.

Precautions Regarding Protection of the Capital

As per TCC Art. 376/1[1], if it has been ascertained from the latest annual balance sheet that one-half of the total amount of legal reserve funds has remained uncovered due to losses, the board of directors is obliged to convene the general assembly, and provide the general assembly with appropriate remedial measures.

This paragraph merely requires the board of directors to inform the general assembly of the situation, and the general assembly to make a decision thereof. On the other hand, such provision does not necessitate a certain method to do so. The mentioned precautions may be exemplified as capital increase, reduction of outgoings, or shutoff of an ongoing investment, if the equity has not been fully paid, convocation for encashment of the remaining capital receivables, sale of assets, and other similar precautions[2]. The board of directors is responsible to undertake such precautions.

In accordance with TCC Art. 376/2[3], if it is determined from the company's balance sheet that two thirds of the total of the equity and legal reserve funds have become uncovered due to losses, then the board of directors is obliged to immediately convene the general assembly, and the general assembly must decide whether to replenish the capital or to continue operations with the remaining one thirds of the capital. If the general assembly refrains from making such decisions, then the company shall be deemed to be automatically terminated.

In summary, solely the lawmaker enables companies to lose an amount equal to, and at most, one-half of the sum of the capital and legal reserve funds, and requires additional precautions for losses that exceed half of such sum.

---

1 TCC Article 376/1: If it is detected from the last annual balance sheet that one-half of the total amount of the capital and legal reserve funds remains uncovered due to losses, the board of directors shall immediately convene the general assembly and provide them with appropriate remedial measures.

2 **Prof. Dr. TEKİNALP Unal**, Sermaye Ortaklıklarının Yeni Hukuku, Degistirilmis ve Duzenlemelerle Guncellestirilmis 3. Basi, Vedat Kitapcilik 2013, p. 244.

The TCC considers losses up to and exceeding one-half of the company capital to be significant matters requiring prompt notification to the general assembly and, thus, burdens the board of directors with the obligations to convene the general assembly for an extraordinary meeting, and to provide them with improvement projects that aim to reimburse the loss of equity. It is surely beyond doubt that the general assembly, solely, shall decide whether to take precautions or not, to accept or decline the suggestions of the board of directors, or to take precautions other than those that the board of directors suggests[4].

The first precaution envisaged under Article 376/2 of the Law, which is the general assembly decision pertaining to continuation of the operations with the remaining one-third of the capital, is a capital decrease by means of reducing two-thirds of the capital. This may only be performed via extinguishing one-third of the capital, or reducing two-thirds of the nominal price of each share. Minimum capital and nominal prices envisaged in the TCC must be regarded during the implementation of both methods.

If the general assembly decides to continue operations with the remaining one-third of the capital, then Art. 474/2 of the TCC shall be instructive. Pertaining to such Article, the board of directors may relinquish convening the creditors and satisfying or securitizing them[5].

The other precaution that the Law envisages for the loss of two-thirds of the equity, is replenishing the capital. As is mentioned in the preamble of Art. 376 of the TCC, replenishing may be performed via three methods. These are as follows:

(i) Decrease of capital, as much as the uncovered portion, and following, increase of the capital as much or more,

---

3 TCC Article 376/2: If it is detected from the last annual balance sheet that one-half of the total amount of the capital and legal reserve funds remains uncovered due to losses, the immediately convened general assembly shall decide as to whether or not to continue operations with the remaining one-third of the capital, or to replenish the capital; otherwise the company shall automatically be terminated.

4 **Prof. Dr. KAYAR Ismail**, Yeni TTT'ya Gore Anonim Sirkette Sermaye Kaybi ve Borca Batıkligin Tespiti ve Sonucları Tebligi.

5 **Prof. Dr. TEKINALP Unal**, Sermaye Ortakliklarinin Yeni Hukuku, Degiştirilmis ve Duzenlemelerle Guncellestirilmis 3. Basi, Vedat Kitapcilik 2013, p. 245.

(ii) Covering of adverse balances by all shareholders or some of the shareholders, and

(iii) Some creditors' waiver of their receivables.

It should be stated that along with the option to increase the capital to an amount higher than the former capital, by complying with the capital increase and decrease procedures, the general assembly may also choose to replenish the capital of the company until registered share capital is reached, provided that this increment does not exceed the capital loss by two-thirds.

Due to Art. 480/1 of the TCC that prohibits the general assembly resolution from forcing the shareholders to make additional payments, such general assembly resolution regarding the method mentioned above under subparagraph (ii), which covers adverse balances by shareholders, must be unanimously taken. However, if unanimity is not able to be provided, there are no restrictions inhibiting the shareholders to cover the adverse balances by submitting cash at their own discretions. This submission denotes neither a shareholder loan, nor an advance payment for capital increase. This submission of cash solely signifies the shareholders' sacrifice in order to save their company from the current situation without expecting something in return, or claiming a right in return. The amount of shares that the shareholders hold shall not change after the completion of this capital replenishment.

Although loss of capital is detected principally from the annual balance sheet, it may also be identified from the interim balance sheet issued for any reason. For instance, if the interim balance sheet that has been issued upon the suspicion of over-indebtedness and implies that the company is not over-indebted, yet it has lost 1/2 or 2/3 of its capital, the precautions stipulated under Art. 376/1 and 376/2 of the TCC should be taken[6].

The debates regarding the implementation of Art. 376 of the Law revolves around the detection and determination of loss of equity. Both of the aforementioned paragraphs of the Article include the expression

---

6 **Prof. Dr. KAYAR Ismail**, Yeni TTT'ya Gore Anonim Sirkette Sermaye Kaybi ve Borca Batıkligin Tespiti ve Sonucları Tebligi.

of "*total of the capital and the legal reserve funds.*" The first issue to clarify here is the definition of capital and the legal reserve funds.

According to the first view, the preamble of Art. 376 of the TCC, it includes the explanation of "*By the term of capital, the law maker aims to predicate the registered capital found under the capital item of the balance sheet.*" This means that the registered capital shall be the total amount undertaken by the shareholders, which are designated under the articles of association, and registered, accordingly. Revaluation fund is not included in this amount. Moreover, *legal reserve funds* are stipulated under Art. 519 of the TCC. This Article has been regulated in view of the *numerus clausus* principle, and the items other than the ones stipulated therein shall not be considered in calculation of legal reserve funds[7]. Due to the fact that such provision explicitly indicates that the premium of newly issued shares shall be added to the legal reserve fund, premiums on issued capital shall be regarded in calculating the legal reserve funds. By virtue of the fact that inflation correction differences are not listed under Art. 519, they shall not be taken into consideration in calculation of legal reserve funds[8].

In accordance with the opposing view, in order for the precautions on the loss of capital to be taken, the equity that is equal to the residual of the difference between the assets and the liabilities of the company should be less than half or one-third of the total amount of capital and legal reserve funds. As per such view, due to the fact that all assets and liabilities of the company shall be regarded in determination of the equity of the company, all resources that constitute the assets of the company, such as the capital, undistributed profit, legal, contractual, mandatory and voluntary reserve funds, revaluation funds should be considered in the event of capital loss.

---

7 Sermaye Ortakliklarinin Yeni Hukuku, Degiştirilmis ve Duzenlemelerle Guncellestirilmis 3. Basi, Vedat Kitapcilik 2013, p. 244.

8 **Prof Dr. PULASLI Hasan**, Yeni Sirketler Hukuku Genel Esaslar, Guncellenmis 2. Basi Ankara 2013, p. 467.

Conclusion

Currently, in commercial life, no uniform implementation of the effects and consequences of Art. 376 of the TCC have been adopted thus far. The distinctness of two such opposing views induces significant distinctions in the determination of the financial position of companies; therefore, legal precedents should also be borne in mind while deciding on the financial future of companies.

Leveraged Buyouts within the Context of Financial Assistance Ban*

Prof. Dr. H. Ercument Erdem

In General

Article 380 of Turkish Commercial Code numbered 6102[1] ("TCC") bans the legal transactions of a joint stock company that are intended to finance the purchase of its own shares by third parties, or supporting third parties, by granting loans or providing security for the acquisition of its own shares ("financial assistance ban"). This provision is regulated just after art. 379 that regulates the company's purchase or pledge of its own shares. TCC art. 379 prohibits the acquisition or acceptance of a pledge of a company of its own shares that exceeds ten percent of the registered or issued capital. The ban regulated under art. 380 of the TCC is an extension of this article. The law maker determines financial assistance, such as a company's buy back of its own shares.

The ban brought by TCC art. 380 bears importance with respect to the leveraged buyout method that is used in large-scale share purchase transactions. In a leveraged buyout, the financing used in the purchase of the target company is ultimately met using the capital and income of the target company. The financial assistance ban set forth in the TCC prohibits leveraged buyout transactions. This newsletter article examines the financial assistance ban that closely concerns investors, and the effect of this ban on leveraged buyouts.

---

* ***Article of April 2015***

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

The Concept of Leveraged Buyout

Leveraged buyout is an important financing method used in company acquisitions. In this method, loans that are granted to the purchaser by credit institutions for the purchase of the shares of the target company are repaid by the income of the acquired target company. The term "leveraged buyout" reflects the financial aspect of such method. Provided that the company's net assets and the total proceeds procured through the utilization of foreign debts in company activities are higher than the debt interest to be paid by the company, and the difference between these will constitute the profit. Accordingly, when the proportion of debt increases, the proceeds of the capital subscribed by the shareholder increases proportionately, as well[2]. This effect is described as the leverage effect.

One of the most important principles of the joint stock company law is the preservation of the capital. Since the ultimate financial source in leveraged buyout transactions is the capital of the target company, the exercise of this method is restricted in different laws. Accordingly, the TCC in art. 380, based on the Second Company Law Directive of European Union ("Directive 77/91/EC" or "Second Directive")[3], sets forth a provision that bans leveraged buyout transactions.

Purpose of the Financial Assistance Ban

The roots of the financial assistance ban leans on English law. In England, specifically after the First World War, share purchases were made through leveraged buyouts by using the resources of the target companies, and many companies declared bankruptcy in the economic crises of 1920-1921. As a result, a company's provision to finance the acquisition of its own shares has been considered as dangerous, and a rule prohibiting such financial assistance has been added to English Company Law. Following England's entry into the European Union, such law has been included in the Second Directive.

---

2 **Gül Okutan Nilsson,** Anonim Şirketlerin Kendi Hisselerini İktisabı Bağlamında Finansal Yardım Yasağı, Anonim Şirketler Ve Sermaye Piyasası Hukukunda Güncel Gelişmeler Türk - Alman Uluslararası Sempozyumu, August 2011, p. 91.

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

Art. 23 of the Second Directive anticipated that the company may not provide advances, loans or security to a third party with a view to acquire its shares by a third party. This prohibition did not apply to the legal transactions in the ordinary course of business of credit and finance institutions, and to the legal transactions in which the company provides advance funds, loans and security to its own employees in order for them to acquire the shares of the company.

Art. 23 includes a strict regulation, and has been subject to criticisms due to its restriction on financing possibilities. Accordingly, in 2006, the Second Directive was amended by directive numbered 2006/68/EEC[4]. This amendment sets forth that the companies may lend financial assistance provided that (i) the advance, loan or security provision transactions are concluded on an arm's length basis, (ii) a detailed written report on the credibility of the person who is party to the transaction is prepared by the board of directors, (iii) the general assembly of the company approves the report of the board of directors with a two-thirds majority, and the report is registered with, and announced by, the trade registry, and (iv) the financial assistance granted does not cause diminution of authorized share capital and non-distributable reserves of the company.

However, the TCC was enacted with the aim to harmonize with the European Union, and took into consideration the provision of the Second Directive that was in force prior to 2006. Article 380 of the TCC did not include the provision that amended directive numbered 2006/68/EEC that enables financial assistance under certain conditions. Within this context, the provision included in Turkish law is stricter than the current provision of the European Union, and does not allow leveraged buyout transactions, except for the two limited exceptions as foreseen under the law.

Financial Assistance Ban regulated under TCC Art. 380

Pursuant to Art. 380/1 of the TCC, the legal transactions where the target company provides advances, loans, or securities to a third party so that its shares can be acquired will be deemed null and void. As stat-

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

ed in the justification of the article, the broad interpretation of the expression "advances, loans or security" is due to *ratio legis*, and any type of financial assistance that may serve in the acquisition of the target company's shares, could conceivably fall under the scope of Art. 380. Such transactions would result in the loss of the company capital in any event, whether such risk actually materializes or not is irrelevant[5].

In order to consider a financial assistance ban, firstly, the shares of a joint stock company must be purchased. The shares to be acquired must be the shares issued by the "target company" that is to provide the financial assistance. If the company providing financial assistance and the company that is issuing the shares to be acquired are not the same, this ban would not be applied. As stated in the justification of the article, it is not required that the share purchase takes place before the advance, loan, or security is granted; the mutual purpose attained afterwards is in the scope of the provision, as well. Therefore, the time of the financing does not bear any importance. Accordingly, if the financing provided after the share purchase is not included within the scope of the article, the article may easily become entangled. The important point to consider is the purpose of the transaction. In order to apply the ban, the primary purpose of the financial assistance must be the procurement of the share acquisition. In other words, for instance, the company's shares should be acquired by the money lent by such company, or the company should provide a guarantee if the party that is acquiring the shares of the company takes a loan from a third party. However, a written agreement between the parties is not required in order to consider such purpose. Implicit agreements suffice with respect to art. 380 of the TCC.

The type of security provided by a company is unimportant with respect to the ban, the security may be in cash, in kind, or individual security; however, this ban does not prevent the acquirer from providing the acquired shares as a guarantee to the credit institutions, or placing a pledge over such shares.

---

5 **Veliye Yanlı**, Şirketin Kendi Paylarını Edinmesinde Finansal Destek Yasağı, Banka ve Ticaret Hukuku Dergisi, December 2012, p. 31.

Different from TCC art. 379 (the share transfers and pledges exceeding ten percent of the capital), TCC art. 380 does not foresee any threshold with respect to the amount of shares to be acquired. The ban shall be valid regardless of the amount of shares acquired by the third party that is financed by the target company. In addition, in order to apply this provision, the transaction should be concluded with a third party. The term "third party" is interpreted broadly, and includes the shareholders, the persons in management, and the board of directors, as well.

The legal consequence of the violation of art. 380 of the TCC is that the financial assistance transaction is rendered void. Where financial assistance is concerned, there are two transactions - one being the acquisition of the shares, and the other one being the financial assistance for the payment of the share price. When the purpose of the ban is considered, it may be concluded that the voided transaction is the financial assistance. The validity of the share purchase transaction is dependent of its own conditions and is not affected by this ban. Furthermore, art. 385 of the New TCC foresees the obligation of the disposing of shares purchased in violation of articles 379. 380 and 381 that govern company share buybacks, rather than rendering such transactions invalid (void). This wording is inclined to be interpreted that share purchases, which are in violation of art. 380, may be realized. Therefore, the only transaction that is invalid is the financing transaction.

The doctrine differentiates between the consequences of the financial assistance ban with respect to the promissory transactions and disposal transactions. The dominant view accepts that only promissory transactions are invalid and that disposal transactions are valid. However, even if the validity of disposal transactions are accepted, the action performed is required to be returned. For instance, if the company became a guarantor to a bank credit obtained in order for its shares to be purchased by a third party, this guarantee agreement would be invalid, and the responsibility of the company may not be claimed.

Exceptions to the Financial Assistance Ban

TCC Art. 380 provides two exceptions to the financial assistance ban. The first exception governs the day-to-day transactions that are

overseen by credit and finance institutions. The financial assistance ban will not apply where the financing provided by the credit and finance institutions are used in the acquisition of their own shares. In other words, the financing provided by the target company from the credit and finance institutions for the acquisition of its own shares is beyond the scope of this exception. Accordingly, if the credit institution is not the company whose shares are acquired, TCC art. 380 would lose its meaning, in a market where the majority of the sources of financing are composed of banks.

Similarly, the ban does not apply to legal transactions, wherein a company provides advances, loans, and securities to its own employees for the acquisition of the company's shares. The justification of the article specifies that this exception is recognized in order to provide convenience for the company's employees in acquiring the shares of the company and its affiliates. However, this exception would not be applied for the senior executives of the company. Otherwise, a management buyout, which is one of the sub-types of leveraged buyouts, will be allowed, and the ban regulated under Art. 380 will be eliminated.

In order for the abovementioned exceptions to be applied, transactions may not reduce company reserves, and must comply with the provisions of art. 519 and art. 520 regarding the disbursement and separation of the reserves.

Conclusion

The financial assistance prohibition regulated under the TCC bans the transactions of a company intended at financing the acquisition of its own shares by third parties, or supporting third parties by granting loans or providing security. By virtue of the amendment in 2006, this ban, which is regulated under the Second Directive of the European Union, has been softened, and assistance to third parties is enabled under certain conditions. Consequently, leveraged buyouts are allowed under EU law, under certain conditions. However, art. 380 of the TCC did not incorporate such regulation and prohibited the application of leveraged buyouts, a financing method used in acquisitions. However, in order to harmonize the amendment with the Second Directive, and to overcome financing issues in mergers and acquisitions, thus encour-

aging such transactions, it is suggested that an amendment similar to the Second Directive be made to art. 380 of the TCC, and the strict ban is thereby softened.

Right to Request Information of the Shareholders in Joint Stock Companies*

Prof. Dr. H. Ercument Erdem

The right to request information is one of the most important rights granted to the shareholders, and it enables shareholders to receive solid information on the functioning, financial status and expectations of the company, as well as the quality of the management. The right to request information facilitates the company's accountable and transparent functioning; thus, it is considered as an "inalienable right" of the shareholders. In accordance with Article 437 of the Turkish Commercial Code ("TCC"), the right to request information and examination shall not be restricted nor removed by the articles of association or the resolution of the corporate bodies. Accordingly, the TCC considers the right to request information as an element concerning the basic structure of joint venture companies, and sets forth provisions on the effective exercise of the right to request information.

Exercise of the Right to Request Information

Right of Examination before the General Assembly Meeting

The right to request information has different aspects, and the first one is the right of examination of the shareholders before the general assembly meeting. Pursuant to Article 437/1, the company shall hold the financial statements of the company, the board of directors' annual activity report, the audit reports, and the board of director's proposals to distribute dividends that will be available for the shareholder's examination at least 15 days prior to the general assembly meeting. Financial statements and consolidated statements shall also be accessible to the shareholders at the company's registered office and branch-

---

* ***Article of October 2015***

es for a one year-period. The shareholders may request a copy of the statement of income and balance sheet, and the expenses shall be covered by the company.

The TCC enables shareholders to exercise their right to request information through the website of the company if that company is under the obligation to create a website. In practice, companies do not make the relevant documents available, as the shareholders do not go to the company's registered office to examine the relevant documents. In order to prevent any violations, the draft provision setting the forth disclosure of the financial statement and board of directors' annual activity report for 3 years on the website of the company was thought to be the best solution. However, the draft was amended, and the scope of documents required to be disclosed was limited. As a result, the level of transparency is reduced.

It should be noted that due to the explicit provision on the inalienable character of the right to request information and examination, the resolutions of general assembly adopted by way of violation of the right of examination shall be deemed null and void. Whereas a violation of the relevant right during the enforcement period of Abrogated Commercial Code ("ACC") is deemed as an individual non-compliance in the event of an action to void the general assembly's resolution[1].

Right to Request Information at the General Assembly Meeting

Another aspect is the shareholders' right to request information from the auditors and board of directors' members at the general assembly meeting. Pursuant to Article 437/2 of the TCC, shareholders may request information on the company's businesses from the board of directors, and the manner as to the method of audit that was conducted by the auditors.

The exercise of the right to request information is not subject to any prior condition of being necessary for the exercise of the other shareholding rights. For instance, the information does not have to be

---

1 **Ünal Tekinalp**, Sermaye Ortaklıklarının Yeni Hukuku, 4. Bası, İstanbul 2015, p. 321, para. 14-73.

necessary for the exercise of the right to vote. Such a condition is not provided in order that the shareholders are not prevented from exercising their right to request information on the bases of unlawful causes. However, some scholars state that such a condition is necessary to prevent shareholders from requesting irrelevant information in order to block the general assembly meetings[2].

Right of Examination following the General Assembly Meeting

The TCC also enables shareholders to examine, after the general assembly meeting, the commercial books and correspondence related to questions that were addressed at the general assembly meeting. In order to exercise the right of examination after the general assembly, the shareholder shall have posed a question at general assembly meeting, and the answer shall not have been satisfactory[3]. The shareholder was not satisfied with the answer shall ensure that the same is included in the meeting minutes, and may request an authorization for the examination later from the general assembly or board of directors. The exercise of the right is subject to the explicit authorization of the general assembly or affirmative decision of the board of directors. If the authorization is granted accordingly, the right of examination may be exercised by way of an expert in accordance with Article 437/4 of the TCC.

In accordance with Turkish law, shareholders are not entitled to request written information from the board of directors without any prior condition established to address questions at the general assembly meeting. Adoption of the right to request written information from the board of directors will enable shareholders to obtain concrete and actual information on the functioning of the company.

Extent of the Information

The extent of the right to request information includes information on financial statements, the company's business and activities, invest-

---

2 **Hasan Pulaşlı**, 6102 Sayılı Türk Ticaret Kanunu'na göre Şirketler Hukuku Şerhi, 2nd Volume, Ankara 2011, p. 1352-1353, para. 212.

3 **Ünal Tekinalp**, p. 324, para. 14-79.

ments, relationships, and its subsidiaries, if any. Pursuant to Article 200 of the TCC, the right to request information of the shareholders of the parent company includes the subsidiary's financial situation, assets, together with its accounting outcomes, the relationship between the parent company and subsidiaries, between the subsidiaries, shareholders of the subsidiaries, and the parent company, directors, and their related parties, as well as the transaction between the parent company and these parties, together with the results of the transactions.

The right to request information is limited by protecting the company's secrets and other interests that are required to be protected. Pursuant to Article 437/3 of the TCC, requesting information may only be rejected for these reasons, in principle. However, in accordance with the principle of equal treatment and Article 437/2 of the TCC, if any information is shared with a shareholder outside of the general assembly meeting, the relevant information shall be shared to the same extent and details with the other shareholders upon the request of any of its shareholder. In that instance, the sharing of information shall not be rejected on the grounds that sharing of the relevant information may place the company at risk.

The information to be shared within the scope of right to request information shall be in compliance with the principles of accountability and good faith, and shall be prudent and relevant. Accountability is in direct relation with the release by the board of directors' members; therefore, the relevant information shall include any information that is necessary to release the directors[4].

Right to Request Information on the Compensation of the Directors

Under certain jurisdictions, there are specific provisions regarding the shareholders' right to request information on the compensation of the directors and the disclosure of such information. As the compensation of the directors may have adverse effects on the company's financial situation, shareholders have an interest in obtaining information as to compensation.

---

4 **Ünal Tekinalp**, p. 322-323, para. 14-77.

There are no specific provisions on the preparation of a compensation report, or on the request of information regarding the compensation of the directors at general assembly meetings. Therefore, shareholders are only entitled to obtain the relevant information within the scope of the general provisions of the right to request information. In addition, neither the TCC, nor capital markets legislation, sets forth any provision on the disclosure of information on compensations. Some scholars state that the absence of such a provision is a deficiency considering the fact that such excessive compensations may affect the financial situation of the company[5]. On the other hand, the Communiqué on Corporate Governance ("Communiqué") Annex-1 4.6.2 provides that companies' compensation policies shall be presented on the related websites of the companies. Additionally, Communiqué Annex-1 4.6.5 sets forth the disclosure of the compensation granted to the board of directors' members and directors having an administrative personal liability by way of disclosure of the annual activity report. As a result, shareholders may obtain the relevant information through the company's website and by way of annual activity report.

A specific provision on the relevant issue may assure better protection for the shareholders. Shareholders' access to the information on compensation is essential in order to file a lawsuit for nullity of the general assembly's resolution that violates the principle of protection of the capital (TCC Art. 447/1, c) and to initiate the liability of the board of directors' members in executing resolutions that grant excessive compensation to its directors[6].

Lawsuit Regarding the Request of Information and Examination

Pursuant to Article 437/5 of the TCC, the shareholder who did not obtain the relevant information, is entitled to file a lawsuit before the commercial court of first instance located at the registered Office of the company if his/her right to request information is ignored, unlawfully rejected or suspended.

---

5 **Işık Özer**, Anonim Şirket Yöneticilerinin Mali Hakları, Ankara 2013, p. 358.

6 **Özer**, p. 384.

The application shall be made within 10 days following the rejection and within a reasonable period of time for other cases. The lawsuit regarding the request of information and examination is subject to a simple procedure. The application and the decision of the court shall be based on the facts, and the information to be provided shall be specified. For instance, a determination of corruption may not be requested as it is too general. Additionally, the decision of the court is definitive and shall not be appealed.

Conclusion

Pursuant to the TCC, the right to request information and examination is among the "alienable rights" of the shareholders. Right to request information may be in different forms: right of examination before the general assembly meeting, right to request information at the general assembly meeting; and right of examination if unsatisfactory answers are given at the general assembly meeting. Turkish law does not provide any specific provision regarding the compensation of the directors; shareholders may obtain information on the relevant issues within the scope of general provisions on the right to request information. In any event, the information provided shall be in compliance with the principles of accountability, as well as good faith principles, and shall be provided duly. The shareholder who does not obtain information may file a lawsuit with the commercial court of first instance located at the registered office of the company and request a decision that the relevant information be provided.

Annulment of General Assembly Resolutions of Joint Stock Companies and the Influence Rule*

Att. Ecem Cetinyilmaz

Introduction

The shareholders, board of directors, and each member of the board of directors are entitled to challenge the general assembly resolutions, subject to several conditions. Reasons for annulment are listed under Turkish Commercial Law No. 6012 ("TCC") as the breach of the law, breach of the articles of association, and breach of especially good faith. This article focuses on annulment cases brought by especially the minority shareholders and the implementation of the influence rule. On the other hand, the rules of procedure have not been addressed.

Annulment of Resolutions

The right to claim for annulment of general assembly resolutions is the principal defense mechanism that the minority shareholders are entitled to against the abuse of the majority shareholders. It is neither possible to remove, nor limit, such right by the articles of association or a general assembly resolution, nor it is conditional upon whether or not the capital commitment has been paid by the claimant shareholder. Article 446 of the TCC regulates the shareholders who can challenge the resolutions in two separate groups: shareholders who attended the meeting but cast negative votes; and shareholders regardless of whether or not they attended the meeting.

Shareholders Who Attended the Meeting

Shareholders who attend a general assembly meeting have the right to challenge the general assembly meeting resolutions on the condition that they cast a negative vote, and had their dissenting opinions

---

* ***Article of May 2015***

stated in the meeting minutes. It is possible either to state dissenting opinions against several decisions as a whole, or separately, for each decision made in a general assembly meeting.

Shareholders Regardless of Attendance

Shareholders who allege that (i) the convocation of the meeting has not been duly made, (ii) the agenda of the meeting has not been duly announced, (iii) persons who do not have the authority to attend the general assembly meeting, or their representatives attended the meeting and cast votes, or (iv) they have been unjustly prevented from attending the meeting and casting votes can challenge the general assembly resolutions regardless of whether or not they attended the relevant meeting provided that, in any case, the aforementioned breaches had an influence on the resolution. The existence of one of these conditions is required for the consideration of an annulment case.

- ***Method of Convocation:*** Unduly convocation to the general assembly meeting is a reason for a shareholder who did not attend the meeting to challenge such resolution. However, the type of the breach should be also taken into consideration. For the existence of a convocation, it shall have been made to all shareholders; it shall have been made by the authorized bodies of the subject company; and shall allow the shareholders to be made aware that a meeting will be held at a specific given date and time. A convocation that does not bear such features is deemed to be non-existent; therefore, the general assembly meeting without a convocation will be considered as not having been held, as well, and it will not be annulled, since it does not, in law, exist. Other inconsistencies of the convocation will constitute the basis of the case for annulment. Notwithstanding these comments, the right to claim should be limited in terms of good faith. For example, the claim of a shareholder – who attended the meeting and cast affirmative vote – on the grounds that the convocation had not been duly made, should be considered as an abuse of right and rejected, even if such breach had an influence on the resolution.
- ***Announcement of the Agenda:*** An agenda that has been unduly announced, or has not been announced, is another reason for

an annulment case. A duly announced agenda should be included within the convocation and in accordance with the procedure set forth under the TCC and articles of association. Moreover, agenda items should give shareholders a clear understanding of what is going to be discussed at the meeting. The important criterion is whether or not the claimant shareholder would have attended the meeting and have been able to change the resolution with his/her votes if the agenda had been duly announced.

- ***Attendance of Unauthorized Persons:*** Shareholders are entitled to challenge general assembly resolutions if persons or respective representatives who were not authorized to attend the meeting actually attended the meeting and cast votes. These unauthorized persons may well include the holders of pledges, liens, retentions or usufruct rights on the shares. It is unnecessary for the attendant shareholders to have cast negative votes and had their dissenting opinions stated under the meeting minutes.
- ***Unjust Prevention from Attendance:*** Prevention of shareholders, or holders of rights of usufruct, from attending the meeting and casting votes, either by threat, deceit, or physical intervention constitutes another ground for the annulment cases. Such prevention also includes instances where shareholders have been unduly removed from the meeting.

Scope and Implementation of Influence Rule

As mentioned above, for a shareholder to be able to challenge a general assembly resolution based on the above breaches, such shareholder is required to prove that the breach had an influence on the outcome of the resolution. This rule had not been regulated as broadly under the previous Turkish Commercial Code No. 6762, yet was implemented by the Court of Appeals.

The influence rule may be defined as the fact that the general assembly would not have taken a resolution had the subject breach not existed[1]. Turkish court practice implements the influence rule in terms of quora: Influence on the resolution is deemed to be existent where

---

[1] **Ersin Çamoğlu**, Anonim Ortaklıklarda Genel Kurul Kararının İptalinde Etki Kuralı, Yaklaşım Dergisi, August 2014, p. 217.

the claimant shareholder's votes would have sufficed to change the resolution if the alleged breach had not been made, e.g. if the shareholder had been allowed to attend the meeting. If the shareholder's number or percentage of votes is not high enough to change the outcome, it is considered that his/her absence from the meeting did not have any influence. Taking into consideration this practice, in cases where shareholders were prevented from attending a meeting, the possibility of the claimant shareholder to have provided information or documents that could influence other shareholders' votes if he/she were allowed to attend the meeting, is disregarded by the Turkish courts. This approach certainly causes minimizing a shareholder's right to voting, only, and interpreting the influence rule simply in numerical terms.

In parallel with the TCC, the Swiss Code of Obligations also includes the influence rule; however, limited to the cases where unauthorized persons attended the general assembly meeting. This causes the influence rule to be implemented in very limited cases, and allows shareholders in most cases claim for the annulment of the resolutions due to above-explained breaches regardless of the influence. Tekinalp explains the reason for the broad regulation of the influence rule under the TCC as the prevention of small minority shareholders from challenging resolutions due to small irregularities that only concern themselves[2], which is a tool against excessive litigation.

Consequences and Evaluation

Grounds for shareholders' annulment cases against the general assembly resolutions of joint stock companies are listed under the TCC numerus clausus. Shareholders are obliged to rely on one of these reasons. The TCC subjects the annulment cases to the influence of the breach on the resolution considering the already settled case law regarding the subject. Shareholders are obliged to prove that the breach at hand influenced the general assembly resolution in order to have the resolution annulled. The TCC did not adopt the provisions of Swiss or German legislation concerning the annulment of the general assembly resolutions due to the fact that the excessive number of decisions of the Court of Appeals became the established practice in Turkey[3].

---

2 **Ünal Tekinalp**, Sermaye Ortaklıklarının Yeni Hukuku, p. 343.

3 **Ünal Tekinalp**, Sermaye Ortaklıklarının Yeni Hukuku, p. 341.

Liability of Legal Representatives of Joint Stock Companies from Public Debts*

Prof. Dr. H. Ercument Erdem

The liability of legal persons from public debts, and the determination of the scope of this liability are of great importance in practice, since it is possible that the public debts that cannot be collected from joint stock companies may be collected from the legal representatives of the company. This issue is analyzed in this article, in light of the relevant provision of Law no. 6183 on Collection Procedure of Public Receivables.

General

Reiterated Art. 35 of Law no. 6183 on Collection Procedure of Public Receivables ("Law no. 6183") regulates the collection of public debts of legal persons. Pursuant to this article, public receivables that may not be wholly or partially collected from the assets of legal persons, or that possibly may not be collectable from the assets of legal persons, shall be collected from the personal assets of legal representatives of legal persons, or of those who administer those unincorporated organizations, pursuant to the provisions of the relevant law.

Pursuant to this article, in the event public receivables cannot be collected from joint stock companies, legal representatives of such companies would be liable for these uncollectable debts with their personal assets.

Notion of "Legal Representative"

Initially, with the analysis of liability of legal representatives of joint stock companies, the scope of the term "legal representative" must be determined.

---

* ***Article of January 2015***

Pursuant to Art. 365 of Turkish Commercial Code no. 6102 ("TCC"), joint stock companies shall be directed and represented by the board of directors ("BoD"). In other words, the BoD is authorized by law to direct and represent the company. This article also sets forth that the provisions of the TCC regulating exceptions for this rule are reserved. Within this context, pursuant to Art. 367/1 of the TCC, the BoD may be authorized to transfer the direction of the company pursuant to an internal directive, in whole or in part, to one or more directors, or to third persons, with a provision to be put in the articles of association. Therefore, the BoD may, wholly or partially, transfer the direction of the company.

As the BoD is the organ that is competent for the direction and representation of the company pursuant to the TCC, the BoD members are "legal representatives" within the meaning of Reiterated Art. 35 of Law no. 6183. The Court of Cassation has rendered many decisions on this issue[1]. The Court of Cassation emphasizes that the person to be held liable shall be competent to represent and bind the company. The BoD members may transfer their representation authority to executive members (*murahhas üye*) or to executive directors (*murahhas müdür*) pursuant to Art. 370/2 of the TCC. However, in this case, at least one member of the BoD must have the authority to represent the company. Unless they transfer their authority to represent the company, the BoD members shall be liable pursuant to this provision.

If the authority to represent the company is transferred to executive members, or to executive directors, the liability shall be on those to whom the authority has been transferred. If the representation authority has been transferred, the public receivables shall be collected from these persons, and the other BoD members will not be subject to any debt collection proceedings. The Council of State has stated in one of its decisions that the payment order with regard to collection of the receivables from other BoD members is to be cancelled, if the authority to represent the company has been transferred to the speci-

---

[1] Decision dated 09.11.2005 and numbered 2005/9158 E., 2005/11380 K. of the 10th Civil Chamber of the Court of Cassation, Decision dated 08.03.2011 and numbered 2010/379 E., 2011/2028 K. of the 21st Civil Chamber of the Court of Cassation. Source: www.kazanci.com.tr.

fied executive members within the BoD[2]. The Court of Cassation has decided that if the authority to bind the company has been transferred to one or some of the BoD members, the other directors shall be exonerated from liability, and the BoD members to whom the authority to bind has been transferred, shall be severally liable[3].

In light of the decisions referred to above, both the Court of Cassation and the Council of State are of the opinion that the executive directors or executive members shall be liable for public debts, if the authority to represent the company has been entrusted to these directors or members.

The Communique (Serial: A Item No: 5) pertaining to Amendment of General Communique of Collection (Serial: A Item No: 1) published in the Official Gazette dated 11.09.2013 and numbered 28762, contains provisions on the determination of the legal representatives of joint stock companies. Under the title "VIII. Liability of Legal Representatives" of the Communique, it states that "*The representatives are BoD members appointed through the articles of association of the company, pursuant to Law no. 6102, or elected by the general assembly, or third persons elected as directors by the BoD, under condition that at least one of the BoD members shall have the authority to represent the company.*"

Liability of Commercial Agents

The persons who have been granted the authority to represent without having the title of executive member or executive director shall be distinguished from the legal representatives. Pursuant to Art. 368 of the TCC, the BoD may appoint commercial agents. The commercial agent is not a legal representative, but is a representative voluntarily appointed pursuant to Art. 551 of Code of Obligations no. 6098. The representation authority of the commercial agent does not arise from legal provisions, but from the contractual relationship between the agent and the company.

---

2 Decision dated 24.02.2000 and numbered 1998/4697 E., 2000/745 K. of the 11th Chamber of the Council of State.

3 Decision dated 14.06.2011 and numbered 2011/4753 E., 2011/7389 K. of the 21st Civil Chamber of the Court of Cassation.

As the commercial agent has been voluntarily appointed through a proxy, it cannot be considered as "legal representative" within the meaning of Reiterated Art. 35 of Law no. 6183. If the opposite of this statement is accepted, each person who has been granted a voluntary representation authority, such as customs brokers who have been granted an authority to pursue customs operations, these persons will be liable pursuant to this article; however, it is clear that Reiterated Art. 35 of Law no. 6183 has no such intention.

Pursuant to the explanations under the title "VIII. Liability of Legal Representatives" of the Communique (Serial: A Item No: 5) pertaining to Amendment of General Communique of Collection (Serial: A Item No: 1), the "*Legal representative pursuant to Reiterated Art. 35 of Law no. 6183 shall be;*

- *Pursuant to Law no. 6762 (abrogated), a person or persons who have been authorized to represent the company by the articles of association, or who have been granted representation authority by the BoD or general assembly, with the authority that arises from the articles of association,*
- *Pursuant to Law no. 6102, BoD members who have been appointed pursuant to the articles of association or elected by the general assembly, or under the condition to have at least one BoD member, third persons who have been appointed as director by the BoD.*"

Liability Pursuant to Tax Procedure Law

Art. 10 of Tax Procedure Law No. 213 ("TPL") regulates the liability of legal representatives. Pursuant to this Article, in the event that the legal persons or minors and wards, and institutions which do not have legal personality, such as foundations or communities, are taxpayers or are tax responsible, their obligations shall be performed by their legal representatives, by those who direct the institutions that do not have a legal personality, and by their representatives, if any. Tax receivables, and other receivables related to tax receivables that could not be collected from taxpayers or tax responsibles because of the failure of those persons to perform their obligations, will be collected from the personal assets of the persons who did not perform their legal obligations.

Art. 1 of the TPL defines the scope of the relevant law. Pursuant to this article, the TPL shall be applied to taxes, duties and charges within the general budget, and taxes, duties and charges that belong to special provincial administrations and municipalities.

At this point, if public debts are classified as tax debts, it is important to define which provisions shall be applied. Pursuant to the decision of the 7th Chamber of the Council of State dated 09.06.2003 and numbered 2002/4619 E., 2003/3476 K., for those receivables that fall within the scope of Art. 10 of the TPL, and related receivables, Reiterated Art. 35 of Law no. 6183 shall not be applied.

With regard to the scope of "legal representative" in terms of the TPL, in a decision of the General Assembly of Tax Chambers of the Council of State[4], it ruled on the fact that a person having the title of vice general manager who has the signing authority of 2nd Degree and 2nd Group does not grant him the title of legal representative. The jurisprudence within TPL is in parallel with our explanations with regard to Law no. 6183.

Conclusion

The liability of legal representatives of joint stock companies from public debts is set forth by the reiterated Art. 35 of Law no. 6183. Pursuant to this article, the receivables that cannot be collected from these companies, may be collected from the legal representatives of such companies. The decisions of the Court of Cassation and Council of State emphasize that the term 'legal representative' shall be construed as a person or persons having the authority to direct and bind the company. If the public debt is classified as a tax debt, Art. 10 of the TPL shall be applied. In the jurisprudence regarding this article, it is emphasized that the granting of a specific signature authority is not sufficient for liability.

4 Decision dated 13.11.2013 and numbered 2013/353 E., 2013/546 K. of the General Assembly of Tax Chambers of the Council of State.

A Legal Vehicle in Institutionalization of Family Companies and Transfer between Generations: Internal Directive*

Att. Ali Sami Er

An internal directive may constitute a stepping stone for family companies to become institutionalized. A simple distribution of duties to be provided in consideration of the accountability principle may enable differentiation in decision-making processes, and may convert the board of directors from an executive organ to a surveillance organ. Moreover, it may enable the company to be transferred from generation to generation in a more planned manner. Although it may seem hard to delegate management authorities, the main hardship stems from the transfer of representation authorities. Each member of the board of directors, from the second and third generations that are almost deemed to be the heads in internal affairs, usually is not vested with the representation authority of the company in external affairs. However, the substructure of the transfer to the next generation may be procured by an internal directive, which governs both management and representation authorities.

What is an internal directive?

An internal directive is a regulation issued by the board of directors, governing the management of the company, and its representation structure against third parties, which results in consequences, both related and unrelated to the company.

What are the elements of an internal directive?

"Management of the company" means a comprehensible explanation of the management process setting forth sharing of the duties,

* ***Article of December 2015***

authorities of the board of directors, transferred authorities, definitions of the management duties and work flow charts, along with hierarchical reporting structure. Actually, the internal directive, presenting the management process, renders the job definitions, which are mostly designated by companies in order to meet the ISO Quality Certificate requirements, as applicable, rather than being non-functional.

"Representation structure against third parties," on the other hand, resembles a signature circular. The mere difference here is that the representation authorities become evident, as opposed to managerial duties. For instance, *one of the duties that falls within the job definition of the finance director, which is the investigation of appropriate loans, constitutes* the managerial duty, and the signature on the loan agreement constitutes the representation duty. It is possible to restrict the representation authority to be granted via an internal directive, in terms of subject and monetary amount (*for instance: it is possible to limit the authority in the loan agreements to be signed to a certain degree or according to the type of the loan*).

What is an internal directive not comprised of?

As mentioned earlier in the introduction of the article, an internal directive may serve as a vehicle for institutionalization. In furtherance of this view, Trade Registries also state that only duties and authorities shall be mentioned in the internal directive, but no authorizations shall be made by name. Therefore, the representation authorities of the Store Manager shall be designated under the internal directive, but not the authorities of Mr. Ahmet the Store Manager. As it is noted, below, authorization by name shall separately be made via a board of directors' resolution (for joint stock companies) or board of managers' resolution (for limited liability companies).

Can a limitation be made in the internal directive in terms of subject and amount?

The answer to such question is both yes and no. If authorities as found in the internal directive are appointed to the designated duties, then all kinds of limitations may be made for these persons. However, it is not possible to set forth limitations with regard to authorized per-

sons who are not set forth in the internal directive (for instance: board of directors' members having representation authority).

What are the necessary resolutions to be taken in order to issue an internal directive?

In order to issue an internal directive, first of all, there must be a provision in the articles of association stating that the board of directors are authorized in this regard[1]. To add a provision to the articles of association, such as the following, is sufficient: *The board of directors may either use the management and representation authorities, or may delegate such authorities via an internal directive*.

If the internal directive does not contain such provision, the general assembly will need to amend the article concerning the management and representation authorities of the board of directors. A participation rate of 1/2, and the majority vote of the shareholders attending the meeting, is sufficient to take such resolution in the general assembly.

Along with the modification of the articles of association, the board of directors may prepare an internal directive dated either the same as the resolution, or a future date, before such resolution is registered.

How can the appointments of the duties determined in the internal directive be made?

Appointments to such duties shall be made via a board of directors' resolution in joint stock companies, and via a general assembly, namely, a board of shareholders' resolution in limited liability companies. This resolution shall absolutely include the TR Identification number of the related person. Therefore, immediately after a resolution regarding the internal directive, appointments may be made via a board of directors' resolution (in joint stock companies) or general assembly resolution (in limited liability companies). For instance: *It has been resolved in our Board of Directors' resolution dated X and numbered Y that Mr. Ahmet shall be appointed as a store manager, of which its authorities are indicated in our Internal Directive […]*

---

[1] For our readers who are also law practitioners, we would like to remind that as per the TCC, there is a provision in the articles of association solely about the transfer of management. Therefore, in order to issue an internal directive in terms of representation transfers, there is no need to have a provision thereof in the articles of association.

Does the internal directive require registration?

Only the parts of the internal directive concerning representation should be registered. In other words, there is no need for registration of the regulations related to management. At some point, the regulations concerning management of the company may be comprised of confidential information of the company. Thus, the lawmaker does not require registration of such parts. If there is a dispute that requires the management transfer to be demonstrated, an internal directive may be preserved for years as a confidential document only to be disclosed via a court order.

The parts concerning representation, on the other hand, are subject to registration. The aforementioned resolution of appointment is also subject to registration.

As of this part of this newsletter article, some properties of the internal directive in terms of representation authority shall be evaluated.

What shall be done following the registration of the internal directive?

Following the registration of the internal directive, in terms of the necessities of commercial life, it is required to get the signature specimens authenticated by the Notary Public. The document issued by the Notary Public, within the scope of this authentication, shall constitute the signature circular of the company.

Who can be granted the representation authority by means of internal directive?

Any employee who is connected to the company via a service agreement, and any member of the board of directors who is not granted a representation authority via a general assembly meeting, may be rendered authorized via an internal directive. Therefore, at first view, it may be claimed that the persons who are not in connection with the company in terms of an employee-employer relation cannot be authorized via an internal directive. However, if we interpret the law in accordance with its purpose, it can be said that the required service is not, independently, about being permanent, but more about continu-

ously serving the company[2]. Due to the fact that Trade Registries do not conduct examinations, in practice, persons in group companies who are not employed by the company are also authorized in the internal directive.

Can the internal directive contain persons who are not vested with limited representation authority?

Since there are no limitations stipulated in the law in this regard, persons authorized to jointly represent the company, or branch representatives, may also be mentioned in the internal directive. However, in practice, different approaches of trade registries may be encountered. The benefit of such document is to allow the company to demonstrate its representation authorities by means of more than one document. Moreover, it is more suitable in terms of commercial life to avoid the dispersed structure of the law to enforce a burden upon the companies in issuing different documents in order to transfer their representation authorities. Therefore, it is more practical to mention the authorities whom shall be appointed in accordance with the board of directors' resolution regarding joint or several representations, and the authorities to be appointed via an internal directive within the same resolution.

How can persons who cannot be authorized by means of an internal directive be authorized?

It is possible for companies to authorize persons who are not their employees, for certain operations, by means of a power of attorney, via a board of directors' resolution or via their representatives (for example: members of the Board of Directors or the authorized persons as per the internal directive). Such authorizations shall not be registered with the Trade Registry, and shall not be announced. On the other hand, upon the appointment of a generally authorized attorney, such attorney shall be legally deemed as a commercial agent, namely, a commercial representative, and such appointment shall be registered with the Trade Registry.

---

2 **Yanlı/Okutan Nilsson** P. 12 BATIDER V. XXX No. 4 2014.

In practice, notaries public examine authorities granted via powers of attorney and, meanwhile, they abstain from issuance of a power of attorney when they encounter expressions, such as "*to represent the company to the greatest extent possible.*" In such a case, they indicate that this authorization is subject to authorization, and can only be made via a board of directors' resolution. Within this context, the power of attorney that is issued by a notary public must concern a certain limited operation.

Are amendments to the internal directive also subject to registration?

Legally, all amendments made in matters that are subject to registration shall also be subject to registration. However, it must be pointed out that there are differences, in practice. Some trade registry directorates solely require the registration of amendments; whereas, others require the entire internal directive to be registered[3]. It can be foreseen that the practice will harmonize over time, just as the registration of only the amended article in the articles of association.

What are the effects of the internal directive in terms of liability?

The internal directive system is a shield that can protect the company from third persons. Therefore, it must be registered before the trade registry. In order for an agreement concluded by the representatives of the company shown in the internal directive to be binding upon the company, such representatives shall hold representation authority. Otherwise, the counterparty of the agreement's concluded representative without authority shall have no claims arising from the agreement. Here, the effect of a registered internal directive is observed. The counterparty to the contract may confirm whether the representative in the internal directive has authority, or not, from the trade registry gazette.

---

3 Istanbul Trade Registry Directorate: "In case of amendment to the internal directive which is registered and announced in the company records or in case of additions to such internal directive, a new and differently dated, numbered internal directive should be registered and announced."

http://www.ito.org.tr/wps/portal/tescil-ilan-kurulus?WCM_GLOBAL_CONTEXT=Sirket_Sinirli_Yetkili.

In short, in the case of a representation without authority, the company will be protected by means of a registered internal directive.

However, the internal directive system does not comfort the board of directors in terms of responsibility. The wording of TCC Art. 371/7 states that persons who are granted representation authority through an internal directive shall be severally liable along with the board of directors. This means that if damages arise as a result of an agreement, the creditors and the shareholders may claim their damages from either the representatives shown in the internal directive who signed the said agreement, or the board of directors' members, irrespective of whether or not they signed it. At this point, a board of directors' member may waive liability by claiming that he/she acted with due care in choosing, instructing, and supervising the said representative[4].

Conclusion

In a nutshell, there is great benefit in re-evaluating the current signatory circular of a company within the framework of an internal directive system. This way, while taking a step towards institutionalization of the company, the transfer of authority from generation to generation in family companies are facilitated. Obviously, this work has to be done in consideration of the law of liability. Otherwise, given that a simple signatory circular has not been issued, this may have unwanted consequences, and may also give rise to the responsibility of the members of the board of directors.

---

4 On the other hand, it is also stated by the academics that the liability structure envisaged by Art. 371/7 shall not be eliminated by Art. 553. **Akdağ Güney** p. 22 Evaluations Regarding the 7th paragraph added to TCC Art. 371 by the Omnibus Law numbered 6552 www.arslanlibilimarsivi.com.

Joint Stock Companies' Capacity of Becoming a Surety*

Prof. Dr. H. Ercument Erdem

General

Before the entry into force of Turkish Commercial Code No. 6102[1] ("TCC") the capacity of joint stock companies with respect to becoming a guarantor or surety was an important issue, which was assessed within the scope of ultra vires principle (prohibition of transactions out of a company's purpose). In accordance with the ultra vires principle, which was regulated by the abrogated Turkish Commercial Code No. 6762[2] ("Abrogated TCC"), joint stock companies did not have legal capacity beyond the company's subject of activity and, thus, transactions concluded beyond their subjects of activity were deemed to be null and void. The TCC has not included this principle, which limits the company's capacity with its subject of activity, by taking into consideration the First Council Directive on Companies no. 68/151 of the European Economic Community ("EEC")[3].

This newsletter article will analyze joint stock companies' capacity to be the subject of rights, and the capacity with respect to becoming a surety in accordance with the ultra vires principle under the Abrogated TCC, the relevant provisions of TCC, and the Court of Cassation's decisions rendered with respect to such topic.

Joint Stock Companies as Subjects of Rights

The joint stock companies' ability to be the subject of rights is extended following the abandonment of the ultra vires principle.

---

* ***Article of February 2015***

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

2 Abrogated on 1 July 2012 by the entry into force of the TCC.

3 http://eur-lex.europa.eu/ date of access: 3 March 2015.

Pursuant to the TCC, the companies are entitled to exercise all rights and undertake all obligations pursuant to Art. 48 of the Turkish Civil Code[4] ("Civil Code"), without prejudice to the legal exceptions (TCC Art. 125/2). Moreover, pursuant to Art. 48 of the Civil Code, legal persons are entitled to exercise any rights and obligations apart from the rights and obligations that are specific to persons, such as gender, age, and kinship. Therefore, joint stock companies may enter into transactions, and undertake liabilities, without any limitation regarding the company's subject of activity. In this respect, even though a company's purpose and objectives must be stated in its articles of association, the company's purpose and object is not of vital importance in determining the boundaries of the company's being the subject of rights, and, in principle, the company is bound by those transactions that are beyond its subject of activity.

The same principle is also regulated in the first paragraph of Art. 371/2 of the TCC regarding representation. In accordance with the said provision, the company is bound by transactions that its authorized representatives conclude with third parties that are beyond the company's subject of activity. However, Art. 371/2 of the TCC also provides an exception to this principle. If it is proven that the third party knew or was in a position to know that the transaction fell outside the company's subject, then that joint stock company is not bound by the transaction. The third party who knew, or who was in a position to know, that the transaction fell outside of the company's field of operation would not be able to claim that it was acting in good faith. The burden of proof lies with the joint stock company in such case. The fact that the articles of association stipulates such issue, or if the articles of association are announced, shall not be deemed as a sufficient proof by itself (TCC Art. 371/2), since the third parties are not under the obligation to know the scope of a company's subject of activity. Therefore, the third party's affirmative knowledge is necessary.

An important question that arises within this context is whether the transactions with respect to becoming a surety and providing a guarantee may be assessed within the scope of Art. 371/2 of the TCC.

---

4 Published in the Official Gazette dated 8 December 2001 and numbered 24607, and entered into force on 01 January 2002.

Likewise, if being a surety is assessed as being beyond the subject of activity of the company pursuant to TCC Art. 371/2, such surety shall not bind the company where the articles of association does not include the relevant provision. However, when the transaction of becoming a surety is assessed within the scope of a company's subject, thus not falling within Art. 371/2 of the TCC, this will result in the joint stock company becoming bound by such surety.

Joint Stock Companies' Capacity of Becoming a Surety

A joint stock company's capacity of becoming a surety and providing a guarantee used to be analyzed in accordance with the ultra vires principle, pursuant to the Abrogated TCC. Art. 137 of the Abrogated TCC specified that the companies may acquire any right, and undertake any obligation, provided that they fall within the subject of activity of the company, as stated in the company's articles of association. The ultra vires principle, and the literal interpretation of such article, could result in the conclusion that companies may not become a surety unless it is expressly provided for in their articles of association. However, the Court of Cassation prevents such interpretation, and concluded in clear and established precedents that such guarantee is in the ordinary course of business of a company.

The Court of Cassation, while evaluating the ultra vires principle, defines a company's subject of activity as being comprised of the continuous transactions concluded by the company. Additionally, it states that businesses and agreements that are not directly included in a company's articles of association, while evaluating the ultra vires principle, but which facilitates the business of the company, are required to be included in the company's subject of activity, even though not specifically set forth in the articles of association. Otherwise, this would be contrary to the natural flow of life. Indeed, the subject of activity of a joint stock company must be evident in the title of the joint stock company, and stipulate the fundamental activity areas of the company, such as tourism, construction and commerce. Joint stock companies may be established for any economic purpose that is not prohibited by the law (TCC Art. 351). Since becoming a surety or providing a guarantee are not regarded as economic activities alone, they do not constitute the purpose and subject of the company. However, they are transactions

that intend to effectuate such purpose and subject, and which are included in the ordinary course of business.

In this respect, Court of Cassation decisions that are rendered under the Abrogated TCC with respect to ultra vires principle may be relied upon in order to determine whether becoming a surety or providing a guarantee should be included in the scope of Art. 371/2 of the TCC. Likewise, the established precedents of the Court of Cassation conclude that becoming a surety and providing a guarantee is in the ordinary course of business, and are included in the company's subject of activity.

Accordingly, the 11th Civil Chamber of the Court of Cassation, in its decision dated 19.07.2005 and numbered 4621/7778[5], ruled that in accordance with established practices in Turkish Law, companies must be deemed capable to conclude surety and guarantee agreements due to their commercial activities, even if such activities are not explicitly stated in their articles of association as an area of activity. Similarly, the 11th Civil Chamber of the Court of Cassation, in its decision dated 07/02/1978 and numbered 7/354[6], stated that: "*A company's subject of activity means commercial transactions concluded regularly by such company. Such transactions are related to the transactions as set forth in the company's articles of association. However, it is necessary to accept that the businesses and transactions, which do not directly fall into the scope of the company's subject of activity as specified in its articles of association, but which facilitate the company's commercial activities, shall be assessed within the scope of the company's subject of activity. Those companies with commercial purposes may jointly undertake liabilities in order to obtain loans from banks and, therefore, support each other, and maintain their commercial activities in such a way. Such transactions are considered to be among ordinary commercial transactions. Therefore, the surety contract in question shall be deemed within the scope of the company's subject.*"

It is clear from the Court of Cassation's decisions that surety and guarantee transactions are accepted as those transactions that lie within the scope of a company's subject of activity, even if they are not includ-

---

5 www.kazancı.com.tr date of access: 3 March.2015.

6 **Seza Reisoğlu**, Türk Kefalet Hukuku, Ankara 2013, p. 56.

ed in the articles of association. In other words, being a surety may not be regarded as a transaction, which is beyond the company's subject of activity, pursuant to Art. 371/2 of the TCC. Art. 371/2 of the TCC shall not apply to surety and guarantee transactions and, thus, joint stock companies may not claim that they are not bound by such transactions. In this respect, a company's capacity of becoming a surety and providing a guarantee shall be determined pursuant to Art. 125 of the TCC, and the guarantee provided by a joint stock company shall be valid. Considering the fact that the relevant decisions were rendered when the ultra vires principle was valid, Art. 125 of the TCC, which does not refer to the ultra vires principle, will not introduce any novelty on the freedom of becoming a surety, which was already acknowledged by the commercial companies, but will assure the application of this practice setting forth such freedom[7]. For all these reasons, in practice, the banks' requiring an explicit provision in the articles of association of the joint stock companies with respect to being a surety, or providing a guarantee when taking a guarantee from the companies in order to secure their loans, is inconsistent with the spirit of the TCC, as well as being inconsistent with the established Court of Cassation precedents.

Conclusion

Following the entry into force of the TCC, the principle that limits the companies' ability to be the subject of rights concerning their subject of activity has lost its validity. However, Art. 371/2 of the TCC, by setting forth a special provision for joint stock companies, ensures that the effect of a company's subject of activity over representation continues against third parties. In this respect, it is important to understand and examine the meaning of the subject of activity. Pursuant to the established precedents of the Court of Cassation, and pursuant to the doctrine, surety and guarantee transactions are considered to be ordinary transactions of companies, and they are included in companies' subjects of activity in accordance with the ordinary flow of commercial life even, if they are not explicitly set forth in those companies' articles of association. Therefore, joint stock companies are entitled to become a surety and provide guarantees even though there is no explicit provision in their articles of association.

---

7 **Burak Özen**, Kefalet Sözleşmesi, İstanbul 2012, p. 172.

Ceasing Commercial Activities versus Liquidation of Legal Entities*

Att. Leyla Orak Celikboya

Introduction

Bankruptcy and Enforcement Code No. 2004[1] ("BEC") regulates certain obligations for merchants who are ceasing to continue their commercial activities. Pursuant to Art. 44 BEC, a merchant ceasing commercial activities must notify the commercial registry to which such merchant is registered, declare all of its properties, debts, and the names and addresses of its creditors, as a declaration of property. This provision aims to minimize damages that may be suffered by the creditors due to the malicious actions of the debtor merchants[2]. In fact, merchants may be subject to bankruptcy proceedings, both pursuant to the BEC and Turkish Commercial Code No. 6102[3] ("TCC"); however merchants may intend to avoid any such proceedings of creditors through ceasing their commercial activities.

The BEC regulates the obligations of merchants ceasing commerce and sanctions in the event of their violation. However, this framework as established under the BEC must be assessed carefully for legal entity merchants, especially the commercial companies regulated under the TCC that have detailed and specific liquidation proce-

---

* ***Article of July 2015***

1 Published in the Official Gazette dated 19 June 1932 and No. 2128.

2 Government Justification of Law No. 538: see. **Necip Bilge-Burha Gürdoğan**, *Son değişikliklere göre gerekçeli İcra ve İflas Kanunu*, Ankara, 1965, page 41, cited from **Baki Kuru**, *Ticareti Terk Eden Tacirlerin Tabi Bulunduğu Hükümler*, AUHFD, 1970, http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-1970-27-01-02/AUHF-1970-27-01-02-Kuru.pdf (accessed on 22.07.2015), footnote. 2.

3 Published in the Official Gazette dated 14 February 2011 and No. 27846. Art. 18/1 of the TCC, Art. 43 of the BEC.

dures foreseen thereunder. In fact, commercial companies' trade names shall be deleted from the register following the liquidation, and the legal entity will cease to exist. The coherence of the obligations and sanctions related to the cease of commercial activities with the framework as foreseen for the liquidation of legal entities must be evaluated.

Obligations of a Merchant Ceasing Commercial Activities

Who is a Merchant?

The TCC defines the scope of merchants in Art. 12 et seq. Persons operating a commercial enterprise, commercial companies, foundations, associations operating a commercial enterprise to realize their purposes and entities established by the State, the provincial administrations or other public entities that are governed by private law, or which shall be operated commercially shall be deemed a merchant (Art. 12, 16 TCC). Based on the issues addressed in this article, among these merchants, commercial companies, specifically joint stock and limited liability companies will have a special emphasis.

Obligations Governing Ceasing Commercial Activities and Sanctions

Art. 44 of the BEC regulates that a merchant ceasing commercial activities shall notify its commercial registry of the same. The merchant is also obliged to provide a declaration of property together with this notification. This shall be published and announced on the gazette where trade registry announcements are made, and in local newspapers where the creditors are located.

There are certain consequences of, and sanctions governing the ceasing of, commercial activities, some of which are set forth below:

- Pursuant to Art. 18/1 of the TCC, the merchant may be subject to bankruptcy proceedings for all kinds of indebtedness. Art. 43 of the BEC also regulates that persons declared a merchant under the TCC may be subject to bankruptcy proceedings. Pursuant to Art. 44 of the BEC, merchants having declared that they cease their commercial activities will continue to be subject to bankruptcy proceedings for an additional period of one year. Therefore, in the event merchants fail to make their decla-

ration to cease commercial activities, they will continue to be at risk of bankruptcy proceedings, as the one year period will not have yet commenced.

- For a period of two months following its declaration of property, a merchant may not dispose of assets that may be confiscated (Art. 44/3 of the BEC).
- A debtor who fails to make its declaration of property under Art. 44 of the BEC, whose declaration is incomplete, who hides assets or other values from execution of bankruptcy, and who disposes of assets following their declaration, shall be subject to imprisonment from between three months to one year upon complaint of a creditor who incurs damages (Art. 337/a of the BEC).

Hence, Art. 337/a of the BEC provides for a material sanction. Certain conditions need to be met in order for this sanction to apply. Firstly, a merchant must have failed to make the declaration of property under Art. 44 of the BEC, must have provided an incomplete declaration, hidden assets or other values from the execution of bankruptcy, and/or disposed of assets following their declaration. In short, the debtor must have violated the provisions of the BEC governing the ceasing of commercial activities. Additionally, there must be a complaint from a damaged creditor. In other words, a creditor needs to have incurred damages and have filed a complaint. In fact, Art. 337/a/2 of the BEC states that if the debtor proves the non-existence of damages of the creditor, imprisonment will not be imposed.

In short, if the above conditions are met, the debtor will be imprisoned.

Ceasing of Commercial Activities versus Liquidation

Different Mechanisms Foreseen

The TCC provides for a regulatory framework governing the termination and liquidation of commercial companies. Art. 243 et seq., and especially Art. 267 et seq., for collective companies; Art. 329 for commandite companies that make a reference to the provisions related to collective companies; Art. 529 et seq. for joint stock companies. Art.

636 et seq. and, especially, Art. 643 for limited liability companies (the latter referring to the provisions governing the liquidation of joint stock companies), provide for such framework[4].

The aforesaid provisions regulate the duties and obligations of liquidators, the protection of property, assets, and especially, the creditors, protection measures, preparation of balance sheets, and liquidation of assets, in detail. Special emphasis should be placed on certain provisions governing the liquidation of joint stock companies, which shall apply by analogy to limited liability companies by reference under Art. 643:

- A general assembly resolution is necessary for the liquidator(s) to sell a material lump sum asset (Art. 538/2).
- Liquidators shall prepare an initial balance sheet following their appointment, and submit it for the approval of the general assembly (Art. 540).
- Invitations shall be issued to creditors three times in three consecutive weeks in order that they may declare their receivables from the company (Art. 541).
- The assets may not be liquidated until the lapse of a one-year period from the date of the final invitation issued to the creditors. Only if it is clear that no harm or risk exists on the receivables of the creditors may the courts authorize liquidation prior to the lapse of this one-year period (Art. 543/2).
- Upon the completion of the liquidation procedure, the trade name of the company shall be deleted from the commercial registry (Art. 545).

In light of these provisions, the TCC enacts mechanisms to assist the creditors from incurring damages as a result of malicious actions of legal entities in the liquidation process that are ceasing their commercial activities. For example, three invitations are issued to creditors,

---

4 Please see previous newsletter articles governing the liquidation of joint stock companies: *Dissolution And Liquidation Of Joint Stock Companies,* http://www.erdem-erdem.com/en/articles/dissolution-and-liquidation-of-joint-stock-companies/; **Nilay Celebi**, Duties, Obligations and Liabilities of Liquidators http://www.erdem-erdem.com/en/articles/duties-obligations-and-liabilities-of-liquidators/ (accessed on 22.07.2015).

which is not a procedure that is foreseen to cease commercial activities of real persons. Unless the court authorizes otherwise, the assets that constitute security for receivables of creditors may not be disposed of.

The underlying purpose of Art. 44 of the BEC that envisages the protection of creditors is achieved through other mechanisms for joint stock and limited liability companies under the TCC.

The declaration of property, and the inability to dispose of assets for a period of two months from such declaration, is not in accordance with the liquidation procedure of such companies. If this declaration is made together with the initial inventory, the liquidator's authority, which it needs to use to protect the assets and rights of the company in liquidation, will be limited by this prohibition. On the other hand, such declaration cannot be made after the trade name is deleted from the registry. The legal entity will cease to exist together with such deletion, and unless a property item is overlooked, there will be no property to declare. In fact, there will no longer be a legal entity that may be subject to any bankruptcy proceeding.

When the provisions of the BEC to cease commercial activities, and the provisions of the TCC for liquidation are assessed, it could be argued that the BEC provisions govern real person merchants only.

Jurisprudence

Based on the above explanations, one could easily argue that the BEC framework to cease commercial activities, and the TCC framework for liquidation are not in line with the other. When the main purpose of these provisions are taken into consideration, it could be said that Art. 44 and 337/a of the BEC should be applicable to real person merchants only, and that legal entities fall outside of their scope. In fact, in practice, the commercial registries do not list the declaration to cease commercial activities and declaration of property among the procedures that need to be complied within the scope of liquidation. The registry representatives have also stated verbally that such declarations shall be made by real person merchants, and not by legal entities in liquidation.

Nonetheless, the Supreme Court jurisprudence is established contrary to the arguments and opinion voiced, above. Three different rul-

ings of the Supreme Court General Assembly of Criminal Chambers, under file no. 2010/16-75, decision no. 2010/159 and dated 01.06.2010; under file no. 2011/16-505, decision no. 2012/28 and dated 14.02.2012; and under file no. 2013/11-821, decision no. 2014/478 and dated 4.11.2014 adopt this jurisprudence. In short, the Supreme Court follows the below-summarized logic:

- Art. 44 of the BEC refers to "merchant ceasing commercial activities." The article makes no distinction between real person and legal entity merchants.
- The partnership shall cease through liquidation. This is assessed within the scope of ceasing commercial activities.
- If it were to be accepted that persons authorized to represent and manage a company cannot be charged with the crime regulated under Art. 337/a of the BEC, this would result in real persons being sanctioned; however, managers of companies engaging in the same act would be relieved from punishment. This discrimination has no basis in law.
- Pursuant to Art. 354 of the BEC, in the event this crime is committed during the management and operation of a legal entity, the managers and representatives shall be subject to the sanction. In the given Supreme Court rulings, the managers of limited liability companies are addressed.
- Accordingly, if legal entities violate Art. 44 and 337/a of the BEC, the sanction foreseen under Art. 337/a shall apply.

As a result, commercial companies in liquidation are treated as a merchant ceasing its commercial activities, and therefore, are obliged to make a declaration of property and refrain from disposing of its property for two months in accordance with Art. 44 of the BEC. Otherwise, despite the ceasing of the legal personality, the (former) managers of the legal entity shall be faced with the imprisonment sanction as foreseen under Art. 337/a if the relevant conditions are met.

Conclusion

It is clear that the legal framework governing the ceasing of commercial activities, and the liquidation of commercial companies are

incompatible. Based on the current legislation and the Supreme Court jurisprudence, unless an amendment is made to the applicable codes, legal entities in liquidation must give notice of its ceasing of commercial activities and make a declaration of property prior to the ceasing of its legal personality.

In fact, if liquidation is pursued in accordance with the legal framework, it is unlikely that the creditors will incur damages or make a complaint that results in sanctions. Furthermore, as the TCC introduces certain restrictions on the liquidation of assets, the prohibition to dispose of assets for a period of two months will not result in any major inconvenience, in practice. However, the fact that discrepancies and inconveniences are overcome in practice through various mechanisms does not eliminate the issue that incompatibility exists. Therefore, an amendment is necessary for the BEC provisions to be harmonious with the liquidation procedure as foreseen under the TCC.

Termination Agreements for Agency and Distribution Contracts*

Prof. Dr. H. Ercument Erdem

Introduction

Execution of a termination agreement is one of the methods to terminate a contractual relationship between the parties. An advantage compared to a unilateral termination declaration by one of the parties is that it ensures that the rights and obligations of the parties arising from, or in connection with, the contract have been satisfied, and regulates the post-contract relationship between the parties, as well.

Parties are free to determine the principles of termination, the effective date of termination, and the contents of the termination agreement, to the extent possible under the applicable law. Content should be determined by taking into consideration the particulars of the main contract and the parties' intention. Depending on the parties' intention, the termination date may be set as the signing date of the termination agreement, or a specific date or occasion after the date of signing, as well as a retroactive date.

If both parties have fulfilled their obligations under the contract and are satisfied with the other party's fulfillment, a settlement clause may be set forth in the termination agreement enabling the release of the parties from their duties and obligations under the contract, subject to the conditions of the applicable law. Applicable law and the dispute resolution venue may be different than that of the main contract.

This newsletter focuses on the characteristics and essential contents of termination agreements that terminate agency and distribution contracts. While setting forth the common principles applicable to both types, it also addresses the differences thereof when necessary.

---

* ***Article of June 2015***

Usage and Repurchase of Stocks

Within the ordinary course of business, agencies do not hold stocks. With regard to stocks that are held by distributors, it is up to the parties whether they will continue to be used by the distributor or repurchased by the principal. In the event of repurchase, it is important to explicitly specify the conditions of the goods that are subject to repurchase in the termination agreement; i.e. whether or not they are new, in original packaging, etc. Another item that should be agreed upon by the parties is the repurchase price subject to the condition of the goods, provided that the principles for the determination of the repurchase price have not been regulated under the distribution contract.

Cancellation of Data and Confidentiality

During the period of the agency and distribution relationships, it is usual that confidential information and documentation of the principal are shared with the agent or distributor for conduct of the business. Accordingly, the termination agreement should include provisions regulating the usage or cancellation of such information, documents and materials, and the data and documents that are in the possession of the receiver should be either cancelled or returned to its owner. The parties may agree to determine the confidentiality period following the termination, provided that such confidentiality obligation is not restricted under the applicable competition rules. It is stated under the Turkish Competition Authority's Guidelines on Vertical Agreements[1] that the usage and disclosure of the non-public know-how may be restricted for an indefinite period of time. EU Commission Regulation No. 330/2010[2]

---

1 Guideline on Vertical Agreements was published on June 3, 2009. The provision regarding confidential information is in Paragraph 40 of the Guideline. To find the English version of this Guideline see: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fGuide%2fDikey+Anla%C5%9Fmalara+%C4%B0li%C5%9Fkin+K%C4%B1lavuz.pdf (accessed on: 09.07.2015).

2 EU Commission Regulation No. 330/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices was published on April 23, 2010. The provision regarding the confidentiality of know-how is in Article 5/3 of the Regulation. To find the English version of this Regulation see: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010R0330&from=EN (accessed on: 09.07.2015).

("Regulation") also contains a parallel provision that allows the possibility to impose a restriction that is unlimited in timeframe on the use and disclosure of know-how which has not entered the public domain.

Non-Competition Obligation

It is possible to regulate a post-termination non-competition obligation under the termination agreement. Such an obligation is customary for agency relationships. It is important to explicitly define the scope of the territory, products or services and duration, subject to the non-competition obligation. The non-competition period cannot exceed a period of one year for the distributor, and two years for the agent.

Under Turkish law, Art. 123 of the Turkish Commercial Code ("TCC")[3] governing the agency relationship sets forth that post termination non-compete obligation may be agreed by the parties provided that a suitable amount of compensation is paid to the agent. The non-competition agreement must be made in writing, and a written document that bears the provisions of the agreement and that is signed by the principal should be delivered to the agent. Such agreement can be only made for a maximum period of two years as of the date of termination and should be limited to the geographical area or the group of customers entrusted to the agent and to the kind of goods covered by the agency contract. Council Directive 86/653/EEC[4] ("Directive") also includes similar provisions except for the payment of suitable compensation to the agent but allows national laws to impose other restrictions.

As to distribution relationships, post-termination non-competition obligations are permitted neither as per the Regulation, nor the Block Exemption Communiqué on Vertical Agreements of Turkish Competition

---

3 Turkish Commercial Code no. 6012 was published in the Official Gazette dated February 14, 2011 and numbered 27846, and entered into force on July 1, 2012.

4 Council Directive 86/653/EEC on the Coordination of the Laws of the Member States relating to Self-employed Commercial Agents was published on December 31, 1986. The provision regarding post-termination non-competition obligation of agents is in Article 20 of the Directive. To find the English version of this Directive see: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31986L0653&from=EN (accessed on: 09.07.2015).

Authority No. 2002/2[5]. However, both legislations set forth that a non-competition obligation may be imposed on the distributor for a maximum period of one year provided that the prohibition (i) relates to goods and services that are in competition with the goods or services which are the subject of the contract, (ii) is limited to the facility or land where the distributor operated during the term of the contract, and (iii) is compulsory for the protection of the know-how transferred by the principal to the distributor.

Transfer of Customers

On the subject of the transfer of customers, agents and distributors are subject to different regimes. Upon termination of the agency contract for any reason, the agent is required to transfer its customers within the subject territory to the principal and to co-operate and assist the principal for the conduct of smooth and efficient transitioning.

On the other hand, since the distributors act in their own name and on their own behalf, it is unusual that they return their customers to the principal. Notwithstanding this, there is no restriction for the regulation of a transfer of a customer clause under the termination agreement, and such an obligation can be regulated as a part of the non-competition clause, as well.

In any event, both the agents and distributors must halt all sales, offers for sale, advertising and/or promotion of the products, and must no longer represent the principal within the subject territory.

Post-Termination Commission

As per the Directive, agents are entitled to request commission for transactions that are concluded after termination, provided that (i) the transaction is mainly attributable to the agent's efforts during the period covered by the agency contract, and the transaction was entered into

---

5 Block Exemption Communiqué on Vertical Agreements no. 2002/2 was published on July 14, 2002 and entered into force on the same date. The provision regarding post-termination non-competition obligation of distributors is in Article 5(b) of the Communiqué. To find this Communiqué see: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fTebli%25c4%259f%2fteblig35.pdf (accessed on: 09.07.2015).

within a reasonable period after the contract terminated; or (ii) the order of the third party in relation to a transaction that would normally entitle the agent to commission during the term of the contract reached by the principal or the agent prior to the termination of the contract. Art. 113/3 of the TCC also follows these same conditions.

Notice Periods

A contract is deemed to be indefinite if it does not provide any specific term, or if both parties continue to perform the fixed-period contract after the expiry of its term. The Directive determines minimum notice periods for the termination of indefinite term contracts depending on the timing of the notice; i.e. one month for the first year of the contract, two months for the second year, and three months for the third year and subsequent years. The parties are not allowed to agree on shorter notice periods.

National laws of the member states may fix longer notice periods; i.e. four months for the fourth year of the contract, five months for the fifth year, and six months for the sixth and subsequent years, and may decide that the parties may not agree to shorter periods. Turkish law fixes the notice period as three months.

Considering the freedom to set longer notice periods, setting of the same may be an essential content of the termination agreements. If longer periods are provided in the agreement, it is important to know that the notice period to be observed by the principal cannot be shorter than the one to be observed by the agent, and any attempted waiver of this right will be void.

Indemnity and Compensation

The Directive offers choices to the member states to include in their local legislations (goodwill) indemnity or compensation. Parties are not allowed to derogate from the provisions on indemnity and compensation that are to the detriment of the agent prior to the expiry of the agency contract. The agent loses his entitlement to indemnity or to compensation if he does not notify the principal that he intends to pursue his entitlement within one year following the termination of the contract.

No indemnity or compensation is payable to the agent in cases where (i) the immediate termination by the principal is justified by the agent's default; (ii) the agent has terminated the contract, unless such termination is justified by circumstances attributable to the principal, or on the grounds of age, infirmity or illness of the agent, the consequence of which he cannot reasonably be required to continue his activities; or (iii) the agent assigns his rights and duties under the contract to another person.

Compensation

In the event of termination, if, in particular, the agent is deprived of the commission that he would normally be entitled to while the principal derives benefits that accrue in connection with the agent's activities, or has been unable to amortize the costs and expenses he had incurred for the performance of the contract on the principal's advice, then such agent would be entitled to compensation for the damages suffered.

Indemnity

As per the Directive, goodwill indemnity may be requested by the agent on the condition that (i) the agent has brought new customers, or has significantly increased the volume of business with existing customers, and the principal continues to derive substantial benefits from the business with such customers, and (ii) the payment of this indemnity is equitable, having regard to all of the circumstances and, in particular, the commission lost by the agent on the business transacted with such customers.

Under Turkish law, conditions for agents' entitlement to goodwill indemnity are similar to the provisions of the Directive. In addition, the last paragraph of Art. 122 of the TCC sets forth that the relevant provisions are also applicable to the termination of exclusive distribution agreements and other similar continuous agreement relationships that grant an exclusive right, provided that it is not in breach of the fairness principle.

Conclusion

Termination agreements usually include provisions that regulate non-competition, confidentiality, goodwill indemnity, stocks, terms, and notices, which are essential in terms of agency and distribution contracts. In conformity with the freedom of contract, provisions may be extended so as to cover certain other matters depending on the nature of the main contract and the intention of the parties. Rules of the laws that are applicable to the termination agreement must certainly be taken into consideration as they vary between countries.

Goodwill Indemnity of the Agent Pursuant to the Turkish Commercial Code No. 6102*

Att. Naciye Yilmaz

In General

Turkish Commercial Code No. 6102[1] defines the agent as "*a person who is, on a continuous basis, professionally empowered by a contract to act as an intermediary to facilitate or conclude transactions within a specific geographical area or region on behalf of that commercial enterprise, without being legally related to a commercial enterprise as a commercial representative, salesperson or an employee.*"

As a person conducting its activities on a continuous basis, the agent creates goodwill for its principal, reinforces its principal's relations with the customers, and introduces the trademark of the principal to the customers. Subsequent to the end of the agency relationship, the principal continues to derive benefits from the business with the new customers; however, the agent may not claim any commission as the agency agreement has terminated. This indemnity is entitled as the goodwill indemnity of the agent. The goodwill indemnity is also known as portfolio compensation or clientele indemnity. However, goodwill indemnity is not an indemnity in a usual sense[2]. The purpose of the goodwill indemnity is not to compensate for actual damage arising from the fault of a party, but to ensure, on an equitable basis, an agent's rights deriving from the clientele. Therefore, the fault of the principal is not a prerequisite for entitlement to goodwill indemnity[3].

---

* ***Article of February 2015***

1 Published in the Official Gazette dated 14.02.2011 and numbered 27846, and entered into force on 01.07.2012.

2 **ARKAN Sabih**, *Ticari İşletme Hukuku*, Ankara, 2011, p. 220.

3 **KAYA Arslan**, *Türk Ticaret Kanunu Şerhi, Acentelik*, İstanbul, 2013, p. 231-232.

Turkish Commercial Code No. 6762[4] ("Abrogated TCC") has not provided any explicit provision regarding goodwill indemnity. A goodwill indemnity claim of an agent is based on the broad interpretation of Article 134 of the Abrogated TCC. The first paragraph of the relevant article provides that the party terminating the agency contract without complying with the three month notice period shall compensate the losses of the other party arising from the non-fulfillment of the transactions. The second paragraph sets forth that where the agency contract is terminated due to death, loss of legal capacity, or bankruptcy, a compensation calculated that is based on the remuneration that would have been paid to the agent as a result of the completion of the transactions shall be paid to the agent. Nevertheless, application of this article is not appropriate as goodwill indemnity is not considered as a real indemnity[5]. Article 122 of the TCC put an end to all debates by adopting a clear provision pertaining to the goodwill indemnity of the agent. This Newsletter article assesses goodwill indemnity with its conditions of application pursuant to Article 122 of the TCC.

Conditions to Claim Goodwill Indemnity

Conditions under which goodwill indemnity may be claimed are regulated under Article 122 of the TCC. These conditions are sought cumulatively.

Agency contract should be terminated

Goodwill indemnity is one of the consequences arising from the termination of the agency contract. The contract may be terminated by a contracting party, or may expire automatically. In order for the agent to claim goodwill indemnity, the termination should not be the result of the fault of the agent, nor should it result due to any cause attributable to the principal.

In order to consider causes attributable to the principal, fault is not required. The following are examples for such causes; delay of pay-

---

4 Abrogated on 01.07.2012.

5 **ERDEM Ercüment**, *Türk İsviçre Hukukunda Denkleştirme Talebi*, İsviçre Borçlar Kanunu'nun İktibasının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri, İstanbul, 2009, p. 212.

ment or non-payment of the commission without any just cause, reduction of the territory, imposition of weekly reporting obligation contrary to the independency of the agent. If the agent terminated the agency contract without any reason attributable to the principal pursuant to Article 122/3 of the TCC, the latter shall not be entitled to goodwill indemnity. Since the relevant article is not a mandatory provision, the parties may agree that the agent terminating the contract without any cause attributable to the principal shall be entitled to goodwill indemnity[6].

Pursuant to the same paragraph of Article 122, the agent shall not be entitled to goodwill indemnity where the principal has terminated the agency contract due to a fault of the agent.

Principal should continue to derive benefits from business with new customers.

Another condition under which to claim goodwill indemnity is the principal's continuation to derive substantial benefits from the business with new customers that the agent has brought to the principal.

New customers mean the customers who are brought to the principal after the commencement of the agent's activity. Both the customers concluding an agreement with the principal for the first time, and the customers brought to the principal with whom the commercial relations were terminated in the past, are considered to be new customers. Customers gained by the principal prior to the agency contract, or customers brought to the principal as a result of the activity of the former agents, are not included in this definition of a new customer. Nonetheless, development of commercial relations with existing customers should be considered within this context. The burden of proof is on the agent where it should be proved that new customers have been brought to the principal[7].

While determining the benefit of the principal, characteristics of the market, competition conditions in the market, possible changes in the market, and the scope and term of the relation of the principal with

---

6 **ARKAN Sabih**, *Ticari İşletme Hukuku*, Ankara, 2011, p. 224.

7 **KAYA Arslan**, *Türk Ticaret Kanunu Şerhi, Acentelik*, İstanbul, 2013, p. 238.

new customers shall be assessed as far can be done at the time of the termination of the agency contract[8].

Agent should be deprived of the commission

Another condition under which to claim goodwill indemnity is that the agent should be deprived of the commission due to the termination of the contract. The term "commission" does not refer to commissions that arose during the agency contract, but to commissions due under the contracts to be concluded with new customers after the termination of the agency contract. Despite the termination of the contract, if any remuneration has been paid to the agent, goodwill indemnity shall not be claimed[9].

Payment of this indemnity should be equitable

Within the framework of the conditions under which goodwill indemnity may be claimed, we, lastly, point out the criterion for equity. Insofar as equity may not be considered as the sole reason to be entitled to a goodwill indemnity without the fulfillment of the other conditions, upon the fulfillment of the afore-mentioned conditions, then equity shall be taken into consideration. The burden of proof is on the principal when it should be proven that the claim of goodwill indemnity is contrary to equity. In this respect, the characteristics of the case at hand, and the provisions of the agency contract, shall be taken into consideration. Similarly, while determining the amount of the indemnity, brand awareness and power shall be also considered within this scope[10].

Calculation of the Indemnity

In accordance with Article 122/2 of the TCC, "*The amount of the indemnity may not exceed a figure equivalent to the indemnity calculated from the agent's average annual remuneration, or other remuneration paid over the preceding five years. If the agency contract con-*

---

8 **ARKAN Sabih**, *Ticari İşletme Hukuku*, Ankara, 2011, p. 222.

9 **KAYA Ars**lan, *Türk Ticaret Kanunu Şerhi, Acentelik*, İstanbul, 2013, p. 243.

10 **KAYA Arslan**, *Türk Ticaret Kanunu Şerhi, Acentelik*, İstanbul, 2013, p. 244-246.

tinued less than five years, the indemnity shall be calculated on the average for the period in question." The law stipulates an upper limit; however, the payable amount is not required to reach this amount. Indeed, as understood from the legislative justification of the TCC, this calculation method aims to protect the agent. It is also states that the mandatory character of the provision shall be determined as per scholars' opinions and court practices. However, legislative justification of the TCC also states that the ratio legis of the related article may enable the determination of another calculation method providing a higher amount of claim for the agent.

Claim for Goodwill Indemnity

Pursuant to Article 122/4 of the TCC, the parties may not derogate from the goodwill indemnity prior to the expiry of the agency contract. This provision aims to protect the agent. The claim for indemnity must be pursued within one year following the termination of the agency contract. In accordance with this article's legislative justification, this duration should be considered as a lapse of time[11].

Application of the Provision for Similar Contracts

In principle, a goodwill indemnity claim relates to agency contracts. However, pursuant to Article 122/5 of the TCC, "*Unless it is equitable, this Article shall apply to the termination of continuous contracts that grant a monopoly right, such as exclusive distribution contracts.*" Unlike the agent, an exclusive distributor is not a commercial auxiliary, and concludes agreements in his own name and on his own behalf. Therefore, the exclusive distributor's clientele should be returned to the supplier following the expiry of the contract[12].

Conclusion

Through Article 122, the TCC brought a clear provision pertaining to the goodwill indemnity of the agent. In accordance with the conditions provided in this Article, the principal should continue to derive

---

11 **ARKAN Sabih**, *Ticari İşletme Hukuku*, Ankara, 2011, p. 225.

12 **KAYA Arslan**, *Türk Ticaret Kanunu Şerhi, Acentelik*, İstanbul, 2013, p. 261-262.

substantial benefits from the business with new customers that the agent has brought to the principal. Moreover, the agent should be deprived from the commission regarding transactions with the new customers. In addition, payment of goodwill indemnity should be equitable. In this case, the agent may claim an indemnity not to exceed an amount that is equivalent to an indemnity calculated from the agent's average annual remuneration, or other remunerations paid in the preceding five years. This claim must be pursued within one year following the termination of the agency contract. The parties may not derogate from the goodwill indemnity prior to the expiry of the agency contract. Unless it is equitable, provisions for the agent's right to goodwill indemnity shall apply for the termination of continuous contracts granting monopoly rights, such as exclusive distribution contracts.

Brokerage Agreements*

Att. Nilay Celebi

Introduction

Brokerage agreements are governed by Articles 520-525 of the Turkish Code of Obligations ("Code"). Brokerage agreements are the agreements where a broker prepares an environment to enable the parties to reach an agreement, and undertakes to be the intermediary for the execution of an agreement, and qualifies for a fee after the execution of such agreement. Real estate brokers, employment offices, exchange brokers, financial brokers (eg: persons connecting the seller of a company and buyers) are what constitutes brokers.

Brokerage

Persons who are considered as brokers provide an opportunity to parties to reach an agreement and acts as intermediates between those persons who are to execute an agreement, and/or directs and leads the negotiations of this agreement.

Brokers,

(i) may be the lead in identifying persons who seek to reach an agreement in accordance with the request, needs, terms and conditions of the principal under the brokerage agreement, and suggesting those people to the principle contact, and may gather the parties together, and assist them in connecting with each other.

(ii) may be actively involved in the negotiation process of the parties, prepare or comment on the main agreement, and thus, may play an active role in the execution and signing of such agreement.

---

* ***Article of November 2015***

The principal may appoint more brokers. Those brokers may have differing duties under the main brokerage agreement, or may be appointed to act in concert with the existing broker(s).

There is no precedent form with respect to brokerage agreements except for real estate brokerage agreements. However, having a written form of brokerage agreements is important for the purposes of evidence and future disputes. Real estate brokerage agreements, wherein the broker connects the buyer/tenant and the lessor/seller of a certain real estate, must be in writing. Provisions under the Code with regard to representation shall apply to brokerage agreements.

Rights and Obligations of the Broker

In principal, brokers are entitled to a fee when the parties reach an agreement, and upon the execution of the final and main agreement. However, the principal and the broker may agree on the payment of a fee (a portion or full payment thereof) even if the agreement is not executed. If there is no agreement, the brokerage fee may be determined according to the tariff, or upon private agreement, if there is no tariff according to the practice. (Code Art. 522).

If the parties agree on the payment of the broker's expenses as set forth in the brokerage agreement, then the expenses of the broker shall be paid, even if the main agreement is not executed and signed. In practice, brokerage agreements determine the payment of the documented expenses of the brokers within a limited capped amount, and for any overage expenses, the broker shall obtain the prior consent of the principal.

The broker, in principal, shall fulfill his duties in person; however, as per Article 507 of the Code, he may delegate his duties to a third person; in such case, he shall be responsible for the acts of such third person.

The broker shall report to the principal with regard to his actions, and act in accordance with the instructions given by the principal. The broker shall be loyal, and shall fulfill the duty of care. In the case of a breach of his duty of care, he may forfeit his right to claim the payment of the fee. As per Article 23 of the Code, if the broker acts in favor of the counterparty and not the principal, in breach of his duty, or acts

contrary to good faith and agrees on a payment of a fee from the counterparty, then he forfeits his right to claim the payment of the fee and the expenses.

Obligations of the Principal

The main obligation of the principal is the payment of the fee of the broker, if and when the parties reach a final agreement, and upon execution of the agreement. If the payment of the expenses is agreed to between the broker and the principal, then the principal shall pay all agreed expenses even though the main agreement is not executed and signed. The broker may request ordinary expenses, and expenses which are reasonably considered mandatory in the due fulfillment of his duties.

The principal may not appoint another broker if there exclusivity exists between the broker and the principal. The broker may claim indemnity in the event of a breach of an exclusivity provision.

Conclusion

Brokerage appears as the legal basis for real estate brokers, employment offices, exchange brokers, and financial brokers under the Turkish Obligations Law. Brokers bring together parties and provide an opportunity to parties to reach an agreement, and then acts as intermediary between those persons who are to execute an agreement, and/or direct and lead the negotiations of agreement. Therefore, brokers play a significant role in ordinary and financial life.

New Instructions in Turkish Retail Business: Law on Regulation of Retail Trade*

Att. Ozgur Kocabasoglu

Introduction

The Law on Regulation of Retail Trade ("LRRT" or "Law") numbered 6585, which entered into force through its publication in the Official Gazette dated 29.01.2015, and numbered 29251, aims to simplify the procedure regarding the opening and commencement of activities in retail businesses, to provide retail trade in compliance with efficient and sustainable competition conditions, to protect consumers, to procure balanced growth and development for retail businesses, and to regulate the activities of retail businesses, producers and suppliers. The new Law introduces certain obligations for these businesses, such as shopping malls, outlet stores, and other retail businesses that were not previously regulated or defined under any legislation.

The Law aims to establish legal grounds for the retail trade market, and is comprised of regulations that govern both conventional and organized retailing.

Retail Information System (PERBIS)

The Law envisages an information system that allows retail businesses to make applications a rend perform other necessary operations regarding their openings and closings, as well as other activities. This system transmits these applications to the necessary authorities or institutions, executes the evaluation and finalization of these applications, forms a database for the retail businesses, and provides the exchange of information.

---

* ***Article of February 2015***

The Retail Information System ("PERBIS") will be established by the Ministry of Customs and Trade ("Ministry") and the access to PERBIS will be granted to other relevant authorities and institutions, as well. PERBIS shall have an on-line connection with the electronic registration systems of the above-stated authorities and institutions. According to LRRT Art. 5, PERBIS will also be able to grant retail business place and work permits. These businesses may choose to submit their applications for these permits either directly to the authorized/related institutions, or through PERBIS. The applications directed to the authorized institutions will be forwarded to PERBIS, accordingly. The institutions authorized to grant permits will conduct a pre-assessment.

Following the pre-assessment procedure, affirmatively assessed applications will be transferred to the relevant institutions within three days from the date of application, in order for the incorporation and opening operations to be initiated. In conjunction with this transfer, necessary applications shall be deemed to have been made before the related authorities and institutions. Businesses that are deemed to be inadequate will be informed of this decision within thirty days, and will include the grounds for this decision.

According to Provisional Article 1 adopted by the LRRT, current business licenses will remain valid under the new system. However, information concerning these businesses will be transferred to PERBIS by the authorized institutions within one year following its establishment. The Ministry may extend this period twice, for periods of one year, each time.

This provision enables the incorporation operations of retail businesses to be less complicated and less costly. Additionally, this new registration system will expedite traceability functions amongst the businesses. Pursuant to the LRRT, Art. 4/4 and Art. 5, the procedures and principles of the information to be processed and accessed through PERBIS, as well as the operation procedures of this system, will be promulgated by regulations.

Claims of Premiums and Consideration, Store Branded Products

The LRRT Art. 6 prevents large stores, chain stores, and franchise businesses to claim premiums, or other similar claims, from producers

and suppliers of products. The stated provision prohibits premiums or other claims that are not directly connected to the demand of the products, such as the consideration to open or alter the stores, turnover deficit charges, and contribution fees of banks and credit cards. As this article and its preamble state, premiums and considerations provided for in the provision are not listed using the *numerous clausus* approach. Therefore, all of the retail businesses' premium or consideration claims that are not directly connected to the demand of products may be precluded within the context of this provision. In addition, the retail businesses (shopping malls, chain stores, etc.) may be entitled to premiums or consideration regarding advertisements, announcements, or shelving-space allocations that are directly connected to the demand of the products, only if the type and ratio of these premiums or considerations are specified in the agreements that are concluded between the retail businesses and producers or suppliers. These considerations can only be claimed within the duration of the agreement, and on the condition that the relevant product shall be displayed for sale on shelves until the expiration of the agreement. Upon any non-compliance with this provision, an administrative fine that is equal to the amount of the unjustly applied premium or consideration will be imposed upon the business according to the LRRT Art. 18/a.

With the intent to procure protection for small businesses, LRRT Art. 7 stipulates that payments made to the suppliers or producers by the retail businesses must be fulfilled on the date provided in the agreement. The period for payments of fast-moving consumer goods, whose shelf life is limited to 30 days, cannot exceed 30 days following the delivery of the goods. This provision will be applied in cases where the producer or the supplier is a small business[1] and the debtor is a large-

---

[1] Regulation on the Definition, Qualities and Classification of Small and Medium Scaled Enterprises Art. 5/b defines small businesses. Pursuant to the definition, a small business is a business in which less than fifty persons are employed, and that either of its annual net sales revenue or financial statement does not exceed eight million Turkish Liras. For the Regulation, please see: http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=3.5.20059617&MevzuatIliski=0&sourceXmlSearch=K%C3%BC%C3%A7%C3%BCk%20ve%20Orta%20B%C3%BCy%C3%BCkl%C3%BCkteki%20%C4%B0%C5%9Fletmelerin%20Tan%C4%B1m%C4%B1,%20Nitelikleri%20ve%20S%C4%B1n%C4%B1fland%C4%B1r%C4%B1lmas%C4%B1%20Hakk%C4%B1nda%20Y%C3%B6netmelik.

scaled business[2].

Within this framework, the LRRT Art. 8 states that the name, trade name, or brand name of the producers is to be printed on fast-moving consumer goods (food, beverages, cleaning and personal care products) that are produced in Turkey, along with the name, trade name or brand name of the retailer.

Sales Campaigns and Shopping Festivals

LRRT Art. 8 allows retail businesses to organize discounts and promotional sales, providing that the start and end dates of these sales are predetermined. Additionally, these sales shall not constitute breaches of the Law on the Protection of the Consumer ("LPC") numbered 6502 and other related legislation. The duration of these sales must last up to six months in the event of liquidation, and three months in the event of business openings, closings, transfers, or alterations to activities or addresses.

In addition, local administrations, professional organizations with public institution status, as well as companies and other legal entities that these administrations and organizations are connected with, will be able to organize shopping festivals within certain periods of time within a year, on provincial, regional or national scales. These activities were conducted beforehand; however, along with this regulation, the legal grounds and conditions of these activities are introduced. According to the preamble of the provision in question, the provision aims to prevent unjust practices by referring to the LCP. It has also intended to prevent businesses from creating unjust circumstances for both their competitors and consumers, by alleging non-existent reasons, such as liquidation or going out of business.

---

2 Regulation on the Procedures and Principals of the Efficiency Project Awards Art. 3/c defines large-scale businesses. Pursuant to the definition, large scale-businesses are not considered as micro, small or medium-scaled businesses. For the Regulation, please see: http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.19415&MevzuatIliski=0&sourceXmlSearch=Verimlilik%20Proje%20%C3%96d%C3%BClleri%20Usul%20Ve%20Esaslar%C4%B1%20Hakk%C4%B1nda%20Y%C3%B6netmelik.

Continuous Discount Sales

LRRT Art. 10 has introduced the definition of outlet stores for the first time under the term of "continuous discount sales." According to the definition, continuous discount sales concern end of the line products, end of season products, export surplus products, faulty products, and similar products, by retail businesses, at a discounted price, or at ex-factory cost, throughout the year. Currently, some businesses tend to misguide consumers and create unfair competition by making sales through the use of "outlet" terminology, even though discounted products do not constitute a high percentage of the products being sold in their stores. In order to avoid such practices, certain thresholds and obligations are stipulated under this provision. In order for retail businesses that are engaged in permanent discount sales to use such terminology (outlet, outlet store, etc.) at least 70% of their products must be sold pursuant to the definition of the continuous discount sale. In order for a shopping mall to use the above-mentioned terminology, all of the stores therein must qualify as businesses that conduct continuous discount sales.

On the other hand, retail businesses that are engaged in permanent discount sales must place signs that are easily read, and seen, on the front of the business, and inside of their stores, stating that discount sales are being offered in their stores.

According to Provisional Article 1/6 of the Law, retail businesses that conduct continuous discount sales must comply with Art. 10 within two years from the effective date of the Law. In the event of noncompliance or a breach of Art. 10, an administrative fine of 5,000 TL, pursuant to LRRT Art. 18/c will be imposed.

Obligations of the Shopping Malls

Shopping malls are defined under the article titled "Definitions"; hence shopping malls, "Malls," as they are commonly referred to, obtained legal status. According to the definition, shopping malls are "*businesses having an entirety either within a building or any other area, with a central management and communal areas, as well as other qualities determined by the regulation, that contain large stores and/or business complexes where nourishment, clothing, entertainment, recreation, cultural and other needs are addressed.*"

LRRT Art. 11/1 necessitates that 5% of the sale space must be allocated to social and cultural activities. According to the second subparagraph of the same provision, communal areas, such as emergency medical intervention units, prayer rooms, baby changing units, and playgrounds must be provided. In accordance with Provisional Article 1/7 of the Law, businesses that obtained the necessary permits prior to the effective date of the Law must establish these stated communal areas within one year starting from the effective date of the Law. It has been envisaged that in the event of non-compliance, or upon a breach of the first and second subparagraphs, administrative fines between 20,000 TL and 50,000 TL that corresponds to each square meter that has not been duly allocated, will be, respectively, imposed.

Another innovation regarding shopping malls is that at least 5% of the space of sale must be allocated to tradesmen and craftsmen, and at least 3% of the sale space must be allocated to persons who conduct rare businesses. It is stipulated that the stated spaces must be rented to those persons provided for, above. According to subparagraphs 8 and 9 of Provisional Article 1 of the Law, upon a vacancy of sale spaces, these spaces must be rented to tradesmen, craftsmen, and to persons who conduct rare businesses until the stipulated percentage is reached. According to LRRT Art. 18/e, in the event of a breach of the stated provisions, administrative fines corresponding to the current market value of each square meter that has not been duly allocated, will be imposed. Additionally, it is stipulated that large stores or chain stores in which fast-moving consumer goods are being sold must allocate a certain amount of shelves for local products. According to LRRT Art. 18/f, an administrative fine of 20,000 TL for each store or branch of the business that is in breach will be imposed upon the non-conformity to this provision.

Conclusion

The Law on Regulation of Retail Trade constitutes legal grounds for retail businesses, and in particular, for shopping malls and outlet stores. The Law sets forth provisions and obligations on both the protection of consumers, and on unfair competition. In accordance with Provisional Article 1 of the Law, certain regulations will be promulgated within nine months, by the Ministry of Customs and Trade.

Provisions Introduced by the Law on the Regulation of Electronic Commerce*

Att. Selen Ozturk

Introduction

The Law on the Regulation of Electronic Commerce numbered 6563 ("E-Commerce Law") was published in the Official Gazette dated 05.11.2014 and numbered 29166 and will enter into force on 01.05.2015. The E-Commerce Law carries importance specifically in Turkey, which occupies the 9th place among the developing markets with highest e-commerce potentials[1]. The scope of the E-Commerce Law comprises of commercial communication, the liabilities of the service providers and the intermediary service providers, the agreements concluded by electronic means, the obligation to provide information on electronic commerce and the sanctions.

Ratio Legis of the E-Commerce Law

As indicated in the legislative justification of the E-Commerce Law, the previous legislation was falling short in regulating the terminology introduced by the developments of the information technology such as access, content provider and service provider. The E-Commerce Law is adopted in order to address this problem and hence to fill the relevant gap in our legal system. Moreover, the E-Commerce Law aims to achieve harmonization with the relevant European Union ("EU") legislation, namely the Directive 200/31/EC on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in

---

* ***Article of January 2015***

1 **Afra, Sina**. Dijital Pazarın Ortak Noktası E-Ticaret: Dünya'da Türkiye'nin Yeri, Mevcut Durum ve Geleceğe Yönelik Adımlar, TÜSİAD Publishing, June 2014, p. 35. http://www.tusiad.org.tr/__rsc/shared/file/eTicaretRaporu-062014.pdf (Date of last access: 20.01.2015)

the Internal Market ("Directive")[2].

The Obligations of the Service Provider

Defined in Art. 2/1(ç) of the E-Commerce Law as "*real or legal persons engaging in electronic commercial activities…*", the service provider is obliged to provide certain information to the recipient before the conclusion of an agreement by electronic means pursuant to Art. 3/1. The relevant information are listed in the article as up-to-date and easily accessible introductory information of the service provider, technical steps necessary for the execution of the agreement, information on whether the executed agreement will be preserved by the service provider and whether it will be accessible by the recipient, the information regarding the technical tools for the determination and correction of the errors in data entry, the privacy rules and information in relation to alternative dispute resolution methods.

In accordance with this provision, the recipient is acquainted with the sales procedure before the agreement is executed and gives his/her decision accordingly. Therefore, the relevant obligation is an obligation which relates to the stage prior to the execution of the agreement. Moreover, Art. 3/3 of the E-Commerce Law stipulates that in case that the parties are not consumers, it is not obligatory to provide information on the trade association and the code of conduct of the service provider to the recipient. However in any case, the seller is under the obligation to enable the recipient to preserve the contractual provisions and general transaction terms. Thus, a unilateral amendment to the contractual terms by the seller is prevented and the review of the agreement by the recipient is enabled.

Regulations Concerning the Order

The Art. 4 entitled "Order" regulates the principles concerning the orders placed through electronic communication tools. The relevant article regulates order placing stage. Accordingly, the first obligation

---

2 Directive 200/31/EG on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=DE (Date of last access: 20.01.2015).

of the service provider is to ensure that the terms and conditions of the agreement, including the cost, is seen by the recipient prior to the entry of the payment information. Following this, the service provider shall send a confirmation through electronic means to the recipient without delay. Moreover, the service provider is obliged to provide necessary technical facilities to the recipient for the correction of the input errors. Pursuant to the legislative justification of the E-Commerce Law, the relevant obligation is an obligation to perform and not an obligation to inform/notify.

Regulations Concerning the Commercial Communication

The commercial communications are regulated under the Art. 6 of the E-Commerce Law. As per the said article, the electronic messages which include direct marketing or advertisement cannot be sent to the recipients through the use of automated calling systems without human intervention, facsimile machines (fax) or electronic mail without the prior written consent of the recipients. It should also be noted that the abovementioned provision is not applicable to consented electronic commercial communication databases established prior to the effective date of the E-Commerce Law.

Two systems are accepted worldwide for the supervision of the unsolicited e-mails. The first system is the "*opt-in*" system, which is also adopted by the E-Commerce Law. This system requires the prior consent of the recipient as a condition for the service providers to communicate with the recipients by electronic means. Accordingly, the service providers cannot send any fax, e-mail and text messages to the potential recipients without their prior consent. Furthermore, the Art. 7 of the E-Commerce Law stipulate that the content of the communication shall be in compliance with the consent provided.

The second system is called the "*opt-out*" system and it is a system accepted by the US and Far East countries[3]. According to this system, the recipient has the right to decline the electronic communication tools which are used. In other words, the service providers do not

---

3 Legislative Justification of Law numbered 6563, p. 7.

require the prior consent for the first e-mail; however the recipient may further prevent receipt of other e-mails at any time.

As far as Art. 8 of the E-Commerce Law is concerned, it is observed that the "opt-out" system is not completely rejected by the E-Commerce Law. In accordance with the said provision, the recipients may refuse to receive commercial electronic communications without any cause even though they have provided their consent beforehand. The same provision regulates the obligations of the service provider regarding the easy and accessible notification of refusal of further communication, inclusion of necessary information regarding the refusal notification in the communication and cessation of further communication within three days following the refusal notification. Additionally, the opt-out system is accepted as the principal system for the electronic commercial communication concluded with craftsmen and merchants pursuant to the Art. 6/1 of the E-Commerce Law.

Regulations Regarding the Protection of Personal Data

E-Commerce Law Art. 10 regulate the obligations of the service provider and intermediary service provider concerning the protection of personal data. Accordingly, the service providers and intermediary service providers are responsible for the preservation and protection of the personal information of the recipient, which are obtained due to the transactions concluded within the scope of E-Commerce Law. Moreover, they are not entitled to use such data for any other purposes and to disclose such data to any other third party without the consent of the recipient. This provision aims to harmonize the Turkish legislation with the Directive numbered 2002/58/EC.

Conclusion

The E-Commerce Law aims to define the terms such as service provider, electronic commercial communication and recipient, emerged especially after internet access became widespread and to regulate the relations between these terms in order to bring harmonization with the EU legislation. The law regulates the service provider's obligation to provide information and the content and exceptions of such obligation. In addition to this, the E-Commerce

Law regulates the supervision of unsolicited e-mails and requires an approval system for the recipients who are not craftsmen or merchants prior to the sending of the communications, which constitute a problem for the internet users on a daily basis. Regulation of the e-commerce which is expected to develop even further in the future has a vital importance since it ensures the formation and strengthening of trust between the service providers and the recipients.

Regulations regarding the Operating License of Payment Institutions and their Corporate Governance*

Att. Selen Ozturk

Introduction

The Law on the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions[1] ("Law on Payment Services") and the Regulation on Payment Services and Electronic Money Issuance and Payment Institution and Electronic Money Institutions[2] ("Regulation on Payment Services") regulates the procedures and principles regarding payment services and electronic money issuance, as well as the activities of payment institutions and electronic money institutions that operate within Turkey. The regulation of payment services is of vital importance in a world where information systems develop each day. Turkey, in order to remain in sync with current developments, has set forth legal regulations on payment services. The Regulation on Payment Services regulates, in detail, transactions that are subject to operating permits, regulations regarding funds, corporate governance of, and agreements concluded by payment institutions. This article specifically examines operating permits granted, and the corporate governance principles that payment institutions abide by.

Payment Services and Payment Institutions

In accordance with Art. 12 of the Law on the Payment Services, (i) all transactions that are required in order to operate a payment account, including services which enable cash to be placed in, and withdrawn from, a payment account, (ii) execution of payment transactions,

---

* ***Article of April 2015***

1 Published in the Official Gazette dated 27 June 2013 and numbered 28690.

2 Published in the Official Gazette dated 27 June 2014 and numbered 29043.

including the transfer of funds to and from a payment account with the user's payment service provider, direct debits, including one-off direct debits, payment transactions through a payment card or a similar device, credit transfers, including standing orders, (iii) issuing or acquiring payment instruments, (iv) money remittances, (v) execution of payment transactions, where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital, or IT device, and the payment is made to the telecommunication, IT system, or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services, and (vi) corresponding services that enable bill payments, are considered as payment services.

As set forth under the Law on the Payment Services, institutions that may provide payment services are limited to those institutions listed under Art. 13 of the Law. Accordingly, institutions other than the banks, electronic money institutions, and payment institutions may not provide payment services.

Conditions to be fulfilled by the Institutions

Institutions that seek to provide payment services must satisfy certain conditions. These conditions are stipulated under Art. 14 of the Law on Payment Services. Accordingly, the payment institution is required to (i) be established as a joint stock company, (ii) meet the bank founders' eligibility criteria as set forth in Banking Law No. 5411 for shareholders who hold ten percent or more shares in that payment institution's capital, and which have control over the said payment institution, (iii) have shares issued against cash, and which are fully registered in its name, (iv) have a paid-up capital that is comprised of cash and free from all kinds of fictitious transactions, and which is not less than one million Turkish Liras for payment institutions that provide corresponding services, which provide bill payments, and not less than two million Turkish Liras for other payment institutions, (v) have sound and prudent management, adequate personnel, and the technical equipment to perform payment services transactions within the scope of the Law on Payment Services, and to establish necessary units for complaints and objections, (vi) take necessary precautions for the continuity of the activities to be conducted within the scope of Law on

Payment Services, and for the security and confidentiality of the payment service user's funds and information, and (vii) have a transparent and clear partnership structure and organizational system that does not prevent supervision of the Banking Regulation and Supervision Agency ("Agency").

Institutions that fulfill such conditions may apply for an operating license in order to conduct payment services. Institutions whose operating license application has been granted are entitled to act as payment institutions, and the decision that grants an operating license is published in the Official Gazette.

Application for Operating License

Payment institutions that seek to provide payment services within Turkey are required to apply to the Agency for an operating license. The documents that must be submitted to the Agency are listed in detail under Art. 8 of the Regulation on Payment Services. Documents must be submitted both for the company applying for the operating license, as well as for the real and legal shareholders of the company who hold, directly or indirectly, ten per cent or more shares in the company. These documents generally confirm that the company is not bankrupt, does not have any tax or premium debt, has not been found to be guilty of certain crimes, and, as well, provides the documentation that sets out the capital of the company.

Moreover, the Regulation on Payment Services regulates specific documents if the shareholders who hold, directly or indirectly, ten per cent or more shares in the company who are applying for an operating license, and the controlling shareholders that are banks or financial institutions established abroad. In this case, the documents required by the relevant legislation are limited due to the fact that the shareholder is a bank established abroad, thus being required to abide by the international principles that are established for banking.

As per Art. 8/4 of the Regulation on the Payment Services, if any deficiencies in the information and documents relating to the operating license are not cured within six months as of the date of notification by the Agency, the application for the operating license shall be rendered invalid.

Principles regarding the Corporate Governance of Payment Institutions

Payment institutions must have a developed management network due to their activities. Accordingly, Articles 16-21 of the Regulation on Payment Services sets forth the corporate governance of payment institutions. The board of directors of payment institutions may not be comprised of less than three persons, including the general manager. The board of directors is responsible for determining strategies and policies with respect to the activities of the internal control and risk management units of the payment institutions, determining policies with respect to the management of information systems and determining, managing, monitoring and reporting the relevant risks. The Regulation of Payment Services establishes special conditions for general managers. In accordance with this regulation, a general manager must have at least 7 years of professional experience in management or finance, and have an undergraduate education in the related field.

Moreover, the members of the board of directors and the general manager must satisfy certain conditions in order to be eligible to sit on the board of directors of a payment institution. The members of the board of directors and the general manager must submit the documents listed under Art. 18 of the Regulation on Payment Services, as well as providing certain undertakings.

Internal controls constitute an important part of corporate governance in payment institutions. In order to carry out activities effectively, and procure unity between systems, an internal control system must be established. Another system to be established along with internal controls is the risk management system. The risk management system aims the identification, measurement, supervision, control and reporting of all risks that the payment institutions may be exposed to in line with the scope and structure of the activities of the payment institutions.

In this regard, one of the most important regulations that the payment institutions are subject to are inspections which are conducted by the Agency. The Agency is entitled to conduct on-site inspections and distant surveillance of the payment institutions. This provision aims to control the activities of the payment institutions, as well as to procure the regular performance of activities.

Conclusion

In line with the developing technology, payment systems that have varied and new payment services have come to light. In this regard, the Law on Payment Services and the Regulation on Payment Services that have entered into force regulates the establishment conditions of payment institutions, the operating license which they are subject to, as well as their corporate governance. With this legislation in effect, it may be concluded that the development of payment services is intended.

The Regulation on Principles and Procedures to be applied in Factoring Operations*

Att. Ozgur Kocabasoglu

Introduction

The Regulation on Principles and Procedures to be applied in Factoring Operations ("Regulation") was published by the Banking Regulation and Supervision Agency ("BRSA") in the Official Gazette dated 04.02.2015 and numbered 29257. Notably, the Regulation entered into force prevailing as of 01.01.2015. The Regulation envisages the principles and procedures to be applied in factoring operations to be conducted by factoring companies and banks; the novelties introduced by such Regulation are examined below.

Avoidance of Duplicate Invoices and Cancellation of Invoices

The second section of the Regulation entitled "Avoidance of Duplicate Invoices and Cancellation of Invoices", stipulates certain obligations, and envisages various procedures for banks and factoring companies that are established in Turkey. Firstly, Art. 4 of the Regulation imposes a prohibition that aims to avoid operations, which are not based on an invoice. In this sense, the Regulation sets forth that financing shall only be provided to clients in return for invoices that are issued for their goods or services. Furthermore, the Regulation sets forth that the total amount of such financing, and income (such as commission or interest) generated therefrom shall not exceed the amount noted on the invoice, subject to the factoring transaction. In the event that the factor pays 100% of the invoice amount, an additional sum for commission and interest can be recovered, separately. The clients shall not be exposed to minor differences arising out of the rounding up of the invoice amount, and the sum stipulated on the bill

* ***Article of October 2015***

of exchange, or other similar instruments. Additionally, banks and factoring companies that are established in Turkey shall not issue additional invoices for exchange differences generated on the date payment is made.

Article 5 of the Regulation sets forth an enquiry system to be established by factoring companies and banks. According to this, banks and factoring companies that are established in Turkey shall be obliged to conduct the enquiry, stipulated under such article, regarding their clients and related invoices. Pursuant thereto, factoring companies and banks shall not be contented with the verbal declarations of their clients; yet, they shall provide enquiries on client information. Such enquiry shall be comprised of, at minimum, the below:

i) Inspection of invoice information, along with a compliance check of the contents with the provisions of related regulations as to format and disposition of the invoice,

ii) Establishment of an internal checking system that monitors the status of the invoices, with a Central Invoice Registration System which avoids the production of duplicate invoices,

iii) Assessment of the status of their clients, with the aid of their financial conditions and investigation of former financial operations, via consulting with the debtors of the invoices and drawers of the bills of exchange.

Know-your-customer check procedures listed in the Regulation are the minimum requirements, and the banks and factoring companies established in Turkey are not limited by them in the enquiry of their clients. They may utilize other methods, as well.

In order to avoid producing duplicate invoices, the Regulation envisages yet another special obligation in its 6th Article. As per such Article, banks and factoring companies that are established in Turkey shall be obliged to inspect the notification form signed by clients (or their signatories) along with the invoice information, and check whether the invoice being examined is a duplicate or not, through the Central Invoice Registration System. Furthermore, the images of such invoices shall be stored by banks and factoring companies in order to be used and checked against in potential audits. The expression of the

"image of invoices", stated in the aforementioned article, introduces a new concept to Turkish law. The word "image" may be interpreted as the copy of the invoice at stake, obtained in any manner. According to this interpretation, the Regulation envisages a new opportunity for factoring companies and banks allowing them to archive the images (*scanned copies* or digital images) of the invoices in electronic databases. However, due to the fact that a photocopy is also a form of image obtained from the original invoice, the same provision may be deemed to include the photocopy (hard copy) of the invoice in question. We consider that the application and implementation of such provision shall be clarified in time.

Another novelty the Regulation introduces concerns the cancellation of the invoices. Pursuant to Article 7 of the Regulation, the factoring companies or the banks performing factoring operations shall be obliged to obtain a letter of undertaking from their clients, stating that upon issuance of new invoices following the cancellation of initial invoices, they shall submit such new invoices to the factoring company or to the bank. As per the second paragraph of such provision, the factoring company or the bank shall inform its clients in this regard, and must obtain this undertaking in the form of a "notification form" that shall be a standard form announced by the BSRA.

Bills of Exchange and Other Bills

The third section of the Regulation entitled, "Received Bills of Exchange and Other Bills," governs the points to consider by factoring companies and banks in the event of receiving bills of exchange or other types of bills in reference to invoice receivables. In such events, the factoring companies and banks shall investigate and bear in mind that the drawer of the bill of exchange or other type of bill shall be the same person as the person stated to be the creditor on the invoice. Additionally, the person before the drawer shall be the same person stated as the debtor in the invoice.

Additionally, Article 8 of the Regulation stipulates certain requirements in order for factoring companies and banks to receive additional bills of exchange and other bills from their clients, other than the ones related to invoices.

Transfer of Potential Receivables

Pursuant to Art. 9 of the Regulation, in order for factoring operations to account for potential receivables, (i) the transferred receivables must be certified by invoice or other documents substituted for an invoice, (ii) the factoring companies and banks will confirm the information on an invoice or other documents substituted for the invoice on the date of the commencement of the receivable.

The second paragraph of the same provision stipulates the conditions for the acquisition of receivables arising out of the sale of goods or services. Such conditions are as follows:

i) Factoring companies and banks shall conclude agreement with their clients that include the definition of the work, quality of the receivable, maximum factoring limit and payment requirements.

ii) The matters concerning the potential receivable shall be certified via other documents, such as an agreement signed by the client and the debtor, an order form, a pro forma invoice or letter of credit.

iii) The accuracy and validity of the documents and information proving the commercial relation between the debtor and the client, as well as the fact that the receivable to be transferred will arise out of such commercial relation, shall be checked and evaluated.

iv) The factoring companies and banks shall obtain the invoice or other documents substituting the invoice that shall be issued following the production of the receivable from the client, and shall submit such documents to the relevant operations file.

Preservation of the Documents

In accordance with Art. 10 of the Regulation, factoring companies and banks that are established in Turkey shall be obliged to preserve the information and documents related to the factoring operations, which are obtained upon the conclusion of their investigation and enquiries, for a minimum period of five years, provided that such period is no less than the durations envisaged under other related regula-

tions. The preservation obligation for minimum five years, stipulated under this provision, shall not constitute a novelty for banks active in factoring operations. This is because, according to article 42 of the Banking Law numbered 5411, the banks operating in Turkey are already obliged to preserve the documents related to their operations for a period of ten years. Therefore, the preservation obligation for minimum five years, which is envisaged in the Regulation, shall solely be considered as a novelty for the factoring companies.

Conclusion

The Regulation introduced new principles and procedures for factoring companies and banks that are established in Turkey, enquiry obligations, a minimum five-year period of preservation of documents obligation, and conditions for the acquisition of receivables arising out of the sale of goods or services. Such provisions are significant for the entities that provide factoring services and should be taken into consideration by factoring companies and banks.

Taking Care of Business in the Family: Resolution Ahead of Time*

Att. Ali Sami Er

Is a family constitution the cure? Should a family constitution be the guide that includes all of the solutions to those problems which might occur, or rather, should it propose approaches to resolve problems before they arise. In other words, should the family constitution stress fundamental values, or include rules, in detail, and to what extent?

Before deciding upon the character of the family constitution, rather than pondering such general questions, it may be useful to focus on various specific questions, the responses of which may serve to satisfy the concrete needs.

For example, should employment in the company, or winning a promotion, depend on kinship, or on merit? How should the income be shared? Will you be able to live on the dividends or salary? When the company needs economic support, do the seniors of the family become its guarantors? Should the cousin who dedicated his life to the company be entitled to overtime payment or bonuses? Should the family member who has never been happy working at the company, and who has chosen to compete with the company through the creation of his own organization, be excommunicated from the family/company, or is s/he free to establish her/his own company? Does the saying, "the younger drinks the water first, but it is the elders who speak first," mean that the younger generation have no right to be heard? If you are of the younger generation holding one share, will you be entitled to speak in the general assembly of the company? What if you do not have any shares, will you still be allowed to comment in the family

* ***Article of August 2015***

council? If a member of the new generation who became a shareholder after a marriage ends in divorce, can the bride or groom acquire the shares of the company? Can these shares be sold to your competitor? When the grandfather passes away, who should be the new leader - the uncle or the aunt? You are the leader - who should be the next? When you need access to funds as a shareholder, should you be able to withdraw cash from the company or resolve on advance dividends? You fell away from your beloved family because the business has now overtaken the family: Can you request the dissolution of the company to solve the problem? Are you entitled to request a company vehicle even though you do not hold any position in the company? You do not hold any position in the company, but you would like to visit the company from time to time – are you allowed to enter the company grounds? Can you offer your shares to the public? Your nephew, whom you appointed as financial manager after his graduation, acted disrespectfully to you. Can you fire him or squeeze him out of the company? You are a shareholder who is unhappy with the general situation of the company, can you dismiss your uncle who is the chairman of the board? Can you request that the company be audited? You have not been receiving any dividends since the general assembly meeting has not convened for quite some time, and you find that your earnings from the company are less than satisfactory, can you invite the shareholders to convene a general assembly meeting? The value of the factory has increased substantially, or has not increased enough as per another's view - who decides on the sale price? You think that the center of the company must be moved to Istanbul, but some members object to this: Can you establish a new company in Istanbul on your own? The family company is managed by a few family members, and the others would like to create their own businesses. How should the salary and dividend policy be established? The members who pursue their own businesses are very busy, and they cannot come to the company headquarters. Can you convene the general assembly meeting online? You are the bride who will become a new member of the family, and when your love is at its peak, you are urged to sign a marriage contract: Do you have to sign it? What if this were a divorce contract? You have suffered a lot because of your family business, and you cannot decide on the distribution of the estate, is a court case inevitable? Have you considered the costs of such a case, and compared it with that of a settle-

ment agreement? Regarding philanthropic activities, would you prefer the family to have a common voice, or should such activities be pursued individually? What should the family members' level of education be, regardless of whether or not they work in the company? To whom does the company belong - to the grandfather or to the family? Should the company belong to you forever, or should a part of your family maintain the business? What if you remain sole shareholder, would you like to continue the business? Or, would you like to establish an airline company, for example, with the monies from the sale of the company? If you work in the family company, should you be with your family all hours of the day and night, aside from sleeping hours? Your father was your boss, so will your elder brother be your boss, as well? When you start thinking critically of the way the business is done in the company, is this accepted by your family? Are you treated as a child or a member of the company? You desire to make a new investment, but other family members do not cooperate, and they do not want you to act individually. Are there any rules that may prevent you? Are you disturbed by the fact that the company employs too many family members? Which positions may be delegated to family members, and which may be held by outside professionals? Can you share a common dream with your siblings or cousins with whom you have played as children, or went to the cinema together, but have not shared one single desire concerning your future? How can you improve your partnership culture?

Let us suppose that you crafted specific rules for each situation, or you adopted general principles regarding approaches to be taken to solve any future conflicts regarding your family business or property. Your consultant named such set of rules or principles as the "Family Constitution." However, when these are not violated, the elders of the family council are unable to resolve the issue in accordance with the Constitution. In this case, is it possible that the conflict may be resolved by a court pursuant to your Family Constitution? Is it possible that such rules can be invalidated as they are contrary to the obligatory provisions of law? Or, if the traditions that started the rulings and constitution were not followed, will you insist on the application of the constitution? Do you have the persistence to regulate sanctions and apply them in the event of breaches? Will you offer to the family mem-

bers who are in breach another opportunity, or will you be determined to apply the weightiest of sanctions from the outset? Are these sanctions legally applicable? You have a constitution which was written 25 years ago. The grandfather has since passed away, the company has survived through very hard times and crises, and has expanded even further. Your family has grown larger by tenfold - will you be bound by the same principles, or are you ready to renew them?

To solve a problem that you are not a part of is the easier position to be in. There may definitely be issues that you cannot predict. Nevertheless, you are always able to consult with someone who has already experienced these problems, or you may request professional assistance. When the problem is actually occurring, conflicts of interest may detract you from the solution. You may opt to avoid any debate, and this may exacerbate the problem. Therefore, the best thing to do is to seek a solution, even by becoming the devil's advocate before any problem occurs when all of the communication channels are still open.

Indeed, family companies are based on a culture of partnership. The company survives by gaining assets. However, family is an institution where you do not expect any consideration in return for your love. Therefore, the different chemistry of a company and family may interfere. Although it is impossible to prevent any conflicts, by anticipating certain situations, the outcome of such conflicts can be foreseeable, thus, it is very useful to gather and evaluate solutions for such problems from similar experiences for the purpose of improving the partnership culture before any problems appear and expectations differ, and different rightful grounds are seized upon. So, when should the family constitution workshops start? In my opinion, the right time may be at the moment of economic crisis when members of the family are most concerned for the future of the company, and the most mature time for emphatic approaches. Another reason for this is the possibility that the scale of the company can no longer require a constitution to be drafted after the crisis if the necessary precautions are not timely taken.

Above all, a family constitution is an inspiring instrument for the entire family that not only frames the basic principles for the

solution of problems that may arise, those of which you are not yet a party to, but it also serves as a lighthouse to help in making the company flourish.

COMPETITION LAW

Minority Share Transfers within the Framework of Competition Law*

Prof. Dr. H. Ercument Erdem

Introduction

Minority share transfers between competitors can be examined within the scope of Art. 4 of the Act on the Protection of Competition ("Competition Act") on agreements, concerted practices, and decisions that limit competition, Art. 6 regarding the abuse of dominant position, and Art. 7 regulating mergers and acquisitions. Minority share transfers are often considered within the context of mergers and acquisitions.

In general, authorizations that are granted by the competition authorities in mergers and acquisitions are subject to the concept of control as the legal basis. Within the European Union ("EU") practice, the concept of control is stipulated by Council Regulation (EC) No. 139/2004 ("Regulation"). In parallel with the EU practice, Communiqué Concerning the Mergers and Acquisitions ("Communiqué") calling for the Authorization of the Competition Board No. 2010/4 requires a permanent change in control for a merger or an acquisition to be deemed as calling for authorization.

The mergers and acquisitions between competitors are realized either by transfer of full or partial control or by minority share transfers. A certain merger or acquisition transaction is subject to examination under the Communiqué, provided that it results in a permanent change of control. Minority share transfers that do not cause such a change are not considered to be mergers and acquisitions.

---

* ***Article of August 2015***

The Concept of Control within the Scope of Mergers and Acquisitions

In order for the conditions upon which the minority share transfers between competitors are subject to authorization may be identified, the concept of control must be elaborated upon within the context of competition law. Both the Communiqué and the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("Guidelines") regulates the instruments that constitute control, as well as the change of control. Similarly, the ability to exercise a "decisive influence" over an undertaking is the condition foreseen by the Regulation for a minority share transfer to fall within its scope. The "decisive influence" as described by the Regulation may be defined as the power to influence the strategic decisions of an undertaking.

As per Art. 5 of the Communiqué, the control is defined as whether, separately or together, there is de facto or de jure exercise of decisive influence over an undertaking. The influence in question may be acquired through rights, such as the transfer of shares or assets, contracts or other instruments.

Sole Control

The Guidelines define the concept of sole control as the case where one undertaking, alone, has decisive influence over an undertaking. The decisive influence in question is regulated as the right to determine the strategic commercial decisions of an undertaking and, although not being able to take advantage of these strategic decisions, the right of a single shareholder to prevent these types of decisions from being taken, in other words, the right to veto. Pursuant to the Communiqué and Guidelines, sole control can be acquired on a de jure and/or de facto basis.

In order for de jure sole control to be in question, the majority of voting rights must be transferred. In cases where minority shares are transferred, when the market structure, the shareholding structure of the company, and the distribution of voting rights are considered, the majority of voting rights may be transferred between the competitors by way of preference shares on voting, thereby resulting in that merger or acquisition being subject to authorization as per the Communiqué.

In addition, certain rights held by the minority shares can constitute sole control. It may also be observed in cases where certain preferences are granted to minority shares. Specifically, preferences that have an effect over strategic decisions may create sole control. It can also be the case when, due to the shareholding structures and management structures of certain undertakings, various minority shareholders make financial, executive, or business-related decisions.

In determining de facto sole control, the share percentages, the participation levels in general assembly meetings, and the voting patterns adopted are taken into account. The Guidelines require the minority shareholders to hold a majority in the general assembly for them to be considered as having sole control. However, it is essential that the change of control is permanent.

Joint Control

Joint control exists where two or more undertakings or persons are able to exercise decisive influence over another undertaking. Decisive influence is described by the Guidelines as the power to block actions that determine the strategic commercial behavior of an undertaking. In this instance, the possibility of a deadlock situation exists when the power of two or more companies rejecting proposed strategic decisions by taking joint action is in question.

Joint control is also exercised in situations where equality in voting rights and appointment of decision-making bodies, the rights of the minority shareholders to veto decisions, such as the budget, the business plan, major investments, etc. exist (it is laid out in the Guidelines that possession of even one such veto right may be sufficient), and where voting rights are jointly exercised by the minority shareholders even though they do not have veto rights.

The fact that the majority shareholders are dependent on the minority shareholders when adopting certain decisions, as well as the possession of certain know-how by the minority shareholders, may also create de facto control.

It must be noted that the transfer of either majority or minority shares gives rise to the same consequences for situations where sole, joint, de facto or de jure control is created. The most basic of these are

the merger or acquisition in question being subject to authorization (provided that the turnover thresholds stipulated by the Communiqué are exceeded), and being examined within the same competitive concerns and effects.

Anti-Competitive Effects and Concerns

The mergers and acquisitions concluded between competitors are evaluated within the framework provided by the Guidelines on the Assessment of Horizontal Mergers and Acquisitions ("Guidelines II"). The evaluation stipulated by Art. 9 of the Guidelines II is twofold: defining the relevant product and geographical market, and assessing the effects of the merger or acquisition on competition.

Situations that may create anti-competitive concerns are the creation and strengthening of a dominant position, and the prevention of competition through coordination between undertakings. The creation of a dominant position causes unilateral anti-competitive effects and concerns. The reduction of competitive pressure by a merger through creating market power is a unilateral anti-competitive effect. The competitive dynamics may be altered due to market shares, whether the undertakings are in competition or not, the substitutability of products specifically in markets of differentiated products, the likelihood of customers to change their providers, the barriers to growth, and the taking part in a merger of an undertaking that can create competitive pressure.

Another anti-competitive effect may be caused by coordinating undertakings. In this regard, keeping the prices above the competitive level is given as example to a most likely coordination by the Guidelines II. Undertakings may also coordinate the dividing of the market, or for limiting production.

In accordance with the Regulation, the coordination between undertakings is taken into consideration even when minority share transfers that do not create control are in question; more specifically, the level of influence of the minority shareholders - for instance, their power to appoint management, and their access to classified information of the undertaking[1].

---

[1] **M. Selim Ünal**, *Sanayi İktisadı ve Rekabet Hukuku Açısından Rakipler Arası Azınlık Hisse Devirler,* Series of Expert Thesis No: 93.

The Minority Share Transfers within the Framework of Agreements, Concerted Practices and Decisions that Limit Competition

Minority share transfers may be subject to examination pursuant to Art. 4 of the Competition Act, or in relation to investigations and evaluations concluded with regard to another transaction (for example, a cartel agreement) even when the above-mentioned change of control is not in question. In this regard, the issue that the Competition Authority pays the utmost attention to is the management structure and representation.

The role of an undertaking that is also a minority shareholder of its competitor in the management can be examined because of a possible coordination between the competitors, facilitation of exchange of information, and creation of an anti-competitive effect[2]. However, instead of generalizing, each case must be evaluated separately due to its unique conditions.

Conclusion

Mergers and acquisitions are subject to evaluation under the Communiqué, provided that they result in a permanent change of control. This practice is in parallel with the EU legislation. As per the Communiqué and the Guidelines, control can be sole, joint, de facto or de jure, and is described as the ability to make strategic decisions, and to prevent them from being made. Similarly, holding the majority of the voting rights, the special rights, and preferences that are conditional on holding minority shares, and the power to hold the majority in general assembly meetings can create de facto and de jure sole control, as well. The possibility of creating a deadlock situation by blocking strategic decisions, voting rights, equality in the appointment of decision-making bodies, and veto rights are the examples of the instruments that constitute joint control.

The change of control by way of minority share transfers attracts the attention of the Competition Authority since it is likely to cause

---

2 Please see: Decision dated 13.7.2005, numbered 05-46/668-170 and Decision dated 29.3.2007, numbered 07-29/268-98.

competitive concerns and anti-competitive effects, and the transfer of both majority and minority shares are subject to the same examination within the scope of the Communiqué. Anti-competitive concerns, such as the facilitation of coordination between competitors and the exchange of information, increasing transparency in the market, the creation and strengthening of the dominant position and, thereby, impeding competition between competitors, and decreasing competitive pressure are assessed within the scope of horizontal mergers and acquisitions.

Distribution Agreements within the Framework of Turkish Competition Law*

Att. Naciye Yilmaz

Introduction

Article 4 of the Act on the Protection of Competition numbered 4054 ("Competition Act") prohibits "*agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect, or likely effect, the prevention, distortion, or restriction of competition, directly or indirectly, in a particular market for goods or services.*" Undertakings may cooperate in such a way that this cooperation may prevent or restrict the competition. Block Exemption Communiqué on Vertical Agreements numbered 2002/2("Communiqué no. 2002/2"), Amended by the Competition Board Communiqués No. 2003/3 and 2007/2 provides a "vertical agreement" definition. Pursuant to Communiqué No. 2002/2, a vertical agreement may be predicated as an "*agreement concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services.*" Within this framework, distribution agreements are considered as vertical agreements. This Newsletter Article evaluates distribution agreements with some of their clauses typically used within the framework of Turkish competition law.

Exclusivity

Exclusivity, in general, means to grant commercial privileges to a certain person or enterprise within a bordered region, or for a certain clientele. In terms of distribution agreements, exclusivity may be considered as security requested from the producer by the distributor, in

---

* ***Article of April 2015***

return for his obligations and investments that he has made. Along with the provisions that require the producer to conclude a distribution agreement with another party within the same region, provisions prohibiting the producer, himself, from procuring goods within the same region may also be considered under exclusivity clauses. In the case where all, or a significant amount, of producers applying the exclusive distribution system, these applications may expedite anti-competitive cooperation. As mentioned above, the Competition Act prohibits, in principle, this kind of cooperation; however, an exemption regarding that system is granted to a certain extent.

As per the Article 2 of Communiqué No. 2002/2, the "*exemption granted by this Communiqué shall apply in the event that the market share of the provider in the relevant market in which it provides the goods or services that are the subject of the vertical agreement does not exceed 40%. For those vertical agreements involving an exclusive supply obligation, an exemption applies on the condition that the market share of the buyer in the relevant market in which it purchases the goods and services that are the subject of the vertical agreement does not exceed 40%.*"

The exclusivity granted for the distributor shall be granted an exemption, provided that the market shares of the producer and the distributor (in case of an exclusive supply obligation) do not exceed 40% of the relevant goods or services market. Moreover, as per Article 4/b of Communiqué No. 2002/2, the introduction of restrictions in relation to regions or customers where, or to whom, the goods or services that are the subject of the contract shall be sold by the purchaser, other than the following cases, shall block the grant of exemption. The agreement shall be subject to a grant of exemption if one of the exceptions listed in the related article is present. One of these exceptions is to assign to a purchaser an exclusive region, or exclusive group or customers, and restrict the active sales to this region or group of customers for other customers and purchasers.

Resale Price Maintenance

Article 4/I/a of Communiqué No. 2002/2 leaves the provisions that prohibit freedom of the distributor to determine his own price scale

beyond the scope of the exemption. In accordance with Article 2.1 of the Guidelines on Explanation of the Block Exemption Communiqué on Vertical Agreements numbered 2002/2 ("Guidelines"), entitled as "Resale Price Maintenance," the producer determining a fixed or minimum resale price on behalf of the distributor, is prohibited. However, the producer may maintain a maximum or suggested price for the distributor, unless this determination reaches a level where it constitutes a determination of a fixed or minimum resale price. In order for the determined prices not to become fixed or minimum resale prices, it should be explicitly stated either in the price lists or on the products that such prices are the maximum or suggested prices. Within this framework, it should be emphasized that in the event where the resale price maintenance of the producer exceeds the level of determination of suggestion or maximum prices, and imposes such prices upon the distributor, this distribution agreement shall not be covered by the exemption.

Non-Competition Clause

Non-competition clause is defined under Article 3/d of Communiqué No. 2002/2, entitled as "Definitions." According to that definition, a non-competition clause is "*…any kind of direct or indirect obligation preventing the purchaser from producing, purchasing, selling or reselling goods or services that compete with the goods or services which are the subject of the agreement.*" In addition, "*taking as the basis the purchases of the purchaser in the previous calendar year, any obligation imposed on the purchaser, directly or indirectly, that is more than 80% of the goods or services in the relevant market, and which are the subject of the agreement, or that of substituted goods or services, be purchased from the provider, or from another undertaking to be designated by the provider, is also considered as a non-compete obligation.*"

Article 5 of Communiqué No. 2002/2 determines the scope of a non-competition clause for the distributors. According to the related provision, in cases where the non-competition clause exceeds five years, or is fixed for an indefinite term, or prohibits the distributors to produce, sell, purchase or resell the goods or services following the termination of the agreement, or bans the members of the selective distribution system from selling competitor-branded products, such clause

shall not be covered by the exemption. However, there are certain exceptions.

As mentioned above, following the expiry of the agreement, any direct or indirect obligation imposed on the purchaser, prohibiting it from producing, purchasing, selling or reselling goods or services, is considered to be beyond the scope of the exemption. Nevertheless, a non-compete obligation may be imposed on the purchaser, provided that it does not exceed one year from the expiration of the agreement, with the conditions that the prohibition relates to goods and services that compete with the goods or services which are the subject of the agreement, it is limited to the facility or land where the purchaser operates during the agreement, and it is compulsory to protect the know-how transferred by the provider to the purchaser.

In the case where the distribution agreement contains a clause which is considered beyond the scope of the exemption, if such clause is separable from the other clauses of the agreement, this clause shall not be covered by the exemption, while the other provisions are exempted. However, if the non-competition clause is inseparable from other clauses of the distribution agreement, the agreement, as a whole, shall not be covered by the exemption. Pursuant to the Guidelines, the non-competition clause envisaged for the distributor in the agreement shall be evaluated within the scope of the exemption following the termination of the contract, under certain circumstances. However, the non-competition clause should not result in shut-down of the distributor's activities, and should not create non-competitive circumstances.

Conclusion

Distribution agreements are considered to be within the scope of the vertical agreements that are defined as agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services. Within this context, distribution agreements are precluded by competition rules, to the extent that they are non-competitive, just like every other vertical agreement. Typical provisions of distribution agreements, such as exclusivity, resale price maintenance and non-competition clauses may not be covered by the exemption of Communiqué No. 2002/2, under certain circumstances.

Supervision of Concentrations in Competition Law*

Att. Ecem Susoy Uygun

Introduction

Mergers and acquisitions are one of the fundamental concepts of dynamic economies. However, in order to maintain a competitive environment in the marketplace, mergers and acquisitions must be subject to the supervision of the Competition Authority ("Authority"). Thus, in order to avoid abuse of the dominant position and prohibition of uncompetitive mergers and acquisitions, the Authority has the task of monitoring, regulating and supervising the markets[1].

Concept of Concentration

Despite the fact that competition law regulations contain the concept of 'mergers and acquisitions,' they do not provide their exact definitions. In accordance with Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board ("Communiqué"), the merger of two or more undertakings, acquisition of direct or indirect control over all, or part of one or more undertakings, by one or more undertakings, or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means, shall be considered a "merger or acquisition" by the Authority. Moreover, the establishment of a joint venture that performs all operations of an independent economic asset shall be considered as a merger and acquisition, as well[2].

---

* ***Article of September 2015***

1 For the 16th Annual Report of the Competition Authority please see: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fFaaliyet+Raporlar%C4%B1%2fRK_16.pdf (Access Date: 28.09.2015).

2 For the Merger and Acquisition View Report of the Competition Authority please see: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fBirle%C5%9Fme+Devralma+G%C3%B6r%C3%BCn%C3%BCm+Raporu%2fEk1+-+2014+Birle%C5%9Fme+Devralma+G%C3%B6r%C3%BCn%C3%BCm+Raporu.pdf (Access Date: 28.09.2015).

In practice, it could be observed that the terms of a merger and acquisition or concentration are being used as substitutes for each other. However, there is no unity in the usage of such terms, neither in practice, nor in the doctrine. Although Draft of the Law to Amend the Protection of Competition No. 4054 carries the term, 'concentration transactions,' the term of 'merger and acquisition' is used in Law on the Protection of Competition No. 4054 ("LPC") and the Communiqué.

Nevertheless, other than mergers and acquisitions, concentrations might be performed through the establishment of a joint venture, as well. A concentration can be defined as the power of economic decision-making and leading; in other words, changing hands of economic control between the undertakings and, thus, the creation of a situation that leads to structural modifications in the related market by lessening the number of players in such market[3]. In order for all activities that cause the central concentration to be considered within the scope of the LPC, it might be more accurate to use the word 'concentration,' instead of the term 'merger and acquisition'[4].

Supervision of Concentrations

Mergers and acquisitions might damage a competitive environment via monopolization and cartelization. Therefore, all competition rules of developed countries contain provisions regarding the supervision of mergers and acquisitions[5].

Article 7 of the LPC entitled "Mergers or Acquisitions" prohibits mergers by one or more undertakings, or acquisitions by an undertaking or a person from another undertaking that aims to create or strengthen a dominant position, which would result in a significant lessening of competition. Therefore, in order for a merger or an acquisition to be prohibited, it should either (i) create or strengthen a dominant position or (ii) the created or strengthened dominant position should significantly lessen the effective competition.

---

3 **SEZEN, Ayse**, Birlesme ve Devralmalar, Uluslararasi Rekabet ve Teknoloji Birligi, 2007, p. 2.

4 **ERDEM, H. Ercument**, Turk-İsvicre Rekabet Hukuklarında Birlesme ve Devralmalar, Prof. Dr. Erdogan Moroğlu'na 65 Yaş Günü Armağanı, 1999, p. 203.

5 **ERDEM, H. Ercument**, Turk ve AT Rekabet Hukukunda Birlesme ve Devralmalar, 2013, p. 32.

This provision does not prohibit an undertaking being in a dominant position. An undertaking might become dominant solely through its own dynamics and success. The intended prohibition is the dominant position of an undertaking that is achieved without relying on the current efficiency of the established capacity[6]. Undertakings in dominant positions might perform concentration transactions; yet, the undertaking with a dominant position shall not significantly lessen competition with the aim to strengthen its dominant position.

The kinds of mergers and acquisitions subject to the Competition Board's ("Board") authorization are stipulated under the Communiqué. Each concentration shall be subject to the Board's supervision or control. The mergers and acquisitions that are subject, or not, to the Board's authorization are explicitly set forth in the Communiqué.

Concentrations Subject, and not Subject to, the Board's Authorization

In order for a merger or an acquisition to take place, there must be two independent undertakings. If a merger occurs with two dependent companies, namely, companies in the same group, such transaction shall not be considered as a merger, nor as an acquisition, in terms of the competition law.[7] Thus, such types of mergers shall not require authorization.

Article 6 of the Communiqué stipulates the transactions that are not deemed as a merger or an acquisition. In accordance with the Communiqué, intra-group transactions that do not lead to a change of control shall not subject to the Board's authorization. The significant matter here is the event of change of control following a merger or acquisition. If the control of an undertaking or a company remains the same following the transfer of its shares, in other words, if only the minority shares are transferred, then such transaction shall not be considered as a merger or acquisition as per the competition law and, thus, shall not be subject to authorization[8].

---

6 **ASLAN, Yilmaz**, Rekabet Hukuku Dersleri, 2014, p. 212.

7 **ASLAN, Yilmaz**, Rekabet Hukuku Dersleri, 2014, p. 213.

8 **ASLAN, Yilmaz**, Rekabet Hukuku Dersleri, 2014, p. 213.

In accordance with Art. 7(1) of the Communiqué, in a merger or acquisition transaction that creates a definite change in control, Board authorization shall be required for the relevant transaction to carry legal validity if a) total turnovers of the transaction parties in Turkey exceed one hundred million TL, and turnovers of at least two of the transaction parties in Turkey each exceed thirty million TL, or b) the asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding thirty million TL and the other party of the transactions has a global turnover exceeding five hundred million TL.

Notification to the Board

Article 11 of the LPC shall be applied in cases where the Board is notified, or is notified with delay. In accordance with the said Article, if the Board does not consider the transaction as lessening competition via creating or strengthening a dominant position, then it allows the merger or acquisition, but imposes fines on those concerned due to their failure to notify. If the Board decides that the merger or acquisition is lessening competition via creating or strengthening a dominant position, it decides to terminate the merger or acquisition transaction, and imposes fines, in order to eliminate all de facto situations committed that are contrary to the law.

The notification to the Board regarding mergers and acquisitions that are subject to authorization shall be made via the Notification Form Pertaining to Mergers and Acquisitions ("Notification Form") that is attached to the Communiqué. Easier procedure of application is envisaged for transactions that are less likely to damage the competitive environment, by excluding certain parts of the Notification Form.

As a conclusion of the evaluation of mergers and acquisitions that are subject to authorization, the Board either authorizes the transaction, or initiates a final investigation. Mergers or acquisitions that lead to significant lessening in competition, either in the entire country, or in a certain part of it, by creating or strengthening the dominant position, shall not be authorized. In such case, the merger or acquisition transaction shall be held in abeyance until the final decision of the Board.

In addition, as per Art. 14 of the Communiqué, in order to eliminate any competition issues that may arise under Article 7 of the LPC, undertakings may give commitments concerning mergers or acquisitions. The Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled. Such commitments may be given at the preliminary examination, or during the final investigation stages.

Furthermore, the Board shall also be notified of mergers and acquisitions transactions conducted abroad if they exceed the thresholds stipulated under Art. 7 of the Communiqué, and if Turkish markets are effected.

Conclusion

In the Mergers and Acquisitions Report of 2014[9] (as published by the Authority) the Board was notified of 215 mergers and acquisitions. When the number and value of the mergers and acquisitions transactions performed are taken into consideration, the importance of the supervision of concentration transactions must be emphasized more. The independent undertakings that intend to perform concentration transactions must consider that the transaction shall not create nor strengthen their dominant position, or their strengthened dominant position shall not significantly lessen competition.

---

9 For the Report please see: http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FBirle%C5%9Fme+Devralma+G%C3%B6r%C3%BCn%C3%BCm+Raporu%2FEk1+-+2014+Birle%C5%9Fme+Devralma+G%C3%B6r%C3%BCn%C3%BCm+Raporu.pdf (Access Date: 28.09.2015).

Arbitrability of the Competition Law Disputes*

Att. Nilsun Gursoy

Introduction

Delictual character of the competition law disputes usually renders them inadequate for the arbitration since the parties could not foresee such an event and conclude an arbitration agreement before the arise of this event. However, in certain cases competition law disputes may result from a contractual relationship. When a contract has anticompetitive implications or when a preliminary question on competition law arise before the resolution of the principal dispute, the question may be considered within the scope of the arbitration agreement. In these cases, arbitrability of the competition law disputes must be assessed. On the international level, today the case law tends to give a positive answer to this question. However, Turkish doctrine is divided on the relevant issue, and there are no Court decisions explicitly prohibiting or allowing such practice. We will assess the arbitrability of the competition law disputes under the Turkish law, and enforcement of such arbitral awards; EU and US case law will also be taken into consideration which may have an impact on Turkish practice.

Arbitrability under US and EU Law

US Law

Arbitrability of the competition law disputes started to be discussed in 1970s in the United States. The *American Safety*[1] decision implied that the competition law disputes are not suitable for the arbitration, and a claim under the competition law is not a private matter.

---

* ***Article of November 2015***

1 American Safety Equip. Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir. 1968) (international.westlaw.com Access Date: 04.12.2015).

However, on 1985, *Mitsubishi*[2] case adopted a more liberal approach vis-à-vis international commercial arbitration and ruled that statutory rules may also be subject to arbitration when the dispute has an international character. The Supreme Court underlined that the national courts are entitled to refuse the enforcement of the arbitral award on the grounds of inconsistency with the public policy in accordance with the Art. V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards; therefore made a difference between the arbitrability of the competition law disputes and the enforcement of the relevant arbitral awards[3]. At the enforcement stage, another question is to determine to what extent the national courts may control the substance of the arbitral award. In Mitsubishi the Supreme Court stated[4] that "*while the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.*" The so-called Second Look Doctrine raise the question of the control of the application of the competition rules by the arbitral tribunal, and the extent of such control is also discussed in the future decisions[5]. Mitsubishi case was a milestone for the question of arbitrability of the competition law disputes, and had a significant impact on international practice.

EU Law

Under the EU law, the arbitrability of the competition law disputes was accepted by the *Eco Swiss*[6] case. However, the Court stated that

---

2 Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (international.westlaw.com Access Date: 04.12.2015).

3 Mitsubishi Motors, 638.

4 Mitsubishi Motors, 638.

5 **Didem Uluç**, Rekabet Hukukunda Tahkim Uygulamaları, Rekabet Kurumu Uzmanlık Tezleri Serisi No:132, Ankara 2012, p. 19.

Please see: http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FUzmanl%25c4%25b1k%2BTezi%2F10didemulucmiz.pdf (Access Date: 04.12.2015).

6 Eco Swiss v. Benetton International, European Court of Justice, C-126/97 (1999)

Please see: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0126 (Access Date: 04.12.2015).

EU competition law is part of the public policy of the EU member States, and arbitral tribunal shall apply ex officio the relevant rules even if it wasn't raise by any of the parties. Otherwise, contrariety to the EU competition law constitutes a ground for the refusal of the enforcement of the relevant arbitral award on the basis of inconsistency with the public policy. Additionally, national courts may refer to the European Court of Justice ("ECJ"), if necessary, in order to determine the inconsistency of the award with the EU competition law. In conformity with Eco Swiss and other relevant cases, the arbitrability of the competition disputes is accepted under the EU law, and arbitral awards may be refused to be enforced on grounds of inconsistency with the public policy in case they contradicts with the EU competition law. It should be noted that the courts should refuse the enforcement of the award when the objectives of the competition law is truly jeopardized, and should adopt a minimalist position regarding the control of the arbitral awards[7].

A recent decision by the Madrid Court of Appeal[8] may be a guide for the future practice in Turkish law. The Court concluded that the EU law or Spanish law doesn't preclude the arbitrability of the competition disputes as long as the relevant award applied the mandatory competition rules. Contrary to the Swiss law[9] setting forth the arbitrability of the disputes having pecuniary nature, The Spanish law provides that disputes of which the subject matter is at free disposition of the parties are arbitrable. Therefore, competition law claims are deemed as at free disposition of the parties under certain jurisdictions. Accordingly, the decision of the Madrid Court of Appeal should be considered while determining the arbitrability under Turkish law since the Law No. 4686

---

7 OECD, Arbitration and Competition, related to a hearing on Arbitration and Competition, Working Party No.3 meeting of 26 October 2010, p. 13.

Please see: http://www.oecd.org/competition/abuse/49294392.pdf (Access Date: 04.12.2015)

8 Auto no. 147/2013, of 18 October 2013.

9 Article 177 of Loi fédérale sur le Droit International Privé (Federal Statue on International Private Law).

Please see: https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html

For English text please see: https://www.swissarbitration.org/sa/download/IPRG_english.pdf (Access Date: 04.12.2015).

on International Arbitration[10] sets forth a similar provision on arbitrability and the Turkish competition law is substantially similar to the European competition law.

Arbitrability under the Turkish Law

As above mentioned, the Article 1/4 of the Law No. 4686 on International Arbitration provides that the disputes at the free disposition of the parties are arbitrable. Under the Turkish law the main discussion is the arbitrability of competition law disputes rather than the refusal of the enforcement of the arbitral awards on the bases of public policy. Similar to the American Safety decision, Turkish doctrine is doubtful about the arbitrability of the competition law disputes due its mandatory nature and Competition Authority's expertise on the issue. Scholars concentrate on the exclusive powers of the Competition Authority in order to determine the claims at free disposition of the parties. Accordingly, it is stated that the claims falling within the exclusive powers of the Competition Authority, such as implementation of administrative fines, are not arbitrable whereas the claims having a civil nature, such as compensation claims, deemed arbitrable[11].

The question of determination of the inconsistency of the contracts with competition law remains discussible. Some scholars state that prior to rule on compensation claims, the arbitral tribunal should refer the question of validity of the contract under the competition law to the Competition Authority; therefore, the parties should submit the question to the Competition Authority, and the arbitral tribunal should rule in accordance with the decision of the Competition Authority[12]. However, it this method is not in accordance with the EU practice, and also may attenuate the principle of confidentiality of the arbitration[13]. In the Eco Swiss, the ECJ stated that arbitral tribunals are not entitled to request preliminary ruling on the EU competition law from ECJ; a request of preliminary ruling is only possible at the stage of enforce-

---

10 Law No. 4686 on International Arbitration entered into force through its publication on the Official Gazette dated 05.07.2011 and numbered 24453.

11 **Burak Huysal**, Milletlerarası Ticari Tahkimde Tahkime Elverişlilik, İstanbul 2010, p. 121-122.

12 **Uluç**, p. 55-57.

13 **Pelin Güven**, Rekabet Hukuku Ders Kitabı, Ankara 2009, p. 451.

ment of the arbitral awards by the national courts[14]. For these reasons, some states that arbitral tribunal is entitled to determine the validity of a contract under the competition law for the purpose of ruling on compensation[15].

Furthermore, the ex officio application of the competition by the arbitral tribunals is also discussed by the scholars. Some scholars states that due to the statutory character of the competition law, the arbitral tribunal should assess whether the relevant contract has anticompetitive implications or impacts[16]. Therefore, any concerns on the arbitrability of the competition law disputes on the basis of statutory character of the competition law will be dismissed. It should be noted that the arbitral tribunal's ruling doesn't affect the Competition Authority's power to initiate an investigation and take measures within the scope of its exclusive powers.

Conclusion

Today the case law of EU and US tends to give a positive answer to the question of arbitrability of the competition law disputes. As Turkish Courts haven't ruled on this question yet, the issue is widely discussed by the Turkish scholars. Certain scholars answers in favor of the international arbitration in conformity with the international trends. Article 1/4 shouldn't be deemed as an obstacle before the arbitrability of the competition law disputes considering that other European States having similar provisions in their relevant legislation already ruled in favor of the arbitrability of the competition law disputes. Additionally, arbitral tribunal's power to rule on the preliminary questions on the validity of a contract under Turkish competition law is also admitted by certain scholars, which is in conformity with the international practice. Although the question of control of the arbitral award hasn't raised yet in Turkish law, a possible dispute should be resolved in accordance with the EU case law, and Second Look Doctrine should be taken into consideration.

---

14 Eco Swiss, p. 40.

15 **Huysal**, p. 122.

16 **Güven**, p. 448-449; Huysal, p. 124-126.

Online Sales within the Framework of Competition Law*

Att. Mehves Erdem

Introduction

Internet is a strong commercial platform, which suppliers, distributors and customers benefit. Undertakings who prefer online sales to traditional sales can reach wide customer groups, increase sale opportunities and make savings in operational costs. Advantages undertakings benefit from online sales allow them to lower recommended prices, which create beneficial outcomes for customers. As a result, customers start to use brick and mortar shops for informative and practical purposes such as product try-out and purchase the products via Internet.

Differences between prices among undertakings create extensive competition pressure, which leads to anti-competitive attempts such as executing distribution agreements with limitations for online sales.

The European Commission's Vertical Block Exemption Regulation ("VBER")[1] and European Union Vertical Restraints Guidelines ("Guidelines")[2] provide rules on the use and restrictions of internet in terms of vertical distribution agreements. VBER does not regulate specific rules in terms of internet sales however the Guideline provides reference to selective distribution systems which shows Commission's view on internet sales.

It is important to understand the distinction between active and passive sales in terms of Internet sales within the context of distribution agreements. However it is sometimes difficult to make such dis-

---

* ***Article of February 2015***

1 See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN.

2 See: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

tinction. Legal scholars proposed to enact specific regulations on Internet sales, whereas European Commission preferred to address this distinction within the context of the Guidelines.

Active Sales[3]

Active sales mean reaching out to individual customers through direct mail, unsolicited e-mails, visits or approaching a group of customers through advertisements on Internet and media, which will target specific or a group customers. Promotions or advertisements should aim to influence and attract only the group it target.

Active sales can be restricted by prohibiting unsolicited emails and advertisement. These kinds of prohibitions will secure exclusive distribution. Active sales are also prohibited to protect the quality of the product and to prevent free riding which appears where a distributors advertisement or promotion efforts benefit another distributor.

There are certain restrictions which are allowed for online active sales such as, limiting the use of internet by distributors if such use or advertisement creates active selling in another distributors territory, enforcing quality requirements for the distributors websites, agreeing on certain conditions for becoming a member of the distribution chain especially in a selective distribution system and also enforcing conditions for offline sales such as quantity of sales in order to preserve brick and mortar shops. Besides suppliers can require its distributors to use third party platforms in terms of the quality standards. Agreements including above mentioned provisions and restrictions can be exempted in cases where they meet the foreseen thresholds and requirements of Block Exemption.

Passive Sales[4]

On the other hand pursuant to the Guidelines paragraph 51, "passive sales are defined as responding to unsolicited requests from individual customers including delivery of goods or services to such customers". Internet sales are considered as passive selling since the activ-

---

3 See: Guidelines, para. 51, 53.

4 See: Guidelines, para. 51, 52, 54.

ity is not addressed to a specific customer but aims to fulfill the demands made by the customers. A passive sale is where a customer visits a website of a distributor and contacts that distributor which results as a sale with delivery. In cases where customers prefer to be automatically updated which results as sales are also considered as passive sales. In terms of capturing wider customer groups, websites use different language options, the language preferences provided to customers creates passive character of the sales.

In general it is accepted that passive sales cannot be restricted whereas suppliers can put restrictions on active sales by the distributors.

The Commission regulates hardcore restrictions with regard to passive sales which are considered as unacceptable restrictions limiting distributors' accessibility to variety of customers. In order for the agreements to benefit from Block Exemption they should exclude such hardcore restrictions. Pursuant to Guidelines paragraph 52, restrictions with regard to passive sales include;

- preventing customers to view another distributors website or providing automatic rerouting of customers to other distributors, though it is allowed when a distributor's website offers links to other distributor or supplier websites,
- terminating a customer's credit card data once it appears within an other exclusive distributors exclusive territory,
- limiting a distributors proportion of sales over internet. Although this does not prevent that the supplier requires certain amount of sales to be made offline in order to provide efficiency in brick and mortar shops or a supplier can make sure that the online sales is in line with the suppliers distribution model.
- Agreements of dual pricing, suppliers cannot determine that distributors pay different prices (higher) for online sales compared to offline sales. However the supplier can agree a fixed fee with the buyer.

The Commission regards abovementioned restrictions as limitations addressed to the access of the distributors to wide and various customers.

Selective Distribution Systems[5]

Selective distribution agreements are generally executed where a supplier wishes to have strong control over its product. Products such as luxury goods and complex or technical products are generally subject to selective distribution agreements. There are also motivational reasons behind executing selective distribution agreements. These reasons can be categorized under three divisions; prevention of free-riding, brand image, creation of incentives.

Suppliers can provide certain conditions and minimum criteria for their distributors in order to preserve their brand image and benefit the expertise of qualified distributors. In cases where the conditions set forth aims to preserve such brand image these conditions will not be regarded as anti- competitive restrictions and will not constitute competition violations. These agreements are covered under VBER and the Guidelines.

Prohibition of online sales is regarded as a hardcore restriction under the Guidelines with only two exceptions. The Commission is in the view that safety and health reasons can be the exceptions where hardcore restrictions can be necessary.

Pursuant to paragraph 56 of the Guidelines, "restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorized place of establishment" is not regarded as a hardcore restriction[6]. In other words, in a selective distribution system with the exception to protect an exclusive distribution system[7] operated elsewhere users or purchasing agents acting on behalf of these users to whom they may sell cannot be restricted.

It should be noted that active and passive sales through internet should be allowed in such selective distribution systems.

---

5 Case Law: Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi (Case C-439/09) [2011] O.J. C 355/04.

6 See: Article 4(c) of the Block Exemption Regulation.

7 See: Guidelines, para. 51, 56.

It is commonly advised to execute agreements free from hardcore restrictions in order to benefit from the Block Exemption.

Obligations preventing dealers to reach wider and different customers by way of internet by providing conditions which are not equivalent with the conditions set forth for the brick and mortar shops are regarded as hardcore restrictions. This means, in cases where criteria for online and offline sales are equivalent certain conditions for internet sales can be provided. This regulation does not mean that the conditions imposed for online sales and off-line sales must be the same however, they should bear the same purpose and differentiate only in terms of the nature of online and offline sales. The agreements, which impose the above, mentioned hardcore restriction can not benefit from Block Exemption.

Suppliers can put conditions on minimum time limits for delivery, customer services, design of the website such as using high quality or three dimensional pictures of the product. Quality conditions for internet sales should be in line with the characteristic of the product. Moreover the conditions provided by the suppliers should not interfere with the criteria of other suppliers. The Guidelines provides that in cases where it is easier for unauthorized dealers to obtain the products in question over the internet it is possible to have stricter rules[8]. A supplier may request instant delivery for products sold offline whereas this requirement will not be possible for online sales; suppliers can impose certain delivery times for such sales. Moreover, there can be differences for the costs of costumers in terms of online sales where a customer wishes to return the product and also for secure payment systems[9].

Conclusion

VBER and the Guidelines show the Commission's view on online sales within the context of selective distribution systems. The Guidelines defines the terms active and passive selling and emphasize that "in principle, every distributor must be allowed to use the Internet

8 See: Guidelines, para. 56.

9 See: Guidelines, para. 56.

to sell products"[10]. Active sales are when sellers use advertisements and promotions to attract customers whereas in a passive sale the seller does not try to attract the customer but the customer finds the seller and purchases the product. Online sales are considered as passive sales. It should be noted that passive sales cannot be restricted whereas suppliers can put restrictions on active sales by the distributors.

VBER Article 4(c) regulates that in a selective distribution system members cannot be limited in terms of customers. Therefore pursuant to the Guidelines, preventing customers to view and visit a distributor in another territory and purchase such distributors products is a hardcore restriction.

It is considered that agreements enforcing a general prohibition on Internet sales in a selective distribution agreement will not be regarded as lawful in terms of competition law unless they can be justified objectively.

10 See: Guidelines, para. 52.

Affected Market*

Att. Mehves Erdem

Introduction

The Communique Concerning Merger and Acquisitions Calling for the Authorization of the Competition Board ("Communique")[1] defined the concept of affected market, and regulated the information that parties are obliged to provide notification for.

Prior to the amendment of the Communique, with Communiqué No. 2012/3, published in the Official Gazette dated 29.12.2012, and numbered 28512, the significance of the concept of affected market was that the parties of the merger or acquisition were not obliged to obtain the Board's authorization if there is no affected market.

It was accepted that such Regulation had been intended to decrease the number of unnecessary notifications. This implementation gave representatives, or authorized persons, of the undertakings the freedom to abandon the notification requirement in cases where the affected market was beyond question. This Regulation further provided an exception for joint ventures, and kept the joint ventures beyond its scope. The provision that reads, "*except in cases of joint ventures, authorization of the Board shall not be required for transactions without any affected market, even if the thresholds listed in the paragraph 1 of this Article are exceeded,*" is removed from Communiqué numbered 2012/3. With this amendment, the exception provided for the affected markets is lifted.

---

* ***Article of August 2015***

1 See, http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fCommuniqu%25c3%25a9%2f2010_4ing.pdf.

Definitions

Defining the relevant market has an important impact in competition law, and especially for the determination of abuse of dominant position and mergers and acquisitions. In order to understand and determine the affected market, and the obligations of the parties, accurately, it is crucial to determine geographic and relevant products markets correctly.

Affected Market

The Notification Form Concerning Mergers and Acquisitions annexed to the Communiqué ("Notification Form") provides detailed regulations with regard to affected markets. Relevant markets that are affected by a merger or acquisition are considered to be affected markets. The Communiqué also determines two different criteria for horizontal and vertical relationships in terms of affected markets. Pursuant to Article 5, a horizontal relationship of an affected market is where two or more of the parties are commercially active in the same product market, and a vertical relationship is when at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates.

Relevant Product Market

The Board defines the terms 'relevant product' and 'geographic markets,' and provided criteria to determine such markets in the Guidelines on the Definition of the Relevant Markets[2].

Article 4 of Communiqué No. 1997/1 on Mergers and Acquisitions that Require the Authorization of the Competition Board, defines relevant products and geographic markets. According to this definition, "*In determining the relevant product market, the market comprising the goods or services that are the subject of a merger or an acquisition, and the goods or services that are deemed to be identical in the eye of consumers, in terms of their prices, intended use, and characteristics is taken into account; other factors that may affect the market deter-*

---

2 See, http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fGuide%2fkilavuz8.pdf.

mined shall also be assessed"[3].

Three factors are considered in the determination of the relevant product market. These are demand substitution, supply substitution, and potential competition. Demand substitution means that the product can be replaced by the consumer with another product. The similarities with regard to product quality, usage, and price are important in substituting products.

In supply substitution, if the products can be switched to products that can be produced with minimum risk, cost, and have ease of marketability, such products are considered in the same relevant product market. In the Guidelines on the Definition of the Relevant Markets, paper production is shown as an example in terms of supply substitution, due to the ease in the production of different quality of papers.

Relevant Geographic Market

In terms of the Notification Form, and with regard to the affected markets, the relevant geographic markets should be defined with necessary justifications. As a result, this is also important to accurately define. In Communiqué No. 1997/1 on the Mergers and Acquisitions, relevant geographic markets are defined as the "[..] *areas in which undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighboring areas, as the conditions of competition are appreciably different from these areas.*"

Obligation of Notification

The Notification Form regulates in the context of affected markets, under different headings, detailed obligations under which to provide information. In terms of affected markets, parties shall define the affected market, provide information, and show justification. If parties

---

[3] Similarly, definitions for product markets are given in Article 3 of the Block Exemption Communiqué no. 2002/2 on Vertical Restraints, as well as in Article 3 of the Block Exemption Communiqué no. 2005/4 on Vertical Agreements, Article 3 of the Notification Form of Guidelines on the Voluntary Notification of Agreements, Concerted Practices, and Decisions of Associations of Undertakings and Concerted Practices in Motor Vehicles Sector.

to the transaction concluded mergers or acquisitions within three years in the affected market, such parties are obliged to provide the required information.

Pursuant to Article 5.3 with regard to Turkey, relevant geographic markets for every affected market with respect to last three years, overall size of the market, sales values, and numbers of parties involved in the transaction, titles and market shares of the competitors who have more than 5 percent share in the market, and their contact information, is to be provided.

In addition to such information for the affected markets, information regarding conditions of imports, amounts of imports for the last three years, the five largest suppliers who are active in the affected market, and the five largest clients of the parties in the affected markets shall be presented.

Information regarding supply substitution in the affected markets shall be provided, including distribution channels, total capacity with regard to the last three years, capacity of competitors, and whether any one of the undertakings concerned, or their competitors, have plans to expand or reduce their production or sales capacity in the near future.

Information in connection with growth rate of demand, consumer preferences, customer groups, and distribution agreements shall be provided in relation to demand substitution. Associations of undertakings are also regulated under Article 6, as part of the notification obligation.

Entry barriers, potential competition, and undertakings made in the market in the last five years, or undertakings that will possibly enter the market, are to be included in the Notification Form.

It is clear from the Communiqué that undertakings face serious and heavy obligations with regard to production of information. Undertakings can face challenges in providing such detailed information in a short period of time. Article 11 of the Communiqué regulates that in the event of missing information, the notification shall be deemed to have been made when such information is completed, points to the significance of obligations of the undertakings to provide complete information.

Notification Form Article 1(b) regulates that "for any affected market within Turkey, and in terms of geographical markets; if the sum of the market shares of the transaction parties are less than twenty per cent for horizontal relationships, and the market share of one of the transaction parties is less than twenty five per cent for vertical relationships, in relation to the affected markets in question," information regarding imports, distribution, suppliers, entry barriers, potential competition, and efficiency gains regulated under Articles 6,7 and 8 are not required to be presented. This provision is an exception to the obligation to notify all information completely. However, it should be noted that the Board may decide to fully examine the competition conditions, and request the Notification Form to be fully completed.

EU Practice

A Mergers and Acquisitions Notification Form ("Form Co")[4] within the context of merger control procedures and rules applicable to mergers provides an obligation to produce information in relation to affected markets. Sections 6 and 8 of the Form Co are in line with Turkey's regulations.

The definition of an affected market is different for vertical and horizontal relationships. In horizontal relationships, the parties should, in total, have at least 15 percent of the market share; whereas, in vertical relationships, the combined market share of one of the undertakings or the parties should be greater than 25 percent. The notifying parties shall primarily determine and define the affected market. Following such determination, the information to be produced must contain the size of the market, the market share of the parties for the last three years, the distribution and supply structures, as well as the entry barriers[5].

Conclusion

Defining affected markets accurately, which is regulated in the Communiqué, has an important impact on mergers and acquisitions.

---

4 See, http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32004R0802&qid=1439905124663&from=EN.

5 **Whish, Bailey**; Competition Law, Seventh Edition, Oxford, p. 863.

Parties to a transaction are under the obligation to determine the relevant product and geographic market, while defining the affected market, and must obtain the necessary approval from the Board. Following the general information provided in relation to the affected market, undertakings produce detailed information for various fields, including sales, competitors, distribution channels, import conditions, as well as supply and demand substitutions in relation to the customers. As a result of abolishing the exception provided for the affected markets with the amended text of the Communiqué, once the thresholds are exceeded, the aforementioned information shall be presented within the scope of the merger or acquisition.

Tying Practices*

Prof. Dr. H. Ercument Erdem

Introduction

In general, tying practices indicate the cases in which the sale of a product is tied to the sale of another product. The first product demanded by the buyer is defined as the 'tying product,' and the product purchased together with the tying product is called the 'tied product.' There can be a variety of motivations prompting undertakings to perform tying. The intention to increase the sale of less appealing products is an example of such motivations.

Tying practices do not always create anticompetitive results. Undertakings usually choose to perform tying in an attempt to serve higher quality products to their customers and to reduce the costs. The anticompetitive outcomes of such practices that are frequently observed in business life occurs when evaluated within the scope of the fourth article of the Law on Protection of Competition ("LPC") governing agreements restricting competition, and the sixth article regulating abuse of dominant position. Within this context, the anticompetitive impacts of tying practices, such as exclusion of competitors, foreclosure of the market, restriction of entry to the market, and endamaging of buyers, may lead to competitive concerns.

Types of Tying

In business life, tying practices may be performed in numerous forms. Such types may be exemplified as contractual tying, requiring a buyer to exclusively purchase the tied product from the specific undertaking, tying via refusal to supply, technical tying in which the tied product is physically integrated into the tying product, and bundling[1].

---

* ***Article of September 2015***

1 **Whish, Bailey**, Competition Law, Oxford, 689.

There are certain aspects of bundling, differentiating it from other types of tying practices. In bundling, tied products cannot be purchased individually and sold in specific ratios. Such differences make it difficult to regard bundling as a type of tying practices. Undertakings often choose to apply bundling in order to minimize their distribution costs and to make their pricing effective.

Tying Within the Scope of Agreements Restricting Competition

Anticompetitive impacts of tying practices are regulated under paragraph (f) of Article 4 of the LPC, which provides an example of agreements restricting, disrupting and limiting competition.

Such Article regulates tying practices within its scope and considers the conditions that oblige the purchase of a certain good or service, together with a distinct good or service, or clauses entailing the buyers, who are considered as intermediary undertakings, to display certain goods or services, along with the ones they have requested, or provisions pertaining to resubmission of already supplied goods or services. It would be helpful to understand and evaluate the term of "customs of trade" as indicated under such Article, in accordance with the Turkish Commercial Code.

The Competition Board considers whether the agreements executed between two undertakings consists tying provisions within the same scope. For example in the Competition Board ("Board") decision[2] rendered against Liman İşletmeleri ve Nakliyecilik Sanayi Ticaret A.Ş and Densay Denizcilik ve Ticaret A.Ş the two companies agreed by way of an agreement that the ships which approach to Çukurova dock shall only engage with Densay AŞ as their agent. The Board decided that such an agreement preventing other agencies activities is a tying agreement and against the Article 4 of the LPC.

The Guidelines on Vertical Restraints ("Vertical Guidelines") analyzes the cases where tying practices result in vertical restraints. Article 2 of the Block Exemption Communiqué on Vertical Agreements numbered 2002/2 ("Communiqué"), considers the events in which the market share of the vertical agreement exceeds 40%, with regard to the

2 Competition Board Decision dated 16.5.2002 and numbered 02-29/339-139.

tying and tied products, within the scope of the exemption, provided that all other conditions stipulated under the Communiqué are met. It is significant to evaluate the dominance of the suppliers, compared to their competitors in the tying product market; this evaluation clarifies the amount of possible anticompetitive impacts (such as entry barriers) of the supplier.

Tying in accordance with the Abuse of Dominant Position

Another provision of the LPC regulating the tying practices is Article 6 that pertains to the abuse of dominant position. Tying practices provided under Article 4 are also an example of the abuse of dominant position. Contrary to Article 4, Article 6 does not include the expression "contrary to the nature of the agreement and commercial customs."

Guideline on the Assessment of the Exclusionary Abusive Practices by the Undertakings in Dominant Position ("Guideline") also provides rules regarding tying practices. Tying practices of undertakings in the dominant position may lead to a decrease in the number of potential customers of their competitors, or may create entry barriers.

In accordance with Guideline, determination of the illegal tying practices of the undertakings in the dominant position is subject to two conditions: Tied and tying products shall be different, and closure of the market in an anti-competitive way shall be possible[3].

In the Digitürk decision[4], the Board evaluated the package sale of images of nine match highlights played within a week to the broadcasters as a tying agreement in terms of Article 6 of the LPC. Board in its evaluation regarded two factors listed in the Guideline together with the buyers product selections and decided that Digitürk is abusing its dominant position in the market.

In order for the products to be different, the Board considers that the tied product shall be a product to be sold, or having the potential to be sold, without the tying product. In the Digitürk decision the Board regarded match highlights as different products since the products in

---

3 Guideline on the Assessment of the Exclusionary Abusive Practices by the Undertakings in Dominant Position para. 86.

4 Competition Board decision dated 7.9.2006, numbered 06-61/822-237.

question can be requested separately. Factors such as the market practices of the undertakings having different products, pricing of the products, option to sell the products separately, and the effects of separately selling the products with respect to quality, may be taken into consideration. In the Akınsoft decision in determining the seperability of the products, demand of buyers for the tied product is considered however in conclusion Akınsoft is not regarded as an undertaking in the dominant position and the Board decided that there is no abuse under Article 6 of LPC[5].

On the other hand, pursuant to Vertical Guideline, the products shall be assessed in accordance with the perspective of the buyer. That is to say, if the products may be purchased from different markets, they are considered as different products. However, if the products are expected to be sold together in accordance with the commercial customs, or if selling the products separately causes technical inconveniences, the sale of these products together is deemed as a usual practice in commercial life.

Undertakings in the dominant position may use tying agreements as a means of price discrimination or predatory pricing. For instance, undertakings may tie two products and sell them at a price much lower than the total price of the two products. In such cases, the undertakings aiming to provide pricing advantages to their competitors use the tying practices as a tool.

Practices in European Community ("EC")

Tying practices of the EC provides an insight for competition practices in Turkey. In accordance with the EC competition law, and also in accordance with Turkish law, closure of the market, creating entry barriers, and thus, harming the buyers by an undertaking in the dominant position via abuse of its dominant position, are considered illegal. As it is provided in Guideline, illegality of a tying practice by an undertaking in the dominant position makes clear that there are two different products, and the market is closed in an anti-competitive manner[6].

---

5 Competition Board decision dated 5.3.2009, numbered 09-09/192-59.

6 EC Treaty Article 102.

With the Microsoft[7] decision being one of the most important decisions regarding tying agreements, the Commission assesses the fact that Microsoft Internet Explorer was tied to the Windows software system. The Commission evaluated whether tied and tying products are different in accordance with the buyers demand, and decided that certain undertakings sell only the tied product (software system), and the two products are different in terms of their functions. Microsoft undertook that they will provide the option to choose different web browsers after their illegal tying practices were subjected to the investigation, and the Commission accepted the relevant undertakings. Article 102 of the Treaty of the European Community provides that obliging the buyer to purchase the tied product is an element of abuse of the dominant position. Although the buyer does not seem to be obliged to purchase the software system in the above mentioned Microsoft case, the Commission deems the fact that removal of the system is not possible as a result of the technical tying to be obliging of the buyer. Paragraph 53 of the Commission's Guidance on Article 102 Enforcement Priorities provides that the technical tying is a strict method as compared to contractual tying, considering that separating the products is more difficult and expansive.

Conclusion

Tying practices is implied by the undertakings in commercial life as decreasing distribution expanses, increasing the sales of the non-preferred products, and creating price advantages. These practices are illegal so long as they are considered within the scope of Articles 4 and 6 of the LPC.

Closure of the market in an anti-competitive way, creating entry barriers and harming buyers, are deemed as abuses of dominant positions. In addition, undertakings in dominant positions use tying practices for price discrimination and predatory pricing, and such practices create competitive concerns. Turkish competition law is in compliance with EC competition law in this respect. Decisions of the Commission, such as the Microsoft decision, also provide insight for Turkish practice.

---

7 Regarding the Microsoft Case, please see: http://ec.europa.eu/competition/sectors/ICT/microsoft/.

Selective Distribution System under Competition Law*

Att. Ecem Susoy Uygun

Selective Distribution System

Selective distribution system is defined as a "distribution system whereby the provider undertakes to sell, directly or indirectly, the goods or services that are the subject of the agreement, only to distributors selected by it, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorized distributors," under Art. 3 of the Block Exemption Communiqué on Vertical Agreement No. 2002/2 ("Communiqué No. 2002/2").

Qualification of the goods or services plays a significant role in formation of the selective distribution system. Suppliers who do not prefer to sell products, such as jewelry and perfumeries, with a certain brand image to be sold by personnel with insufficient knowledge and qualifications, at unsuitable places, generally choose the selective distribution system. In order to ensure to supply such products to the end users in the most efficient way, a requirement may be introduced to ensure that the products are exclusively sold by members of the selective distribution system, and to prevent the product from being displayed at sales points that may harm its brand image. As stated in the Guideline on Vertical Agreements ("Guideline"), the selective distributor agreements, as exclusive distributor agreements, limit the number of authorized distributors and resale opportunities, as well.

When restrictions are imposed by the selective distribution system members for the purpose of protecting the quality of the product, these restrictions are not deemed as a restriction of competition. The criteria to be met in the selective distributor agreements has been examined in

---

* ***Article of December 2015***

the Metro[1] case by the Court of Justice of the European Communities ("CJEC"). As per this dispute, SABA sells products, such as televisions, radios and tapes through a distribution network composed of expert sellers who meet certain criteria. SABA refused Metro's claim of being a part of this network since Metro does not meet the criteria required by SABA. The Commission of the European Communities granted exemption to SABA's distribution agreement; thus, Metro applied to the CJEC appealing the decision of the Commission[2].

Legal Framework of the System under Turkish Competition Law

Pursuant to Art. 4 of the Act on the Protection of Competition No. 4054 ("Act No. 4054"), agreements between undertakings that have the intent or effect, or likely effect to prevent, distort or restrict competition, are illegal and prohibited. Within this scope, the selective distribution agreements that have the intent or effect, or likely effect to prevent, distort, or restrict competition, are illegal and prohibited, as well.

If the selective distribution agreements that are included within the scope of Art. 4 of Act No. 4054 meet the exemption conditions stated in Art. 5 of Act No. 4054, the Competition Board ("Board") may decide to exempt these agreements. Also, these agreements may enjoy block exemption communiqués issued by the Board.

There are three block exemption communiqués in force that include regulations on selective distribution agreements. These communiqués are as follows: Communiqué No. 2002/2, Block Exemption Communiqué on Vertical Agreements and Concerted Practices in Motor Vehicles Sector No. 2005/4 ("Communiqué No. 2005/4") and Block Exemption Communiqué on Technology Transfer Agreements No: 2008/2 ("Communiqué No. 2008/2").

---

1 EuGH, 25.10.1977- Rs. 26/76, Slg. 1977 –"Metro/Saba", please see. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0026 (Access date: 08.01.2016).

2 **Uzunallı, Sevilay**, Rekabet Hukukuna Göre Dağıtım Anlaşmalarında İnternetten Satış Sınırlamaları, p. 7, 8. Please see. http://journal.yasar.edu.tr/wp-content/uploads/2014/01/23-Sevilay-UZUNALLI-1.pdf (Access date: 08.01.2016).

Selective Distribution Systems within the scope of Communiqué No. 2002/2

As it is regulated in Art. 4 of Communiqué No. 2002/2, vertical agreements that include limitations and have the intent to hinder competition, directly or indirectly, may not benefit from the exemption. Those that are regulated under Art. 4, and which may not benefit from the block exemption, are related to selective distribution agreements. These are as follows: (i) restriction of active or passive sales to end users, to be performed by the system members operating at the retail level, provided that the right is reserved for prohibiting a system member from operating in a place where it is not authorized, (ii) prevention of purchase and sale between the system members themselves in the selective distribution system.

In light of the foregoing, even if the supplier creates exclusive regions in order to supply goods to a limited number of purchasers, active and passive sales to be performed by purchasers to the end users outside of the region cannot be prevented. Additionally, enterprises that adopt a selective distribution system cannot impose exclusive purchase obligations to the system member buyers. In other words, the system members cannot be prevented from purchasing products from other member undertakings.

Accordingly, selective distribution agreements that do not include restrictions listed under Art. 4 of Communiqué No. 2002/2 benefit from the block exemption, without considering the quality of the goods and services and the selection criteria.

Selective Distribution Systems within the scope of Communiqué No. 2005/4

Pursuant to Art. 3/f of Communiqué No. 2005/4, a selective distribution system means a distribution system where the provider undertakes to sell the goods or services that are the subject of the agreement only to the distributors or authorized services, directly or indirectly, and where these distributors or authorized services undertaking not to sell the said goods and services to unauthorized distributors and services.

The supplier may adopt quantitative or qualitative selective distribution system when selecting their distributors or authorized services. A quantitative selective distribution system is a selective distribution system wherein the provider uses criteria that directly limits the number of these distributors or authorized services when selecting its distributors or authorized services. A qualitative selective distribution system is a system where the provider uses criteria for distributors or authorized services, which are only qualitative and are required by the nature of the goods or services that are the subject of the agreement, are established and put forward so as to be the same for all candidate undertakings that apply for participation in the distribution system, are not applied in a discriminatory manner, and which do not directly limit the number of the distributors or authorized services.

Art. 5 of Communiqué No. 2005/4 regulates restrictions that take the agreements out of block exemptions. Those that are regulated under Art. 5, and which may not benefit from block exemptions, are related to selective distribution agreements. These are as follows: (i) the prevention of exchanges among system members in the selective distribution system, (ii) the restriction of active or passive sales to end users by members of a selective distribution system, (iii) the restriction of sales by members of a selective distribution system to special services.

Moreover, the restriction of the right of authorized services to sell spare parts to independent undertakings[3], or prevention of access to the technical information, diagnostic devices, and other equipment, required software or education that are necessary for the maintenance and repair of motor vehicles, take the agreement out of the block exemption.

Selective Distribution Systems within the scope of Communiqué No. 2008/2

In accordance with Art. 4/f of Communiqué No. 2008/2, selective distribution system is a distribution system where the licensor licenses the production of the contract products only to licensees selected on

---

3 The independent enterprise should be considered as the independent service.

the basis of specific criteria and where these licensees undertake not to sell the contract products to unauthorized distributors.

Where undertakings party to the agreement are not competitors, the exemption granted by Communiqué No. 2008/2 shall not apply to the agreements in the event active or passive sales to end users are restricted by a licensee carrying out activities at the retail level without prejudice to the right to prohibit a member of a selective distribution system from carrying out activities at an unauthorized place.

As per, Guidelines on the Application of Articles 4 and 5 of the Act No. 4054 on the Protection of Competition to Technology Transfer Agreements, in cases particularly where the licensee is obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution according to the license agreement, distribution agreements concluded for the purposes of implementing such obligations must, in order to be covered by a block exemption, comply with Communiqué No. 2002/2.

Non-compete Obligation in the Selective Distributor Systems

In accordance with Art. 5 of Communiqué No. 2002/2, the exemption granted shall not be applied to the obligation not to sell the branded product of designated competing providers, as imposed on the members of the selective distribution system.

Another non-competition obligation practice that is not authorized is the prevention of the sales of a certain competitor's products by the members of a selective distribution system. The supplier of a selective distribution system may mandate that selected buyers sell its own products exclusively, and refrain from selling any competing products. However, it may not allow the sale of the products of some of its competitors while preventing others from using this system. In other words, in a selective distribution system, non-competition obligations must either cover all competing products, or none of them.

As to Art. 6 of Communiqué No. 2005/4, exemptions shall not apply to any direct or indirect non-compete obligation regulated in agreements in terms of the sale, maintenance and repair services, or spare parts of new motor vehicles.

Competition Risks Arising From the Selective Distribution System

As per the Guideline, certain competition risks arise from the selective distribution, such as lessening in inter-brand competition, and particularly, cause a decrease in inter-brand competition, closing of the market to certain types of distributors in the event of cumulative effect, and ensuring cooperation between suppliers and distributors that cause restriction of competition. As well, since distribution systems do not tend to emphasize price competition, some of these systems can be used for the exclusion of re-sale units (such as discount stores) and price competition between brands can be in imperiled in case numerous companies in the market use selective distribution[4]. Also, by selective distribution systems, it may be purposed to hinder competition via preventing a new supplier or distributor from entering into the market, to restrict inter-brand competition by closing of the market to sub-buyers in the market, by the supplier who is in the position of monopoly[5].

Positive Effects of the Selective Distribution System

Some of the positive effects of the selective distribution system may be specified as follows: (i) helping to solve the free-riding problems among the distributors, and keeping pre-sales services at the preferred level, (ii) ensuring decrease in the transportation, logistic and transaction costs due to provision of the products to limited number of distributors, (iii) ensuring effective distribution of the product, (iv) the promotion of distribution services, (v) guaranteeing significant relationship-specific investments, (vi) contributing to consumer satisfaction, (vii) availing sales forecast and production management, etc.[6].

---

4 **Koç, Ali Fuat**, AT Rekabet Hukukunda Seçici Dağıtım Anlaşmaları, Ankara, 2005, p. 20. Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FUzmanl%25c4%25b1k%2BTezi%2Ftez68.pdf (Access date: 08.01.2016).

5 **Koç, Ali Fuat**, AT Rekabet Hukukunda Seçici Dağıtım Anlaşmaları, Ankara, 2005, p. 21. Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FUzmanl%25c4%25b1k%2BTezi%2Ftez68.pdf (Access date: 08.01.2016).

6 **Koç, Ali Fuat**, AT Rekabet Hukukunda Seçici Dağıtım Anlaşmaları, Ankara, 2005, p. 27. Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FUzmanl%25c4%25b1k%2BTezi%2Ftez68.pdf (Access date: 08.01.2016).

Conclusion

Selective distribution agreements have gained importance with Communiqué No. 2002/2, Communiqué No. 2005/4 and Communiqué No. 2008/2. The effects of the selective distribution system, where resellers who meet the relevant criteria and the variety of products that are limited may vary due to several factors in competition. The restrictions introduced in selective distribution provide for gaining efficiency in the relevant market on one hand, while on the other hand, they may have negative effects on competition depending on market conditions. Therefore, collectively evaluating the positive and negative effects of the restrictions imposed by the selective distribution on a case-by-case basis is important.

Liberalization Process in Electricity Market in Terms of Competition Law*

Att. Ecem Susoy Uygun

Introduction

Legislation regarding the electricity market initiated its development in the first decade of this century. Primarily, Electricity Market Law No. 4628 ("Law No. 4628") was approved on 20.02.2001, and then, Electricity Market Law No. 6446 ("Electricity Market Law"), which was published in the Official Gazette dated 30.03.2013 and numbered 28603, took its place. Law No. 4628 was not abrogated with the entry into force of the Electricity Market Law; it was partially amended, however, and its name was altered to the Law on Organization and Duties of Energy Market Regulatory Authority.

Within the framework of the recent legislation that entered into force, a competitive environment in The Turkish electricity market was created by virtue of restructuring with an aim towards liberalization. With regard to the process of the establishment of a competitive electricity market, the Competition Authority ("Authority") published the Report on Wholesale and Retail Electricity Market Sector Inquiry ("Report")[1]. One of the subject matters that is thoroughly examined in this Report is the liberalization process of the electricity market. This article briefly discusses the liberalization process of the electricity market, in light of the aforesaid Report of the Authority.

---

* ***Article of April 2015***

1 Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FSekt%C3%B6r+Raporu%2Felektriksektor.pdf (Access date: 05.05.2015).

General Overview of the Liberalization Process of the Electricity Market

Along with the changes come into play since the entry into force of the Electricity Market Law, the establishment of a competitive environment in The Turkish electricity market accelerated. The aim of the Electricity Market Law is to create a financially powerful, stabilized and transparent electric energy market that operates competitively, in accordance with private law provisions, and to provide independent regulations and auditing procedures within this market, for the purpose of procuring sufficient, high-quality, constant, and low-cost electricity to consumers.

In the past, the generation, transmission, distribution and retail operations of electricity was on public property, in a vertically integrated structure. In order to enable entry into the electricity market, and to create a sector where balanced competition is achieved, the division of a vertically integrated monopoly market has arisen. This division could be defined as the separation of the transmission and distribution, which are, collectively, considered as a natural monopoly from the perspective of generation and marketing.

Determining market entrance and exit conditions, as well as the tariffs regulating the services that enterprises utilize and/or submit, and the retention of anti-competitive activities of the enterprises, are essential to establish competition in the marketplace[2].

As is stated in the Report, the first stage of the liberalization process of The Turkish electricity markets was the period after the division of the Turkish Electricity Institution ("TEI"). The TEI was divided into the Türkiye Elektrik Üretim A.Ş. (the Turkish Electricity Generation Company) ("TEAŞ") and Türkiye Elektrik Dağıtım A.Ş. (the Turkish Electricity Distribution Company) ("TEDAŞ"). Afterwards, TEAŞ split into three independent entities.

As of 2001, which was the year when Law No. 4628 entered into force, the private sector took its place in the electricity market and many privatizations ensued. The Report stated that by virtue of the

---

2 **CAN, Mustafa Erdem**, Hukuki Açıdan Elektrik Piyasasında Rekabet, Ankara 2006, p. 7.

provisions of the Electricity Market Law regarding wholesale markets, as of 2013, a new period for the establishment of a well-operated, liquid wholesale market has commenced.

Developments in Generation within the Liberalization Process

In the Report, it is set forth that due to the fact that electric energy generation requires large-scaled investments, these private sector investments in the Turkish electricity market has started with the establishment of Build Operate-Build Operate Transfer plants. It is foreseen in the Report that the private sector's role in electric energy generation will increase by privatizations.

The variety of resources in the generation of electricity contributes to the establishment of a competitive market. The Report determines that among the electricity generation resources, natural gas plants have a ratio of 43.63% in 2012. Consequently, when the high ratio of natural gas among electricity generation resources is taken into consideration, the liberalization process of the electricity and natural gas markets interact. However, in light of the determination made in the Report, within the context of the current situation, as well as taking into account the forecasts for 2017, the generation from hydraulic resources is also significant in the Turkish electricity generation market.

Developments in the Wholesale Market within the Liberalization Process

Türkiye Elektrik Ticaret ve Taahhüt A.Ş. (the Turkish Electricity Trade and Undertaking Company) ("TETAŞ"), was established as the first wholesale company in accordance with Law No. 4628 and as it is indicated in the Report, TETAŞ undertakes liabilities for a smooth transition in order to attain a competitive market.

TETAŞ is responsible for the sale and purchase of energy that arise from long-term agreements, which are concluded by the state. TETAŞ is active in trading and undertaking electricity on behalf of the state, and purchases electricity energy from the Türkiye Elektrik Üretim A.Ş.'s (Turkish Electricity Generation Company) ("EÜAŞ") power plants that operate pursuant to the Build Operate–Build Operate Transfer-Transfer of Operational Rights model, and other countries, as

well as from the Balancing Market operated by the Market Financial Settlement Center ("MFSC"). It is also involved in sales to concerned electricity-to-electricity distribution companies, authorized supplier companies, as well as customers who have direct access to the transmission system and to the other countries in accordance with exportation agreements and the Balancing Market operated by the MFSC[3].

In 2011, the most significant step for the Turkish electric market was the establishment of the Day Ahead Market. The establishment of the relevant market energized the Turkish electricity market and promoted the establishment of a competitive market[4]. Participation to the Day Ahead Market is not obligatory; however, all licensed legal persons may participate in the Day Ahead Market by signing the Day Ahead Market Accession Agreement. In the Day Ahead Market, participants who are present propose to sell and purchase each hour of the following day, and then Market Clearing Price is established at the point where supply and demand is aligned. Following the closing of the Day Ahead Market, real-time activities with the purpose to eliminate real-time distortions regarding supply and demand is conducted in accordance with the rules that cover the Balancing Power Market.

Therefore, with the impact of the Day Ahead Market and Balancing Power Market, a market structure that is based on bilateral agreements is targeted in The Turkish electricity market. Although the proportion of the bilateral agreements concluded by the private sector is low, the Report states that the increase of that proportion is the main reason and result of the process on the establishment of a liquid wholesale market.

Another development in the electricity market might be specified as the definition of the organized electricity wholesale market by the Electricity Market Law. As stated in the Report, defining the organized electricity wholesale market, and rendering day-ahead and intra-day markets, balancing-ancillary services market, physical and derivative markets made functional by the establishment of the electricity stock market plays a significant role in the liberalization of the market.

---

3 Please see. http://www.tetas.gov.tr (Access date: 05.05.2015).

4 Please see. https://www.pmum.gov.tr (Access date: 05.05.2015).

Finally, the establishment of Enerji Piyasaları İşletme Anonim Şirketi (the Energy Market Operation Company) ("EPİAŞ") to operate in the organized electricity wholesale market was targeted, and it was established on 12.03.2015. The establishment of EPİAŞ is considered as a substantial element to realize a functioning and transparent market.

Developments in Retail Sale Market during the Liberalization Process

The Report states that the most significant step regarding the liberalization and marketization of the retail market is undoubtedly the privatization of electricity distribution companies between January 2009 and July 2013, which was previously held by TEDAŞ, and, therefore, the operation of the distribution and retail sale activities of electricity by the private sector. The acquisition of all of the electricity distribution companies by the private sector was completed between 2009 and 2013.

Another important step for liberalization of the electricity market is the gradual decrease of the free consumer limit. In accordance with the graphics on the evolution of the theoretic and actual proportions of the openness of the market (the proportion showing the marketization level which is calculated by the division of the free consumer consumptions with the total amount of consumption) concerning the period between December, 2011, and January, 2014, as presented by the Report, the actual level of liberalization is far behind the theoretical level of liberalization, and the decrease of the free consumer limit does not assure the actual benefit by consumers from the right of the free consumer and competition in the retail sales market.

With the liberalization of the Turkish electricity market, consumers may choose among the distribution companies and prefer to conclude contracts with a company that provides the best service. However, a chart presented by the Report demonstrates that between the period of July, 2013, and April, 2014, the consumers exercising the right of the free consumer purchases services from official distribution companies, and do not conclude agreements with other distribution companies, although the distribution and retail sales are to be operated by the separate legal entities. The market share of the independent dis-

tribution companies is negligible for private residences, and is higher for consumers in a commercial group, than in an industrial group. Accordingly, consumers in the residential and industrial groups that have a consumption amount higher than the free consumer limit may continue to purchase electricity pursuant to the tariffs provided.

Conclusion

In order for the Turkish electricity market to become competitive, the market model should be planned at every step, and competitive elements should be in accordance with each other. Since the 2000's, liberalization of the Turkish electricity market is commenced, and a free and competitive market system took the place of the system of sole purchaser and seller. The Report published by the Authority assesses the evolution of liberalization of the Turkish electricity market in terms of legislation and market structure and the marketization process along with the current market situation.

The Competition Board Rejected the Acquisition of the Marinas*

Prof. Dr. H. Ercument Erdem

Introduction

The Competition Board ("Board") has rejected the acquisition of the full shares of Beta Marina Liman ve Çekek İşletmesi A.Ş. ("Beta Marina") and Pendik Turizm Marina Yat ve Çekek İşletmesi A.Ş. ("Pendik Turizm") by Setur Servis Turistik A.Ş. ("Setur") in accordance with Art. 7 of the Act No. 4054 on the Protection of Competition ("Competition Act") in its decision[1] dated 09.07.2015 and numbered 15-29/421-118.

Parties of the Transaction

Pursuant to the information examined by the Board, the acquirer party, Setur, was incorporated within Koç Holding A.Ş. ("Koç Holding") in 1965, and is active in the tourism sector. Koç Holding operates nine marinas of which two of them are operated under joint control.

One of the acquired parties, Beta Marina, is indirectly embodied within Yıldız Holding A.Ş., and operates the marina by means of leasing. The other acquired party, Pendik Turizm, is also indirectly embodied within Yıldız Holding A.Ş., and currently holds a utilization permit from Istanbul City Port Marina, and leases this marina to Beta Marina.

Legal Framework of the Transaction

The acquisition of the full control of Beta Marina and Pendik Turizm by Setur is an acquisition transaction within the frame of Art.

---

* ***Article of November 2015***

1 Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f15-29-421-118.pdf (Access date: 08.12.2015).

5 of the Communiqué Concerning Mergers and Acquisitions that Call for the Authorization of the Competition Board[2] ("Communiqué No. 2010/4") and Art. 7 of the Competition Act. Since the transaction exceeds the turnover thresholds specified under Art. 7 of Communiqué No. 2010/4, it is subject to the Board's authorization.

As per Art. 7 of the Competition Act, merger or acquisition transactions by any undertakings with a view to creating a dominant position or strengthening the current dominant position, which would result in significant lessening of competition, is prohibited.

When the prohibition regulated under Art. 7 of the Competition Act and the term of dominant position defined in Art. 3 thereof are mutually considered, merger and acquisition transactions that are subject to the Board's authorization as per Communiqué No. 2010/4 should be assessed in terms of whether the undertakings, individually or mutually, reach the power referred to in the terms of dominant positions, or whether or not to increase such power that exists prior to the transaction.

In this decision, the Board examined whether or not the acquired party creates a dominant position in the related market that would result in significant lessening of competition as a result of this acquisition transaction that is subject to authorization.

Relevant Market

Relevant Product Market: A relevant product market is comprised of the products or services that may be regarded as interchangeable or substitutable by the consumer due to the products' properties, prices, and intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products by the consumer is taken into account.

As per the Guidelines on the Definition of the Relevant Market[3], the Board evaluated whether services that are rendered by marinas con-

---

2 Please see. http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/S%C4%B1k%C3%A7a+Sorulan+Soru/teblig83.pdf (Access date: 08.12.2015).

3 Please see. http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FKilavuz%2Fkilavuz5.pdf (Access date: 08.12.2015).

stitute different relevant markets, since they are not substitutable in terms of their intended purposes and properties from the view of customers. In this respect, sea services, land services and leasing services that are provided in marinas have been evaluated, severally.

Relevant Product Market with regard to Sea Services: Whether mooring services rendered in boat parks and fishing ports are substitutes to marina mooring services was evaluated. Concerning mooring services, it has been decided by the Board that boat parks are interchangeable with marinas in terms of their prices, intended purposes, and properties by customers and, thus, they may be evaluated within the same relevant product market. However, the Board has determined that fishing ports are not interchangeable with marinas, and they are not allowed within the same relevant product market.

Relevant Product Market with regard to Land Services: Marina land services are limited to boatyard services. The Board is of the opinion that there is no defining element of boatyard services that are provided by marinas in land fields from which to distinguish boatyard services offered by other facilities.

Relevant Product Market with regard to Leasing Services: Whether or not field leasing services rendered by marinas are substitutes for land leasing services rendered by entity consumers, other than marinas, has been examined, and it has been concluded that with regard to leasing services, there is no need to limit the relevant product market definition concerning the leasing services offered by marinas.

In light of the foregoing, the Board has defined the relevant product markets as "*mooring services rendered in marinas and boat parks*," "*boatyard field services market,*" and "*field leasing services market.*"

Relevant Geographic Market: Relevant geographic markets are areas in which undertakings 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, as the conditions of competition differ considerably therefrom.

The relevant geographical market analysis for the purposes of this transaction has been separately identified in terms of the relevant prod-

uct services that are separately defined as mooring services rendered in marinas and boat parks, boatyard field services markets, and field leasing services markets.

The Geographical Market with regard to Mooring Services Rendered in Marinas and Boat Parks: Beta Marina, which is one of the companies subject to transfer within the scope of the transaction, is the operator of Istanbul City Port Marina in Istanbul; Göcek Village Port Marina, and Göcek Exclusive Marina, all of which are located in the Aegean region. The geographical market analysis with regard to such marinas has been separately considered. For the Istanbul City Port, the relevant geographical market has been defined as the "*districts of Adalar, Ataşehir, Beşiktaş, Beyoğlu, Çekmeköy, Kadıköy, Kağıthane, Kartal, Maltepe, Pendik, Sancaktepe, Sultanbeyli, Şişli, Tuzla, Ümraniye and Üsküdar,*" and for Göcek Village Port Marina and Göcek Exclusive Marina, it has been defined as the "*Aegean and Mediterranean Sea coastal line.*" However, a specific determination of the relevant geographical market was found to be unnecessary since a narrow determination would not substantially change the evaluation of concentration.

The Geographical Market with regard to Boatyard Field Services: For Istanbul City Port Marina, the relevant geographical market has been determined as "*the cities bordering the Marmara Sea.*" On the other hand, since the assessment would not be affected by different determinations of the relevant geographical market, a specific determination of the relevant geographical market was deemed unnecessary for these marines in terms of the boatyard field services.

The Geographical Market with regard to Field Leasing Services: Although the definition of the relevant geographical market has been considered as "*Turkey,*" a specific determination of the relevant geographical market was deemed unnecessary since even a narrow city-based or side-based determination for Istanbul would not affect the concentration evaluation.

Evaluation of Concentration

The Board has severally addressed the evaluation of concentration, separately, in terms of the relevant product market:

Mooring Services Rendered in Marinas and Boat Parks: In terms of Istanbul City Port Marina, if this acquisition is realized, the Board has specified that the market ratio of the marinas in the relevant market, and which is controlled by Koç Holding, will reach 60-65% in accordance with the figures from 2014. Therefore, it has been interpreted that this acquisition transaction would create competitive concerns.

The Board has reflected its concerns that as a result of this acquisition transaction, Koç Holding will take the control of Istanbul City Port Marina, which is the closest rival of Kalamış Marina, operated by Koç Holding, as well; thus, the compound undertaking to be formed will hold significant market power in the relevant market, and it may use its market power in order to increase prices.

Nonetheless, in the alternative geographical market definitions that might be made for Göcek Village Port Marina and Göcek Exclusive Marina, it has been deduced that the transaction would not cause a significant increase in concentration in terms of the relevant product market.

Boatyard Field Services: In terms of the boatyard field services rendered in the cities bordering the Marmara Sea, the market shares of the parties prior to the transaction, and the market share of the compound undertaking to be formed following the transaction were evaluated. Additionally, it has been concluded that immediately following the transaction, the customers of the compound undertaking would have the opportunity to lean towards rival undertakings due to the high number of undertakings that will operate in the relevant market after the acquisition, the substitution level of services of the rival undertaking compared to services of the compound undertaking, and the rivals' adequate capacity to meet the demands of customers who reject potential high pricing of the compound undertaking. This situation may damper the compound undertaking's motive to increase prices.

On the other hand, in the alternative geographical market, definitions that might be made for Göcek Village Port Marina and Göcek Exclusive Marina are that the transaction would not cause a significant increase in concentration in terms of the relevant product market.

Field Leasing Services: In terms of the alternative geographic market definition for Istanbul City Port Marina, Göcek Village Port Marina, and Göcek Exclusive Marina, it has been emphasized that no significant concentration increase would be created.

Conclusion

As a result of its examination, the Board has decided that the acquisition of the full shares of Beta Marina and Pendik Turizm by Setur was subject to authorization under Communiqué No. 2010/4, and that the transaction in question should be rejected pursuant to Art. 7 of Act No. 4054, since it would lead to Koç Holding acquiring the dominant position in the relevant market defined in relation to the Istanbul City Port Marina and, therefore, would significantly lessen competition in the market.

On the other hand, this decision of the Board is criticized in the Justification of the Dissenting Vote in respect to specification of the relevant product and geographical market, the determination of whether the turnover thresholds have been exceeded or not, and the soft possibilities and assumptions that the prohibition of this transaction is based on. Additionally, not granting authorization to the acquisition transaction, by reasoning that the Kalamış and Fenerbahçe Marina is not legally owned by Setur, and its disembarkation depends on the consent of another institution, is not approved, and is noted in the Justification of the Dissenting Vote, as well.

This decision of the Board is substantial in respect to the mergers and acquisitions realized in Turkey, especially for marina operational activities that are conducted in Turkey. Hence, there are some Board decisions that reject these types of mergers and acquisitions, and the reasons for rejection underlying this decision set a precedent for other merger and acquisition transactions. However, as emphasized in the Justification of the Dissenting Vote, some major errors are observed concerning the decision of the Board such as: (1) The specifications concerning the relevant geographical market remain ambiguous. Also, despite two of the three marinas that are the subject of the transaction are located in Göcek, no relevant geographical market for these marinas are specified. (2) Whether the fishing ports' being considered as

substitutes or not have not been sufficiently searched. (3) The newly built Tuzla Marina that is located in the same geographic market with Pendik Marina has been put into service; yet, the effects of the new marina have not been taken into account. (4) Due to the ambiguities that remain in the definition of the relevant geographic market, whether or not the transaction being subject to the Board's authorization in respect of exceeding the turnover thresholds are deemed as skeptical. (5) Setur's waiver from the right to operate the Kalamış and Fenerbahçe Marina as a reason for the concentration has not been taken into account.

ARBITRATION LAW

Drafting Arbitration Agreements*

Prof. Dr. H. Ercument Erdem

Introduction

Arbitration agreements are the essential basis of international arbitration. A successful arbitration starts with a successful arbitration agreement. The arbitration agreement reflects the parties' consent to submit present or future disputes to arbitration. Unsuccessfully drafted arbitration agreements can face enforcement difficulties, IBA Guidelines for Drafting International Arbitration Clauses ("Guidelines") high and unnecessary costs, and delays. The Guidelines are designated to provide assistance for the drafting of efficient and enforceable arbitration agreements. The Guidelines provide basic and optional rules for the drafting of arbitration agreements, multi-tier clauses, and multi-party agreements.

The arbitration agreement can be in the form of an arbitration clause inserted in the underlying agreement, or in a separate submission agreement.

Basic Guidelines

Wording of the Arbitration Agreement

The arbitration agreement put forward without hesitation the parties' agreement to settle the dispute through arbitration. The parties should use mandatory language, such as 'must' or 'shall,' rather than using permissive language like 'may' or 'might.' It is recommended to use words such as 'disputes' or 'differences,' as compared to 'claims.' The scope of an arbitration agreement will frame the dispute that can be referred to arbitration.

---

* ***Article of July 2015***

An arbitration agreement would include, all disputes "arising out of," "in connection with," or "relating to" the contract. Such broad terms are important to avoid arguments regarding whether the dispute is within the scope of the arbitration agreement. There can be exceptional circumstances where the parties will prefer to exclude various disputes, such as pricing and technical disputes.

Ambiguity should be avoided, primarily to supersede ineffective agreements and to eliminate problematic results, such as enforcement difficulties. It is crucial to understand the parties' intentions in the arbitration agreement.

Parties should decide between Institutional or Ad Hoc Arbitration

In ad hoc arbitrations, the parties have to choose their arbitrators, or address a procedure for their appointment. The parties should also decide upon procedural rules, place of arbitration, language, etc. The parties can prefer to use already drafted rules such as UNCITRAL Arbitration Rules for assistance.

In institutional arbitrations, in general terms, the chosen institution has the duty to organize the arbitration. The institution provides rules for procedural matters that assist parties[1].

The parties should consider in determining the institution the reputation and trustworthiness, rules of the institution, lists of the arbitrators, as well as powers granted to the institution. The parties should select governing arbitration rules and use the model clause provided in these rules. The preferred arbitration rules will form the procedural scheme. If the parties fail to make such designation, procedural matters have to be included in the arbitration agreement, which is not generally desired. When the parties adopt the model clause recommended by the selected arbitration rules, they can add new points, but should not remove any points. Such new additions shall be parallel with the language of the selected arbitration rules.

The parties are recommended not to limit the scope of disputes, and it is suggested that they draft the scope in broad terms, excluding special circumstances.

---

[1] See Article 6 of the ICC Rules.

Parties should select the Place of Arbitration

In making such determination, the parties should consider strategic, practical, and legal criteria. The strategic criteria cover neutrality and effectiveness. In practice, neutrality is guaranteed by selecting the seat of the arbitration to be in a country that is not connected to any of the parties. Effectiveness is related to the enforcement of the award.

Practical criteria highlights comfort, security, practical conditions to carry out arbitration activities, costs, hearing facilities, closeness to the parties, witnesses and evidence, etc.

In general terms, the place of arbitration determines intervention of the courts and applicable procedural law. There is a natural relationship between the "place of arbitration" and the "applicable procedural law." The applicable procedural law is the law of the place of arbitration unless the parties agree to another procedural law. The parties should be careful when selecting a place of arbitration to consider the procedural law and courts' position towards arbitration. The place of arbitration, or the seat, is significant in terms of the award. It provides "nationality" to the award. The nationality of the award may be significant for the enforcement of the award, since the New York Convention enables the signatories to make a reciprocity reservation.

The institutional rules generally provide that the award is deemed to be made at the place of arbitration. An award is described as "foreign" when it is rendered in a country different than the country in which it is to be enforced.

In the absence of an agreement between the parties, the place of arbitration is either fixed by the relevant institution or the arbitrators[2]. The place of arbitration, which is a legal concept, does not provide that all procedural acts that include hearings be held in the determined city or country (the seat). The location of hearings may be different. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. In ad hoc arbitrations, Article 18 of the UNCITRAL Rules provide a similar approach.

---

2 See Article 18 of the ICC Rules.

Parties should determine the Number of Arbitrators

This selection has an impact on the costs, duration and quality of arbitration. The parties are free to determine the number of arbitrators. Both Articles 8 and 9 of the UNCITRAL Rules, and Article 12(1) of the ICC Rules, provide that the parties can appoint one or three arbitrators.

If the parties fail to make this determination, the arbitral institution (if selected) will decide upon the arbitrators with regard to the complexity and amount of the case. In ad hoc arbitrations, the arbitration rules (if selected) will provide the number of the arbitrators to be appointed. If the parties do not select rules for arbitration, it is important to make this determination in the arbitration agreement. The parties should set the process for selection and replacement of arbitrators. Generally, institutional and ad hoc arbitration rules regulate the methods to select and replace arbitrators.

The parties may elect to adopt another method, such as selecting the presiding arbitrator. It is important that the parties use language similar to the arbitration rules. In ad hoc arbitrations, there is no appointing authority. Therefore, it is important that the parties make such determination.

If the parties fail to designate the appointing authority, the courts at the place of arbitration may make this determination. Pursuant to the UNCITRAL Rules Article 6, the Secretary General of the Permanent Court of Arbitration at The Hague will designate the appointing authority, if the parties fail to do so. An appointing authority can be a court, institution, trade or professional association, or other neutral entity.

Parties should determine the Language of the Arbitration

The parties must be careful when selecting multiple languages. Multi-lingual arbitrations can be difficult in practice. It may be a challenge to identify arbitrators who can practice in all of the selected languages. Translations and interpretations will create additional costs and delays. Both Article 19.1 of the UNCITRAL Rules, and Article 20 of the ICC Rules, provide that in the absence of an agreement, the arbitral tribunal shall determine the language of arbitration.

Optional Guidelines

The Authority of the Arbitral Tribunal and the Courts with respect to Provisional and Conservatory Measures

It is rarely regulated in the arbitration agreement. In certain conditions where the availability of provisional and conservatory measures are restricted, the parties can explicitly regulate the authority of the courts and the arbitral tribunal, or decide to modify the applicable arbitration rules.

Document Production

The parties can choose to remain silent on document production, and adopt the provisions set forth in the applicable arbitration rules. The parties can adopt the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), or can designate their own rules.

Confidentiality

Arbitral proceedings are private, and have the potential to be confidential. In some jurisdictions, confidentiality is regulated; whereas in many jurisdictions, the parties are not under any confidentiality obligations. It may be beneficial to include confidentiality obligations in the arbitration agreement (e.g. trade secrets). It is advisable that the parties not regulate confidentiality in absolute means since, in some instances, disclosure may be necessary for the benefit of one of the parties, or for the enforcement of the award.

Disclosure of confidential information to third parties (such as witnesses or expert witnesses) may also be required and necessary during the preparation of claims, counterclaims and defenses. The parties can prefer to execute a separate confidentiality agreement.

Allocation of Costs and Fees

Arbitrators have wide discretion in terms of cost allocation. The parties may allow the arbitrators to decide on costs and fees, or request that arbitrators make no allocation of costs and fees, or request to allocate the costs on a success basis. The parties should be careful in the

wording covering these matters in the arbitration agreement, as the burden concerning these subjects will fall on the party that is unsuccessful.

Parties can set Qualifications for Arbitrators

The parties can agree on certain professional experience, nationality, and any other qualifications they deem to be necessary. Excessive qualifications will create difficulties in the selection of arbitrators.

Parties can set Time Limits in the Arbitration Agreement

Most of the institutional rules provide time limits. For example, Article 30 of the ICC Rules regulates six months for the arbitral tribunal to render the award with a possible extension. The arbitral tribunal should be allowed to extend these time limits to avoid challenges and enforcement problems.

It is difficult for the parties to ascertain during the drafting period whether a particular resolution can be rendered within specific time requirements. If the award is not rendered within the provided period, there can be enforcement problems.

Finality of the Arbitration

Most of the arbitration rules provide regulations with respect to the finality of the arbitration . If the parties do not choose a set of arbitration[3] rules, it is important to state in the arbitration agreement that the award is final and not subject to recourse. In adding such language, the parties should examine the law of the seat of arbitration to see the scope of the waiver, and the language required under the law of the seat of arbitration.

Conclusion

The will of the parties is the constitutive element of an arbitration agreement. This will should be clear. The selection between ad hoc or institutional arbitration shall be made in accordance with the particu-

---

3 See ICC Rules Article 34 (6).

larities of the case. In the case of an ad hoc arbitration, it is advised to refer to the rules already drafted (i.e. UNCITRAL Arbitration Rules). In the case of institutional arbitration, it is strongly recommended to use the model clauses proposed by the institution. The guidelines prepared to help a better drafting of the arbitration agreement should be referred to IBA Guidelines. Unless there is a particular need, the arbitration agreement should be kept as simple as possible.

Arbitration Clauses Incorporated by Reference*

Att. Fatih Isik

Introduction

Standard contracts and general terms and conditions are commonly used in international trade to agree upon the details of the contracts, and to minimize negotiations. Standardized rules and contracts that are used in such a manner are incorporated via reference into the text of the main agreement concluded between the parties. Some of the standard contracts, such as those prepared by FIDIC and BIMCO, include arbitration clauses, as well. If the standard contract is incorporated into the main agreement, the arbitration clause within the standard contract is also incorporated, and the arbitration agreement between the parties is concluded as an "arbitration agreement incorporated by reference."

In General

The conditions of conclusion of an arbitration agreement by reference are discussed in international law. Due to the fact that standard contracts are not separately signed by the parties, it can be claimed that the arbitration agreement does not fulfill the written form requirement[1]. Apart from the fact that such condition pertains to the form of the arbitration agreement, it is also closely related to the existence of the consent to arbitrate[2]. Eventually, the form requirements usually demonstrate the consent of the parties beyond a reasonable doubt.

There are controversial opinions in Turkish law and comparative law concerning arbitration clauses that are incorporated by reference.

---

* ***Article of June 2015***

1 **Turgut Kalpsüz**, Tahkim Anlaşması, Ünal Tekinalp'e Armağan, Bilgi Toplumunda Hukuk, Istanbul 2003, p. 1038.

2 **Nuray Ekşi**, Milletlerarası Deniz Ticaret Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlaşmaları, Istanbul 2010, p. 47-48.

This is especially clear in cases where there is no specific reference, but only a general referral to the standard contract that includes the arbitration clause. According to one of the opinions, the consent to arbitrate shall not be deemed explicit in cases where there is no direct or specific reference[3] to the arbitration clause, but only a general referral to the standard agreement or general terms and conditions, including the arbitration clause[4]. Due to the fact that the parties renounce their rights to apply to national courts by signing the arbitration agreement, the consent to arbitrate should be certain. The general referrals to the standard contracts only contain the provisions regarding substantive law; therefore, the necessity of an explicit reference to the arbitration clause must be sought. As per the opposing view, the explicit reference to an arbitration clause should not be mandatory in the practice of international trade[5]. With regard to the concept of "prudent merchant," it is clear that the reference to a certain text renders such text as a part of the main agreement, and agreeing on the text means that the assenting person is aware of the contents of the documents, in their entirety.

If the consent of the parties is examined, other elements may be used as evidence for the consent to arbitrate, as well as the explicit reference to the arbitration clause. For instance, attaching the referenced text to the main agreement may constitute evidence as the consent to arbitrate since this action shall enable the parties to be sufficiently informed of the arbitration agreement by access to the texts. In addition, factors such as experience of the parties, nature of the reference, practices of the relevant sector, and whether the parties have concluded similar agreements before may be taken into consideration in determination of such consent.

---

3 For a decision containing an explicit reference to arbitration clause please see the decision of 11th Civil Chamber of the Court of Cassation dated 01.07.2008, numbered 2007/1590 E. (file no.) and 2008/8780 K. (decision no.) (www.kazanci.com.tr).

4 **Emre Esen,** Uluslararası Ticari Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili, Istanbul 2008, p. 164.

5 **Kalpsüz**, p. 1039. For a decision which allows incorporation of arbitration agreement by reference even though such reference is not explicitly made, please see the decision of the 11th Civil Chamber of the Court of Cassation dated 13.6.2005, numbered 2004/9458 E. (file no.) and 2005/6114 K. (decision no.) (www.kazanci.com.tr).

Turkish Law

In accordance with Article 4/2 of International Arbitration Law ("IAL") that stipulates the written form requirement in Turkish law, "*an arbitration agreement shall be deemed concluded by reference to a document including an arbitration clause, with the intent to render such document as a part of the main contract.*" Therefore, incorporation of an arbitration agreement via reference is explicitly allowed in Turkish Law.

The Court of Cassation applies this rule. Moreover, the Court of Cassation decided accordingly prior to the entry into force of the IAL. The 19th Civil Chamber of the Court of Cassation decided in 1997 that due to the fact that the parties agreed to resolve the disputes arising from the agreement as per the FOSFA rules that contain arbitration clauses and, as well, the parties shall be able to apply to arbitral tribunal and enforce the arbitral award[6]. Therefore, it can be deduced that the Court of Cassation decided in accordance with the New York Convention by interpreting it broadly[7].

However, the New York Convention does not stipulate whether the arbitration agreements incorporated by reference fulfill the written form requirement. However, as per the "*more favorable right*" provision in Art. VII of the New York Convention, the regulation in Turkish law may be accepted as a more favorable right and, consequently, the arbitration agreement may be deemed valid[8].

International Law

The incorporation of the agreement to arbitrate by reference is accepted in international law as well. Article 7/2 of the UNCITRAL Model Law explicitly accepts this method. Despite the fact that the New York Convention does not contain explicit regulations regarding arbitration agreements incorporated by reference, it is clear that in

---

6 Please see the decision of 19th Civil Chamber of the Court of Cassation dated 08.05.1997, numbered 1998/9619 E. (file no.) and 1997/4669 K. (decision no.) (www.kazanci.com.tr).

7 **Ercüment Erdem**, Yabancı Hakem Kararlarının Tenfizinde Yazılılık Koşulu, XXVI Symposium of Commercial Law and Decisions of the Court of Cassation, p. 26.

8 **Erdem**, p. 26.

practice, such method is globally accepted. This tendency also serves the aim to simplify a dispute resolution via arbitration, and to meet the requirements of international trade.

In U.S law, incorporation of arbitration agreements by reference is considered as a matter in relation to the consent of the parties, and is evaluated in conjunction with other matters relating to such consent. In accordance with the U.S. Federal Arbitration Act, an agreement may validly incorporate an arbitration clause from another agreement. It is stated that in general, U.S. courts usually require less demanding evidence of the parties' intentions to incorporate an arbitration clause than many other jurisdictions[9].

Similarly, in French law, incorporation of an arbitration agreement by reference is also accepted[10]. However, in one of its decisions, the French Court of Cassation resolved that the existence of the arbitration clause should be mentioned in the main agreement, unless a long-standing business relationship which insures that the parties are aware of written conditions that normally govern their commercial contract exists[11].

As per Swiss law, in order to incorporate an arbitration agreement by reference, the outcome of such reference should be reasonable and should comply with the bona fide principle[12]. German Civil Procedure Law also accepts the incorporation of an arbitration agreement by reference only if the reference is conducted in such a way that renders the agreement an inseparable part of the main agreement[13].

Conclusion

In international trade, it is common for the parties to refer to certain standard contracts and general terms and conditions. If such standard contracts contain arbitration clauses, the validity of the arbitration

---

9 **Gary B. Born**, International Commercial Arbitration (Second Edition), Kluwer Law International 2014, p. 824.

10 **Esen,** p. 160.

11 **Born,** p. 820, fn. 1006.

12 **Esen,** p. 152.

13 **Kalpsüz**, p. 1039.

agreement is controversial. On one hand, some opinions indicate that the arbitration clause should explicitly be included in the reference; on the other hand, it is argued that incorporation via a general reference is sufficient for the arbitration agreement to be valid. The main point is the determination of the parties' consents to arbitrate. In Turkish law, the IAL allows incorporation of an arbitration agreement by reference. However, it should be noted that, while referring to the standard contract, making an explicit reference to the arbitration clause is recommended in order to avoid disputes regarding the parties' consent to arbitrate. Similarly, if the parties do not intend to refer the dispute to arbitration, this intent should be explicitly indicated, as well, while a standard contract is incorporated to the main agreement between the parties.

UNCITRAL Rules on Transparency in Treaty-Based Investor- State Arbitration*

Att. Mehves Erdem

Introduction

In July 2013 the United Nations Commission on International Trade Law ("UNCITRAL") adopted rules for Treaty-based Investor-State arbitration to provide transparency ("Rules"). The rules came into force on April 1, 2014. The Rules are considered as an important step taken in the evolving field of investment arbitration considering that previous versions of UNCITRAL Arbitration Rules do not refer to issues of transparency even in cases of strong public policy.

The origins of the Rules came from the idea to amend the UNCITRAL Arbitration Rules; it was considered that a revision including transparency should be adopted. Following extensive debates the Working Group decided that commercial arbitration and investment arbitration differ from one another in certain aspects, which lead to the designation of separate rules for investment arbitrations in terms of transparency of the proceedings and the award. The Working Group further agreed that the amendments which were made to the UNCITRAL Arbitration Rules should be continued notwithstanding the transparency issues and further it was not desired to include investor state specific rules in the UNCITRAL Arbitration Rules and decided to address issues of transparency after completing the work on the UNCITRAL Arbitration Rules in depth[1].

The Rules include eight articles which govern the scope of application, publication of information and documents, submission of the third parties and by non-disputing party to the treaty, hearings, excep-

---

* ***Article of July 2015***

1 See A/CN.9/646 para. 69.

tions to transparency (confidential and protected information) and finally repository of published information[2].

Scope of Application

Pursuant to Article 1, the Rules apply to investor- state disputes based on a treaty concluded on or after 1 April 2014 unless Parties to the treaty opted out the Rules on transparency. Parties can "opt out" the application of the Rules by clearly stating that the Rules shall not apply or can refer to the UNCITRAL Arbitration Rules as adopted in 1976.

In order to apply the Rules to the treaties concluded before April 1, 2014, the Parties to an arbitration shall agree to apply such Rules or Parties to a treaty shall agree to their application after April 1, 2014. In other words in order to apply the Rules after April 1, 2014 Parties should "opt into" the Rules.

It should be noted that disputing parties are not allowed to derogate from the Rules by an agreement or in another way unless permitted by the treaty[3].

The Rules can also be adopted into the arbitrations which are not governed by UNCITRAL Arbitration Rules such as to the arbitrations governed by Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID)[4].

Discretion of the Arbitral Tribunal

The Rules provide specific regulations on arbitral tribunals' discretion. In using such discretion the arbitral tribunal must take into account certain measures, these are public interest as well as the interest of the disputing parties' in a fair resolution[5]. Pursuant to Article 3(b) of the Rules the arbitral tribunal by providing the consent of the disputing parties can adopt provisions of the Rules to the specific dis-

---

2 For the text of the Rules, see http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

3 See Article 1(3) of the Rules.

4 See A/68/ 17 para. 18-22.

5 See Article 4 of the Rules.

pute in case such adoption is concurrent with the transparency regime that the Rules provide and ensures that the arbitration is carried in practical manner. This power is granted to the arbitral tribunal in addition to its discretionary power.

Applicable Rules in Case of Conflict

As mentioned in the above paragraph, Article 9 clarifies that the Rules can be adopted together with any applicable arbitration rules or in ad hoc proceedings. In case a conflict arises among the Rules and the applicable arbitration rules, Article 7 provides that the Rules should prevail. In case there is conflict between the treaty and the Rules the treaty should prevail[6].

Publication of Documents

The Rules aim to provide transparent proceedings through publication of documents, information and open hearings. It should be noted that the Rules also provide some exemptions by including provisions regarding confidential information and protected information. With regard to publication of the documents certain questions are addressed by the Rules such as access to the documents and types of these documents.

Pursuant to Article 3 of the Rules, documents shall be made accessible to the public. These documents are notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, other additional written submissions or written statements by any disputing party, list of exhibits excluding the exhibits themselves, expert reports and witness statements.

The Arbitral Tribunal has the power to decide on the availability of the exhibits with its own initiative or upon request. In addition, transcripts of the hearing, if available, orders, decisions and awards are also publicly accessible.

---

6 See A/68/ 17 para. 18-22.

Submission by the Third Parties and a Non Disputing Party to the Treaty

Pursuant to Article 4 of the Rules third persons are allowed to submit written submission related to the dispute, such persons shall apply to the arbitral tribunal. In considering whether to accept such submissions the arbitral tribunal shall consider the interest of the third party and the effect of that the submission upon the dispute.

Non- disputing parties to the treaty were excluded from the definition of the third party and regulated under Article 5 of the Rules. A non-disputing party to the treaty can submit a submission regarding issues on treaty interpretation. Such submission shall be allowed by the arbitral tribunal or may be invited after consulting with the disputing party by the arbitral tribunal.

Article 3 further provides that the submissions given by third persons or non-disputing Party (Parties) shall also be made publicly accessible. The Rules do not distinguish persons in the public, public in equal level is allowed to access information[7].

Hearings

Pursuant to Article 6 of the Rules hearings held for the presentation of evidence or for oral arguments shall be public. Arbitral tribunal has the power to hold private hearings in case confidential information or the integrity of the arbitral proceedings needs to be protected. In order for the public to access to the hearings the arbitral tribunal shall make necessary logistical arrangements[8].

Exceptions to Transparency

The Rules provide certain exceptions in terms of confidential and protected information. Article 7 (2) regards “confidential business information, information that is protected against being made available to the public under the treaty, information that is protected against being made available to the public, in the case of the information of the

---

7 See A/68/17 para. 71-74

8 See Article 6(3) of the Rules.

respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or information the disclosure of which would impede law enforcement" as confidential or protected information. This article is regarded as balance mechanism within the Rules where a certain amount of confidence is given to the states with respect of the confidential information.

The Working Group further discussed that in case Parties agree on confidentiality of a document, such Parties should have the discretion to withhold such documents rather than the arbitral tribunal. Pursuant to Article 7(4) of the Rules any disputing party, non-disputing party to the treaty or third person is permitted to withdraw a document which is presented by him in case an arbitral tribunal determines that information shall not be redacted from a document or prevented to be made available to the public.

Repository

In order for the mechanism projected by the Rules to work there needs to be a repository. The information shall be published by a repository which is the Secretary-General of the United Nations or an institution named by UNCITRAL.

The discretion of a repository is limited in the Rules through Article 2 which provides that only the notice of arbitration shall be communicated with the repository which is regulated under Article 8 and further by providing that the arbitral tribunal will communicate the information and requests for documents to be made through the arbitral tribunal. The repository is responsible to inform the public regarding the name of the disputing parties and the economic sector involved.

Conclusion

The Rules which came into force on April 1, 2014 is an important step taken in investor state arbitration. Even though there have been some criticism from some NGOs, it is seen likely that many states will not opt out the Rules for the treaties concluded on or after April 1, 2014. It will be experienced through time whether states will prefer to opt in the Rules for the treaties concluded prior to April 1, 2014. The

exceptions to transparency and the consent mechanism provided for the states are regarded as assurance given to the states with regard to their confidential and protected information. On the other hand regarding the strong public interest which can be a question in investment arbitrations, adoption of certain specific rules on transparency is seen as a promising step to achieve fair and transparent proceedings.

A General Overview on Court of Arbitration Sports' Rules*

Prof. Dr. H. Ercument Erdem

Introduction

The Court of Arbitration for Sports ("CAS") is an independent institution established to provide dispute settlement through mediation or arbitration for any sports-related disputes. The Statutes of Bodies Working for the Settlement of Sports-Related Disputes ("Statutes") foresees two bodies in Article S1, the International Council of Arbitration for Sports ("ICAS") and the CAS - both bodies are seated in Lausanne, Switzerland. The CAS is administered and financed by the ICAS.

The CAS adapted its own Procedural Rules ("Rules")[1] to address specific the character of sports disputes. Pursuant to Article S12 of the Statutes, the CAS resolves sports-related disputes by constituting panels. These panels are responsible to resolve disputes at hand in accordance with the Rules. The three main responsibilities of these panels are to resolve disputes that are addressed through ordinary arbitration in cases where the federation, associations, sports-related bodies statutes, or an agreement, provide resolution through appeals of arbitration procedure disputes, which are related to such decisions of federations, associations or other sports-related bodies, and to resolve disputes addressed through mediation[2].

Organization of CAS

The CAS is divided into two divisions: the Ordinary Arbitration Division, and the Appeals Arbitration Division. The organization and

---

* ***Article of March 2015***

1 See: http://www.tas-cas.org/en/arbitration/code-procedural-rules.html.

2 See: http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html.

distinction between these two divisions are provided in the Statutes, Article S20. Pursuant to Article S20, the Ordinary Arbitration Division is entitled to settle disputes submitted through ordinary procedure, and the Appeals Arbitration Division is authorized to resolve decisions of federations, associations or sports-related bodies on appeal. Pursuant to Article R47 of the Rules, the CAS Court Office is responsible to refer disputes to the competent division.

Ordinary Arbitration Division

In order for a dispute to be settled by the Ordinary Arbitration Division, Article R27 of the Rules provides that the dispute should be related to sports, and parties who wish to resolve disputes through the CAS should come to an agreement in this regard. This agreement can be achieved through an arbitration clause or a provision of a statute with reference to the CAS.

Content of the Dispute

The leading qualification to submit a dispute to the CAS is that it be a sports-related dispute. This condition is referred to in several Articles of the Statute as S1, S3, and S12.

R27 of the Rules provides that "*such disputes may involve matters of principles relating to sports, or pecuniary matters, or other interests relating to the practice or the development of sports, and may include, more generally, any activity or matter related to, or connected to, sports.*" The CAS, in none of its decisions, recused itself by claiming that the disputes are unrelated to sports[3]. The role or titles of the parties, whether the party is a federation or sportsman, do not play a role in determining whether the dispute is sports related.

Arbitration Agreement

The conditions for an arbitration agreement are subject to the law of the seat of the arbitration. As previously stated, Article R28 of the

---

3 **Reeb Matthieu**, Le role du Tribunal Arbitral du Sport (TAS), in, Sports und Recht, Zürich, Basel, Schulthess, 2004, p. 134; Sternheimer William/Le Lay Herve, Arbitrages ordinaires pouvant être soumis au Tribunal Arbitral du Sport, Bulletin, 2012/I, p. 49.

Rules clearly regulates the seat of the CAS as Lausanne, Switzerland, which will mean that *lex arbitri*, the law governing the arbitration, is Swiss Law. In order to have a valid arbitration agreement, parties must comply with Swiss Law. Arbitration is regulated under two codes; the Swiss Private International Law Act of 1987 ("PILA"), which will come into enforce when the parties are not domiciled or habitual residents in Switzerland, and in other cases, the Swiss Civil Procedure Code ("CPC") will prevail.

Pursuant to Article 178 III of the PILA, "*The arbitration agreement must be made in writing, by telegram, telex, telecopy, or any other means of communication, which permits it to be evidenced by text.*" CPC Article 358 reads, "*The arbitration agreement must be made in writing, or in any other form allowing it to be evidenced by text*." It is clearly derived from the regulations of Swiss Law that arbitration agreements must be in writing, or evidenced by text.

Applicable Law

The general rule regulated under Article R45 of the Rules states that the parties are free to choose the law that will be applied to the merits of the case; if the parties fail to make such decision, Swiss law apply. The Panel can decide *ex aequo et bono* upon the parties' authorization. In most cases where a dispute is related to football, the parties will most likely have previously determined the application of the FIFA Rules in their agreements. In these cases, the Panel primarily applies FIFA Rules and subsidiary Swiss law[4].

Language

Article R29 of the Rules provides, in detail, the working language of the CAS as either French or English. Pursuant to R29, the parties are free to choose between English or French. In cases where the parties lack this determination, the President of the Panel or the President of the Division will make the decision. If the Panel or the CAS Court Office agree, the parties may request to conduct the proceedings in another language.

---

4 See: http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1192.pdf.

Arbitrators

The independence and qualifications of arbitrators are regulated under R33 of the Rules. The crucial point to be considered while appointing an arbitrator is the list drawn up by the ICAS. The parties can only decide amongst the arbitrators who are qualified to serve as arbitrators, and who are included in the list. With the amendment made in 2012 to the Rules, the parties are now obliged to use free will to appoint arbitrators from the abovementioned list in accordance with Article R40.2 of the Rules. There are pro and con views regarding this closed list regulation. Pro-view scholars claim that this list strengthens confidence that the parties will have regarding the expertise of the arbitrator in sports and in the CAS's jurisprudence. To the contrary, some scholars are of the view that these parties are capable to choose an arbitrator who has expertise and knowledge in the related sports field and with the CAS, without the need of a closed list[5].

The arbitrators may be challenged, and if not so challenged, confirmed by the Division. Once the Panel is formed, the file will be transferred to the arbitrators.

Request of Arbitration and Answer

In order to conduct an arbitration, the claimant is obliged to prepare a request of arbitration regulated under Article R38 of the Rules. This request is submitted to the CAS Court Office, and in general terms, contain; information regarding the respondents, a brief explanation of the facts and claims, request for relief, the arbitration agreement, information on arbitrators, including the determination of the arbitration, whether a sole arbitrator is to be appointed, or whether a tribunal of three arbitrators is preferred. In the request, the claimant mostly includes matters related to the competence of the CAS; detailed information regarding the dispute is not necessarily included.

Following the request, the CAS Court Office will obtain from the parties their views on the applicable law, and will set a time limit within which the respondent is to submit its answer. The answer that is to be submitted by the respondent is regulated under R39 of the Rules,

---

5 **Kocasakal Özdemir Hatice**, Sportif Uyuşmazlıkların Tahkim Yoluyla Çözümü ve Spor Tahkim Mahkemesi, İstanbul, 2013, p. 248 ff.

and must include the statement of defense, the defense regarding lack of jurisdiction, and any counterclaims.

R39 of the Rules also provides that in cases where the request for arbitration is similar to a pending arbitration case in terms of the facts, the President of the Panel, or the President of the Division, may consolidate the two cases after consulting with the parties.

Procedure

Pursuant to Article of R44 of the Rules, there is a written procedure phase before the Panel, as well as an oral phase. In terms of Article R44, the parties are allowed to exchange one statement of claim, one response and, if necessary for the case at hand, provide one reply and one second response ("Written Submissions"). This provision further provides that the parties can include claims that were not raised previously in their statements of claim and responses. After this step of the procedure, the parties are not allowed to raise additional new claims.

In their written submissions, it is important for the parties to gather their evidence. This evidence will be included in the statement of claim and response. The parties can only produce evidence following the written submission phase through mutual agreement, or with the permission of the Panel.

If the parties wish to call a witness or expert, each party must include the names and summaries of the testimonies of the witnesses into the written submissions.

The oral phase of the CAS procedure, which is the actual hearing, is not obligatory. Pursuant to Article 44.2, if the Panel decides that the information submitted is satisfactory, upon confirmation from the parties, the Panel can decide not to hold a hearing. The rule stipulated under Article 44.2 is to hold a single hearing where the Panel hears all of the oral arguments, witness and expert statements, and the respondent's arguments are heard last. Article 44.2 allows the President of the Panel to conduct a hearing via teleconference or video conference subject to his/her decision. After the hearing is concluded, the parties are permitted to produce any other written pleadings, and the Panel has the discretion to decide otherwise.

The proceedings under the Rules are confidential and will not be disclosed by the parties, arbitrators, or the CAS to any third parties.

Expedited Procedure

It is important to note that parties may wish to proceed with an expedited procedure; the Division or the Panel can decide to expedite the procedure upon confirming the same with the parties. Due to the nature of the sport, the parties, in most cases, prefer to choose the expedited procedure, and even state in their arbitration agreement that the disputes will be resolved through an expedited procedure. The Rules do not provide any guidance as to how the expedited procedure will be conducted. The Division will first fix the stages of the procedure, and if objected to by the parties, this decision will be left to the Panel. In most cases, the expedited procedure is conducted with short deadlines, and with a single round of written submissions. However, the nature of the case may justify a different approach.

Award

The award shall be made by the majority of the Panel, and in the absence of a majority, the decision will be made by the president of the Panel, alone. The award shall be written, dated, signed and, unless otherwise agreed to by the parties, and must state the reasons. The award is subject to the scrutiny of the CAS as to its form. Dissenting opinions are not recognized by the CAS and are not notified.

The award is final and binding upon the parties. However, under Article R47, an appeal against a CAS award rendered by CAS where it acts as a first instance tribunal, is regulated.

Awards will not be made public, unless agreed to by the parties or decided by the Division.

Conclusion

The Rules regulate specific provisions to address sports related disputes through the CAS where the parties execute a written arbitration agreement with a reference to the CAS. In terms of the CAS regulation, it is important to resolve sports-related matters in expedited manners. Specific importance to the experience and expertise of the

arbitrators are given through the closed rule system where the parties are obliged to choose the arbitrator. As a result of the expedited nature of the CAS, it provides that the parties submit one round of written submissions and, in cases where it is considered necessary, a final round of replies and second responses, as well as one hearing. It should be emphasized that the *lex arbitri* is Swiss law, and in terms of applicable law, the parties are free to make a distinction, and in cases where the parties fail to determine the applicable law, the Panel will apply Swiss Law. The parties may appeal the decisions of the CAS, acting as a first instance tribunal.

New Claims subsequent to the Terms of Reference in ICC Arbitrations*

Att. Ezgi Babur

In International Chamber of Commerce ("ICC") arbitrations, new claims that are subsequent to the terms of reference are subject to the arbitral tribunal's authorization. Article 23(4) of the ICC Arbitration Rules ("Rules") give discretion to the arbitral tribunal by setting forth that the arbitral tribunal shall consider the nature of new claims, the stage of the arbitration, and other relevant circumstances. The issue of new claims in ICC arbitrations and the application of Article 23(4) in these matters are analyzed in this article.

In General

In ICC arbitrations, the terms of reference play an important role. One of the purposes of the terms of reference is to establish the parties' claims. The terms of reference contain, among other things, the relief sought by the parties. If the parties make claims that fall outside of the scope of the terms of reference, the provisions to be applied to these new claims shall be determined.

In ICC arbitrations, Article 23(4) of the Rules sets forth under which conditions new claims may be advanced in ICC arbitrations. Pursuant to this provision, after the terms of reference have been signed or approved by the court, no party shall make new claims that fall outside the limits of the terms of reference, unless it has been authorized to do so by the arbitral tribunal. The arbitral tribunal shall consider the nature of such new claims, the stage of the arbitration, and other relevant circumstances.

---

* ***Article of October 2015***

This provision intends to assist the arbitral tribunal in managing the proceedings smoothly and efficiently, as well as providing enough flexibility to permit new claims, where appropriate[1].

Under Article 23(4) of the Rules, the arbitral tribunal is required to conduct a two-step analysis. Firstly, the arbitral tribunal should decide whether the new elements introduced are new claims, and as a second step, whether these new claims should be authorized.

The Definition of "New Claim"

Within this context, the limits of what may constitute a new claim must be analyzed. The Rules do not provide a definition for the term of "new claim". On the other hand, the scope of the terms of reference should be examined with reference to the request for relief, and if a new claim leads to the modification of the relief sought, or to an additional request for relief, there may well be an issue as to whether it is within the scope of the terms of reference[2]. Within this framework, there would be a difference if the claim is based on new facts or new legal arguments, or if there is a change in the nature of the relief sought.

It should be emphasized that only a change in the argument is insufficient to be considered as a new claim, and a new claim will imply that the relief requested is based on entirely new grounds[3]. Therefore, a new characterization of a relief within the scope of the terms of reference will not be considered as a new claim under this provision.

The timing of the decision of the arbitral tribunal may depend on whether the party specifically requests permission to make a new claim, or whether the other party opposes the new claims introduced. If there is an objection to the new claims, or where the new element is obviously a new claim, the arbitral tribunal shall decide whether

---

1 **Jason Fry, Simon Greenberg, Francesca Mazza**, The Secretariat's Guide to ICC Arbitration, ICC Publication 729 (Paris 2012), p. 255 ("**Secretariat's Guide**").

2 **Thomas H. Webster, Michael W. Bühler,** Handbook of ICC Arbitration, Commentary, Precedents, Materials, 3rd Edition, p. 364 ("**Webster/Bühler**").

3 Secretariat's Guide, p. 257.

Article 23(4) applies, and consequently, whether the new claim shall be authorized.

On the other hand, it may be the case that the other party does not object to the new claims. Whether this lack of objection could be considered as a waiver under Article 39 of the Rules shall be analyzed. The relevant article sets forth that a party which proceeds with the arbitration, without raising any objection to a failure to comply with any provision of the Rules, or any other rules applicable to the proceedings, any direction given by the arbitral tribunal shall be deemed to have waived its right to object. However, to err on the side of safety, it is preferable that the arbitral tribunal makes a decision on whether the new elements as introduced fall within the scope of the terms of reference, and if so, whether they should be admitted[4].

The Factors to be considered by the Arbitral Tribunal

Article 23(4) of the Rules gives a broad discretion to the arbitral tribunal in considering whether the new claims shall be admitted. The relevant article provides that the tribunal may consider all relevant circumstances, other than the ones given as examples in the relevant provision.

If the initial claims as recorded in the terms of reference, and the new claims arise out of the same facts and the same agreement, there is a higher chance that these new claims would be admitted by the arbitral tribunal.

Again, the timing of new claims may be of significance, as well. If the proceedings are in an early stage, such as right after the signature of the terms of reference, and prior to the statements of the parties being submitted, it is more likely that they will be admitted by the arbitral tribunal. In this case, the new claims would not have a major negative impact on slowing down the proceedings. On the other hand, if the new claims have been introduced after all the evidence has been submitted, and prior to the rendering of the award, this may affect the proceedings, and may be considered as a factor not to authorize the new claims by the arbitral tribunal.

---

4 Secretariat's Guide, p. 256.

At this point, if the new claims are withheld based on purely tactical reasons, the arbitral tribunal may take a restrictive attitude. Especially if there are factors to be weighed against the belated introduction of new claims, such as the parties submitting new evidence and arguments respecting the new claims[5], they are more likely to be rejected by the arbitral tribunal. These issues may later cause due process concerns, which would, in turn, cause obstacles in enforcement proceedings.

If the new claims are not authorized by the arbitral tribunal, the party who intends to introduce these claims, should initiate separate arbitration proceedings.

Conclusion

The requirement of the arbitral tribunal's authorization for new claims under Article 23(4) is important, since it imposes on the parties to make every effort to concrete their claims in the terms of reference, in order to draw the lines of the arbitration proceedings. If the parties wish to introduce new claims after the terms of reference are established, whether these claims shall be authorized or not would be subject to Article 23(4) of the Rules. The arbitral tribunal has extensive discretion on this matter, and would consider many factors, such as the nature of such new claims, and the stage of the arbitration. The arbitral tribunal may also consider other relevant circumstances, such as whether the claims could have been introduced earlier in the proceedings, and whether they impose an additional burden on the other party.

5 **Webster/Bühler**, p. 366.

Anti-Suit Injunctions in International Arbitration*

Att. Ezgi Babur

Anti-suit injunctions are national court orders used especially in common law countries, in order to protect the jurisdiction of the arbitral tribunal, or to prevent the tribunal from assuming jurisdiction. Anti-suit injunctions may order a party not to pursue court proceedings initiated in breach of a dispute resolution clause, or an arbitration agreement. Anti-suit injunctions are controversial, since they are an indirect interference with the judicial process of a foreign sovereign state, which is analyzed in this article.

In General

The anti-suit injunction is a court order rendered against a private party with the intention of either to prevent that party from commencing an action in another forum, or forcing that party to discontinue such an action if already started[1].

Anti-suit injunctions may be granted where it is absolutely clear that the arbitration proceedings have been wrongly initiated. It should be emphasized that these injunctions can be initiated against the parties alone, or may only be directed against the arbitrators if the court granting the injunction has personal jurisdiction over them[2].

Anti-suit injunctions may be divided into two categories, as injunctions restraining arbitration proceedings, and injunctions restraining parallel court proceedings. The latter is more common in

---

* ***Article of February 2015***

1 **Neil A Dowers,** The Anti-Suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law, Cambridge Journal of International and Comparative Law (2)4: 960-973 (213), p. 960 ("Dowers").

2 **Julian D M Lew, Loukas A Mistelis, Stefan M Kröll**, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 363 ("Lew-Mistelis-Kröll").

practice, since the aim is to realize an arbitration agreement between the parties.

In practice, parties who disregard the arbitration clause, or attempt to pressure the other party may initiate parallel court proceedings in breach of the arbitration agreement. Parallel court proceedings that are initiated in breach of an arbitration agreement could frustrate the ongoing arbitration, since they use resources in time and expense, which leads to re-litigating the same issue, as well as preventing the enforcement of the final award of the arbitral tribunal[3].

National Court Practices on Anti-Suit Injunctions

Court practices regarding anti-suit injunctions differ for common law jurisdictions and civil law jurisdictions.

English courts state that on the condition that they have jurisdiction over the defendant, an anti-suit injunction may be granted if there is a valid arbitration agreement, the application is made without undue delay, the foreign action is not well-advanced, and there is no other reason why the injunction should be granted[4].

With regard to US courts, the standard to be met under the US approach is the determination of "irreparable harm," and the courts take into consideration the stage of the foreign proceedings, as well as the parties' expectation to litigate in that particular court[5].

On the other hand, civil law jurisdictions have considered anti-suit injunctions to be an intrusion into their jurisdiction. For instance, in the decision of *Oberlandesgericht Düsseldorf* dated January 10th, 1996, IPRax 245 (1997), the German court refused to serve a judgment of an anti-suit injunction based on the public policy exception under the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

With regard to European Union Law, the European Court of Justice ("the Court") opined that member states should not issue

---

3 **Lew-Mistelis-Kröll**, p. 363.

4 **Lew-Mistelis-Kröll**, p. 365.

5 **Lew-Mistelis-Kröll**, p. 366.

anti-suit injunctions against another member state, in any case in which a party filed a lawsuit in a member state. In the Turner case[6], the Court referred to mutual trust as being paramount in its judgment, and stated that anti-suit injunctions are incompatible with the Brussels Convention of 1968, and the principle of mutual trust, no matter how sparingly, or under what circumstances they are utilized[7].

Under EU Law, pursuant to Article 27 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Regulation"), in case proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized, shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

It should be noted that arbitration is listed among the exceptions to the application of the Brussels Regulation. Within this context, the doctrine opines that there is a right to commence parallel court proceedings alongside arbitration, which is widely criticized and seen as a problem that can be solved by a rethinking of the Brussels Regulation[8].

Enforcement Issues and Consequences of the Disregarding of Anti-Suit Injunctions

The enforcement of anti-suit injunctions may be problematic. As mentioned above, civil law jurisdictions consider these injunctions as an intrusion of their jurisdiction. Unless the addressee of the anti-suit injunction has assets in the issuing state that could be attached for any breach of the court's order, enforcement is often not possible[9].

---

6 Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit and others [2004] ECR I-3565.

7 **Dowers**, p. 966-967.

8 **Dowers**, p. 972-973.

9 **Lew-Mistelis-Kröll**, p. 366.

On the other hand, the disregard of an anti-suit injunction may cause issues concerning the enforcement of the court decision given at the end of the foreign court proceedings that have been initiated or continued contrary to the anti-suit injunction. For instance, in the event that the proceedings are continued in spite of the anti-suit injunction granted by an English court, the enforcement of the foreign court decision in England would be rejected. However, if the addressee has assets in the state where the court decision has been given, then no enforcement would be required.

In light of the explanations above, even if it is problematic, it is hard to say that there would be no legal consequences of the disregard of an anti-suit injunction.

Conclusion

Anti-suit injunctions are controversial, since they can be considered as interference to the judicial process of a foreign state. On the other hand, it is worth mentioning that the courts applying this remedy make the justification that the order is addressed to the person filing the lawsuit, and not to the foreign court[10]. However, it should be emphasized that this reasoning has been widely criticized. As the disregard of the anti-suit injunction granted by common law courts, such as English courts, would trigger enforcement problems, the parties should be cautious regarding agreements stipulating that the English courts would have jurisdiction in the resolution of disputes.

10 **Dowers**, p. 961.

Confidentiality in Arbitration*

Att. Leyla Orak Celikboya

Introduction

Confidentiality is considered to be among the unequivocal features of commercial arbitration. This feature is regarded as a crucial advantage of arbitration, mentioned among one of the main reasons for parties to resort to arbitration.

The mere fact that arbitration does not take place in public, before national courts, renders arbitration proceedings private. Public authorities are not included in the proceedings. Participation in hearings is subject to numerous regulations. As a consequence, confidentiality is regarded as an inherent quality of arbitration.

Notwithstanding the above, the privacy of arbitration does not, necessarily, always entail confidentiality. The duty of confidentiality and its scope differ when different arbitration rules or national laws come into play. Moreover, transparency and public interest in the disclosure of information must be weighed against the parties' interest in confidentiality. This Newsletter article discusses confidentiality in international arbitration, briefly examining the confidentiality provisions of certain arbitration rules in practice.

Clash of Interests: Confidentiality or Transparency?

While an implied duty of confidentiality in arbitration is referred to, and accepted in certain national laws and jurisprudence[1], the scope

---

* ***Article of April 2015***

1 See English Court of Appeal decisions of *Hassneh Insurance Co of Israel v Mew* where the confidentiality is not questioned, *Ali Shipping Corporation v "Shipyard Trogir"* where the court expresses the need to determine the scope of such duty, and *John Froster Emmott v Michael Wilson & Partners Limited,* where the parties' duty of confidentiality is affirmed; citations of which are provided in **Nick Blackby** and **Constatine Partasides** with **Alan Redfern** and **Martin Hunter**, Redfern and Hunter on International Arbitration, 5th Edition, Oxford University Press ("Redfern and Hunter on International Arbitration"), para. 2.149 to para. 2.151.

of such duty is uncertain. The general trend in international arbitration leans towards questioning, and even disregarding, confidentiality as a whole. Especially in circumstances where governmental institutions are involved, information disclosed during arbitration proceedings, which ought to be public information disclosed by that authority[2], are not protected under the veil of the inherent confidential nature of arbitration. This inclination is not without reason. When confidentiality of arbitration proceedings is concerned, there is a clash of interests: the interest of the parties in terms of confidentiality, versus the interests of the public in disclosure.

The parties may have a material interest not to disclose the existence of a dispute, any information provided therein a dispute, or the results thereof. Confidentiality serves the parties' trade secrets, as well as maintaining an image without suffering damages. It may be easily argued that a party's autonomy is reserved in arbitration. As the dispute concerns the parties, the parties' interests must be taken into consideration, exclusively. Therefore, the parties' interests in arbitration proceedings being entirely confidential must be a determining factor.

To the contrary, although a dispute mainly concerns the parties, access to case law is a key component for the progress of arbitration and the education of practitioners of arbitration. Inconsistencies and lack of predictability may be prevented through transparency[3]. Arbitral awards establish jurisprudence, serving both the parties and practitioners. In practice, awards are published, without disclosing the parties that are involved. In fact, numerous rules of arbitration regulate the procedure of disclosure of arbitral awards. However, in addition to the development of case law and arbitration, at certain times, greater public interest may be the case. Especially when a state is involved in disputes that are resolved through arbitration, transparency becomes very important. In the above example, public interest in the disclosure of information prevails over the concerns of confidentiality.

---

2 Redfern and Hunter on International Arbitration, para. 2.152 to para. 2.157.

3 See **Stefano Azzali,** Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome, http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/ (accessed on 27 April 2015).

Arbitration Rules

Confidentiality and privacy rules are regulated under numerous arbitration rules. However, especially in view of the clash of interests and the relevant discussions among scholars and practitioners on confidentiality versus transparency, the scope of confidentiality needs to be considered in great detail.

ICC Rules

The ICC Rules of Arbitration[4] (currently in force as from 1 January 2012; "ICC Rules") provide, in Art. 22/3, the following: "*Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*" Further, Art. 26/3 of the ICC Rules regulates that the arbitral tribunal shall be in charge of the hearings, where persons not involved in the proceedings shall not be admitted unless approved by the arbitral tribunal.

Art. 6 of Appendix I to the ICC Rules, governing the statutes of the International Court of Arbitration, and Art. 1 of Appendix II, providing the internal rules of the International Court of Arbitration, govern extensive confidentiality provisions, declaring that the work of the court is confidential in nature, and that the sessions are open only to its members.

The ICC Rules provide a broad scope of confidentiality, whereby the arbitral tribunal may make orders governing confidentiality. However, absent such an order, the ICC Rules do not impose a duty of confidentiality on the parties. The hearing and deliberations of the tribunal are confidential.

LCIA Rules

The LCIA Arbitration Rules[5] (effective as on 1 October 2014, "LCIA Rules"), at Art. 30/1, specifically states that "*[t]he parties*

---

4 For the full text, please see http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (accessed on 27 April 2015).

5 For the full text, please see http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (accessed on 27 April 2015).

undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority." Art. 30/2 of the LCIA Rules, similar to the ICC Rules, underlines the confidential nature of the arbitral tribunal's deliberations. The scope of confidentiality is broad under the LCIA Rules, which expressly regulates and imposes a confidentiality obligation on the parties of the dispute.

Swiss Rules

The Swiss Rules of International Arbitration[6] (June 2010, "Swiss Rules"), at Art. 44, also regulate a confidentiality undertaking of the parties in relation to awards and orders and materials submitted to the file that are not already in the public domain, unless it is agreed, in writing, to the contrary by the parties. The same provision also declares the confidential nature of the deliberations of the arbitral tribunal.

UNCITRAL Rules

The UNCITRAL Arbitration Rules (as revised in 2010, "UNCITRAL Rules") does not explicitly provide a confidentiality obligation, but its Art. 25.4 grants the arbitral tribunal to require retirement of witnesses during the testimony of others, and determines the manner of examination of witnesses. The hearing will be conducted as determined by the tribunal. Therefore, it is accepted that the UNCITRAL Rules provides a framework where the hearing is private[7].

---

6 For the full text, please see https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (accessed on 27 April 2015).

7 Redfern and Hunter on International Arbitration, para. 2.148.

ICDR Rules

The ICDR Arbitration Rules[8] (as amended on 1 June 2010, "ICDR Rules") also provide for confidentiality obligations. The ICDR Rules, at Art. 34, govern the duty of confidentiality of the arbitral tribunal and the administrator, and Art. 27 regulates that an arbitral award may only become public if the parties consent thereto, or if so required by law. The ICRD Rules, therefore, imposes a duty of confidentiality on the arbitrators and the administrators, thereby regulating the privacy of the hearing.

In General

Numerous other arbitration rules also contain provisions governing confidentiality. However, the scope of confidentiality as foreseen under arbitration rules is diverse. Different provisions are envisaged in order to ensure confidentiality of the arbitral tribunal's deliberations, confidentiality of the hearings, or the confidentiality duty of the parties. The LCIA Rules is regarded as a notable exception[9] where the duty of confidentiality of the parties is expressly foreseen. Most arbitration rules focus on the privacy of the hearing. The ICSID's Rules of Procedure for Arbitration Proceedings, to the contrary, does not include provisions governing confidentiality.

As no institution must be involved in or notified of the dispute, ad hoc arbitrations may be regarded as being more confidential than institutional arbitrations[10]. However, it is difficult to envisage an arbitration institution disclosing confidential information. To the contrary, in light of the rules assessed above, institutional arbitration may appear to provide for a broader scope of confidentiality.

Regardless of the scholar's discussions on whether the duty of confidentiality is inherent in arbitration, the regulatory framework under

---

8 For the full text, please see http://www.internationalarbitrationlaw.com/icdr-arbitration-rules/ (accessed on 27 April 2015).

9 Arbitration World, Jurisdictional Comparisons, Ed. Karyl Nairn and Patrich Heneghan, Skadden, Arps, Slate, Meagher Flom (UK) LLP, 4th Edition, *Global Overview*, **Constantine Partasides** and **Greg Fullelove**, p. 9.

10 **Michael McIlwrath**, **John Savage**, International Arbitration and Mediation, A Practical Guide, Wolters Kluwer Law & Business, para. 1-144.

numerous arbitration rules does not provide for such a clear cut and universal duty of the parties. Therefore, in the event the parties wish to ensure confidentiality, not just privacy, of the arbitration proceedings as a whole, they are advised to draft a contractual confidentiality obligation.

Conclusion

Both on a theoretical level, and in light of the rules applied in practice for institutional or ad hoc arbitration, a broad acceptance of confidentiality, including the parties' duty of confidentiality, is not inherent in arbitration. Numerous arbitration rules regulate the privacy of hearings, and at times the duty of confidentiality is foreseen, either under express provisions, or through the possibility of an arbitral tribunal, to issue such an order. Nevertheless, privacy does not automatically result in confidentiality.

There is an inclination to move towards further transparency. The clash of interests of the parties considering confidentiality, versus public interest in disclosure, increasingly paves the way to limit the scope of confidentiality. Therefore, it is advised to all parties, who wish to have the arbitration proceedings confidential as a whole, to include a contractual confidentiality obligation.

Third Party Funders in Arbitration*

Att. Leyla Orak Celikboya

Third party financing or third party funding may be defined as the financing of arbitration costs of one of the parties by a third person who is not related to the claim[1]. It may also be defined as "*any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration*"[2].

The methods by which third party funders agree to finance litigation costs of a party vary[3]: The consideration of the third party funder may be the gain of an agreed upon percentage of an awarded proceed, a fixed success fee, or a mechanism combining the two. Funding may result in the issuance of equity or debt instruments, the transfer of a claim to the funder, or the funder gaining control over the party, and, consequently, of the dispute strategy and management. The clients of funders vary: they may be the claimants or the respondents, law firms, individuals, and even states.

Third party financing is relatively new in international arbitration, and its pros and cons are subject to numerous discussions. This article aims to refer to key concerns and touches upon the instruments regulating this funding.

---

* ***Article of September 2015***

1 See **Burcu Osmanoğlu**, Third Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest, (2015) 32 J. Int. Arb. 3, Kluwer Law International, p. 325; as defined by Yves Derains.

This article provides useful insight and detailed explanations on the forms of third party funding, and focuses on its assessment from a conflict of interest point of view.

2 See IBA Guidelines on Conflict of Interest, Explanation to General Standard 6, para. (b), p. 14, 15.

3 **Osmanoğlu**, p. 330, 331.

Pros and Cons – Discussions on Third Party Funders

In General

Third party financing enables parties to initiate their meritorious claims without concern over scarcity of their finances. It is argued that third party financing is favorable and beneficial since it promotes access to justice for parties who financially cannot support a dispute, enables them to maintain their cash flows, and pursue their claims.

However, the increase of third party funders' presence in arbitration has resulted in numerous discussions and concerns. The main concerns are governing impartiality and independence of arbitrators, and the necessity of security for costs[4]; which are briefly assessed, below.

Furthermore, it may be argued that the mere existence of financing, or the denial of financing, may result in bias as to whether or not a claim is meritorious. The funders engage in a thorough analysis of a case they are asked to finance; therefore, their choice of whether or not to finance a party may affect how a claim is regarded by third persons (for instance, the arbitrators). On the other hand, a party may also request a case assessment by a potential funder prior to initiating its claim. This way, if rejected by a funder, a party who decides to not initiate its claim may be spared unnecessary legal costs, which is considered practical and/or favorable[5].

Impartiality and Independence of Arbitrators

In international arbitration, the lack of impartiality and independence of an arbitrator may have severe consequences, such as the challenge and/or annulment of an award. Arbitration rules enable and govern procedures for the challenge of an arbitrator. Further, if and once an award is rendered, lack of impartiality or independence may prevent

---

4 For further information please see **Carlos González-Bueno** and **Laura Lozano**, Third Party Funding Again Under the Spotlight http://kluwerarbitrationblog.com/blog/2014/10/08/third-party-funding-again-under-the-spotlight/ (accessed on 18 September 2015).

5 For further assessment on the impact of third party funders on the parties whose financing requests have been denied, please see **Victoria A. Shannon**, The Impact of Third-Party Funders on the Parties They Decline to Finance, http://kluwerarbitrationblog.com/blog/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/ (accessed on 22 September 2015).

the recognition or enforcement thereof. This is an area of importance while assessing third party financing.

The scenarios where a third party funder may endanger the independence of an arbitrator may vary. When an arbitrator of a dispute, where a third party funder exists, acts as counsel to another party in another dispute funded by the same third party; or when repeated appointments of an arbitrator by parties funded by same third parties are concerned, doubts may arise as to the impartiality of the arbitrator.

These concerns raise questions as to whether an obligation to automatically disclose third party funders should be imposed, and, if yes, what the scope of such disclosure should be. However, it could be stated that there is a general inclination towards accepting a disclosure obligation. The regulations on this disclosure obligation is further assessed below.

Cost Issue

Third party financing also raises the question as to whether the arbitral tribunal may order security for costs against third party funders. This is especially important in the question concerning whether the prevailing party could recover its legal costs from the funder of the other party. These matters result in questioning the jurisdiction of the tribunal.

Unlike the discussions governing disclosure obligations due to impartiality and independence of arbitrators, there isn't a general consensus governing the discussions on costs and security for costs[6].

Need for Regulation

When the present rules, non-binding regulations and other instruments are assessed, it may be observed that third party funding is an area yet to be regulated in international arbitration.

---

6 For further information on this discussion and relevant jurisprudence, please see **González-Bueno** and **Lozano**; and **Paula Gibbs, Chapman Tripp**, Third party funding in international arbitration – lessons from litigation? http://kluwerarbitrationblog.com/blog/2014/12/15/third-party-funding-in-international-arbitration-lessons-from-litigation/ (accessed on 22 September 2015).

IBA Guidelines on Conflict of Interest[7] ("Guidelines") was issued in 2004. The IBA Arbitration Committee commenced a review process of the Guidelines in 2012, and the revised version was published in 2014. The Guidelines do not provide legal provisions, but aim to act as a guide or indicator to be adopted in commercial and investment arbitration, and is expected to be applied with robust common sense (Introduction, Art. 6).

Pursuant to these Guidelines, both arbitrators and parties are expected to disclose any facts or circumstances that may give rise to doubts as to an arbitrator's impartiality or independence.

Third party funders constitute a novelty in the Guidelines as they are included among the persons considered to bear the identity of the party they are funding. As revised in 2014, this disclosure requirement also concerns third party funders, as follows: The Guidelines state in Art. 6(b) that a person may be considered bearing the identity of another party, if such person has a controlling influence over a party, or a direct economic interest in, or a duty to indemnify a party for the award to be rendered in the arbitration. The explanations state that third party funders may be considered to be the equivalent of the party.

This relationship needs to be taken into consideration when assessing an arbitrator's disclosure duty. The Guidelines also charge the parties with the duty to inform the arbitrator, the tribunal and the other party of any relationship between the arbitrator and such party or an entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered.

Accordingly this duty of disclosure by the arbitrator and by the parties comprises of any relationship between a third party funder and an arbitrator.

While the Guidelines provide insight to the disclosure obligations aiming to solve any conflict of interest due to funding, its non-binding nature should be taken into consideration.

In UK, the Association of Litigation Funders (ALF) provides a code of conduct whereby its members are expected to abide in relation

---

7 These guidelines may be downloaded from http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed on 18 September 2015).

to the funding of disputes within England and Wales[8]. This Code of Conduct for Litigation Funders[9] obliges the funders to refrain from steps that do or may cause the solicitor or barrister to act in breach of their professional duties. However, this code is also criticized for not having a binding nature. Further, its scope is limited to disputes in a certain region, only.

The arbitration rules, in general, do not regulate the funding of arbitration by third parties. The disclosure requirements and the rules of conduct constitute areas that are open to further legislation.

Bearing in mind the fact that third party funding is a new concept, it is quite heterogeneous, where both the funders, the funding method, and the funding agreements widely vary, and it may be expected that rules or guidelines for funding in international arbitrations are established in the near future.

Conclusion

Third party financing is new, vibrant in international arbitration, both appealing to arbitrators and parties, and also raises concerns among the practitioners. While it promotes access to parties with weak financial conditions, it raises questions and concerns governing impartiality and independence of arbitrators. However, the arbitration costs remain an unresolved issue when third party financing is concerned.

While the Guidelines of the IBA provide useful insight on how to avoid or solve certain effects of third party financing on the healthy functioning of arbitration, this remains an area to be regulated and clarified. Beyond any doubt, third party financing will continue to stir debates among scholars and practitioners in the near future.

---

8 See http://associationoflitigationfunders.com/wp-content/uploads/2014/03/ALF-info-for-solicitors.pdf (accessed on 18 September 2015).

9 January 2014, accessible on http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf (accessed on 18 September 2015).

Action to Set Aside as per the International Arbitration Act*

Prof. Dr. H. Ercument Erdem

Introduction

In accordance with International Arbitration Act numbered 4686 ("IAA"), the only legal remedy for arbitral awards is the action to set aside. One of the most significant aspects of selecting arbitration as a dispute resolution method is that most of the legal systems lack regulations regarding the legal remedy to appeal arbitral awards. By means of its article 15, the IAA solely enables actions to set aside arbitral awards. As a consequence of such, examination of the merits of arbitral awards in courts is precluded. There are also Courts of Cassation resolutions in this regard[1].

Reasons for Filing an Action to Set Aside

Reasons to set aside listed under article 15(A) of the IAA are limited. An action to set aside for reasons not covered under this article is not permissible. For instance, an action to set aside shall not be filed on grounds of the arbitral award being incorrect in terms of merits.[2] The reasons to set aside may be examined under two headings - court ex officio and reasons asserted by the parties.

Reasons Examined Ex Officio

The reasons that shall be regarded ex officio by the courts are arbitrability, and breach of public order.

---

* ***Article of December 2015***

1 11th Civil Chamber of the Court of Cassation, dated 24.02.2006, 3953/1858.

2 15th Civil Chamber of the Court of Cassation, dated 15.11.2007, 2007/7216.

Arbitrability

In accordance with Art. 15(A)(2)(a) of the IAA, the courts examine the arbitrability of disputes in accordance with Turkish law, as a reason to set aside. IAA Art. 1 is comprised of another regulation on arbitrability[3]. Within this context, disputes regarding the real rights of immovable properties located in Turkey, and disputes that are not subject to the will of both parties are not arbitrable. Due to the fact that there will be no concerns regarding Turkish public order in cases in which the dispute concerns a real right regarding an immovable property that is not located in Turkey, the IAA may be applied, for cases where the dispute at hand is considered arbitrable in the law of the state in which the immovable property is located. Other disputes that are precluded by the Court of Cassation to be resolved by arbitration are cancellation of title deeds and registrations. The Court of Cassation also decided that lease-related disputes, such as disputes arising out of evacuation or rent shall not be resolved by arbitration[4]. The Court of Cassation has also rendered decisions stating that disputes regarding labor law are not arbitrable.[5] Within this context, Article 20 of the Labor Law enables disputes regarding termination of employment agreements to be resolved through arbitration upon the agreement of the parties. It is accepted that the disputes regarding trademarks and patents shall be resolved through arbitration. In addition, disputes that fall within the competence of administrative procedure shall not be resolved via arbitration. The only exclusion thereof are disputes arising out of concession agreements regarding public services[6].

Breach of the Public Order

Another reason that can be ex officio assessed by the courts, as governed under Art. 15(A)(2)(b) of the IAA, is the breach of public order. The meaning of the term public order varies in terms of time and

---

3 Civil Procedure Law Article 408 consists of a parallel regulation.

4 4th Civil Chamber of the Court of Cassation, dated 11.11.1965, 7792/5764.

5 For dissenting view; Kuru, Baki, Hukuk Muhakemeleri Usulü, 6th Edition, Istanbul, 2001, Volume 6, p.5951; 9th Civil Chamber of the Court of Cassation, dated 14.9.1964, 4938/5429.

6 Please see; The Law pertaining to the Principles to be Complied When Applied to Arbitration in the Disputes Arising out of Concession Agreements Regarding Public Services, Art. 3).

place. Therefore, the judges must be diligent in exercising their discretionary powers in this regard.

Reasons Asserted by the Parties

The reasons to set aside as per Art. 15(A)(1) of the IAA are invalidity of the arbitration agreement due to incompetence as per the applied law, if there is no such law, Turkish law, breach of procedure in appointment of the arbitrators, no ruling within the duration of the arbitration, incorrect ruling of the arbitrators regarding their competence or incompetence, arbitrators ruling on matters falling outside of the scope of the arbitration agreement, not ruling for all matters set forth in the claims of the parties or exceeding their authority, and inconformity of the arbitral proceeding with the procedure and principle of the equality of the parties. However some of these reasons can be seen together therefore it is advised that such reasons should be more simply regulated through an amendment to the law.

Invalidity of the Arbitration Agreement being due to Incompetence, as per the Applied Law, and if there is no such Law, Turkish Law

In order for the arbitration agreement, which is the most significant and main element of arbitration, to be deemed valid, the parties should be capable. One of the significant issues here is the law to be applied to capacity. In a foreign dispute to which the IAA shall be applied, the court shall consider the International Private and Civil Procedural Law ("IPCPL"). According to Article 9 of the IPCPL, the national laws of the parties shall be considered to be the determinant law in the case at hand.

In accordance with the same paragraph, another reason is the arbitration agreement being rendered invalid as per the law to be applied to the validity of the arbitration agreement, which is determined by the parties. If the parties showed no will in this regard, and did not determine the law to be applied to the validity, the validity of the arbitration agreement shall be evaluated in accordance with the Turkish laws. The invalidity of an arbitration agreement shall be at stake in terms of form, defective intentions or signing of such agreement by an incompetent person. The issues regarding the form of the arbitration agreement and

defective intentions shall be resolved as per Art. 4 of the IAA. The invalidity of an arbitration agreement by virtue of an incompetent representative may be eliminated by subsequent consent. Moreover, the authority to execute an arbitration agreement by proxy shall only be allowed given that the power of attorney constitutes a special authority thereof (TCO Art. 504).

Breach of Procedure in Appointment of the Arbitrators

In accordance with such provision, the procedure to be complied with, in terms of appointment of the arbitrators, shall be the procedure determined by the parties under the arbitration agreement or the procedure envisaged under the IAA. The IAA provisions enable the parties to determine the number of the arbitrators, such as many institutional arbitration institutions, or the UNCITRAL Model Law. The mandatory rule to which the parties must comply with is that the number of the arbitrators should be an odd number. As per the IAA, the claimant shall inform the respondent as soon as an arbitrator is appointed and the respondent shall appoint an arbitrator within 30 days. If the respondent does not appoint an arbitrator, the arbitrator shall be appointed by the civil court of first instance. Following the appointment of the two arbitrators, such arbitrators shall appoint the presiding arbitrator. In cases where the presiding arbitrator cannot be determined, the presiding arbitrator shall be appointed by the civil court of first instance. In order for this appointment to be considered as a reason to set aside, this procedure shall be considered to have been in violation.

Not Ruling within the Time Limit

In accordance with Art. 10 of the IAA, the duration of arbitration is 1 year. This duration commences as of the date of appointment of the arbitrator in proceedings with a single arbitrator, and as of the date of preparation of the first meeting minutes of the arbitral tribunal in proceedings with multiple arbitrators. The parties may agree otherwise regarding the commencement of the time limit. There are different opinions in the Doctrine regarding this reason. It is sometimes seen to create an unjust reason to set aside for the losing party.

Incorrect Ruling of the Arbitrators Regarding their Competence or Incompetence

In accordance with Art. (7)(h) of the IAA, the arbitrators may give rulings regarding their own competences (*competence-competence*). Accordingly, the objection asserted by the parties regarding the incompetence shall be examined as a preliminary question. Wrong /unlawful decisions rendered as a consequence of this examination shall also constitute a reason to set aside.

Arbitrators Ruling on a Matter Falling outside of the Scope of the Arbitration Agreement or not Ruling for All Matters Set Forth in The Claims of the Parties or Exceeding Their Authority

Arbitrators shall only decide on matters that fall within the scope of the arbitration agreement. If there is a restriction in the arbitration agreement in this regard, the arbitrators are obliged to comply. The part of the award incompetently ruled by the arbitrators shall be set aside to the degree that it can be separated from the award; the competently ruled part thereof shall be deemed valid.

The arbitrators are obliged to render an award in reference to the claims of both parties; thus, disregarding such claims shall also constitute a reason to set aside. If the arbitrators do not give a decision on certain claims, the parties may ask for a supplementary award.

In cases where the parties have determined the rules to be applied to the arbitration proceedings, the arbitrators are obliged to comply with such rules. Otherwise, it shall mean that the arbitrators have exceeded their authority. Within this context, the authority of the arbitrators shall be restricted by the arbitration agreement and the agreement between the parties.

Inconformity of the Arbitral Proceeding with the Procedure

In accordance with Art. 15(A)(1)(f) of the IAA, unless there is an agreement between the parties, in order for an arbitral award to be set aside, this will depend on the fact that the arbitral proceedings have been carried out inconsistently with the provisions of the IAA, and that this inconsistency affects the merits of the award. The parties are free to determine the rules to be applied to the procedure of the proceed-

ings, so long as such rules are in conformity with the law of the place of arbitration. If the parties make a determination in this regard, the arbitral proceeding shall be carried out in accordance with such rules. The determination of the breaches which shall affect the merits of the award shall be made in accordance with the characteristics of the case at hand. For instance, it can be stated that the breaches made during the submission of evidence, and the breaches regarding the language and place of arbitration shall be deemed as breaches that affect the merits of the award. Arbitrators whom do not ground their decisions on certain justifications shall also be considered as a reason to set aside. In practice the question is the breach of right to due process.

The Principle of Equality of the Parties

The parties shall be treated equally throughout the arbitral proceedings with regard to procedural issues. A different perspective of the right to due process can be seen herein. The competence of the arbitrators appointed by the parties may give rise to arguments on the impartiality of the arbitrators. One of the significant points here is that the party appointed arbitrators shall not act as if they are the attorneys of the parties, and that they objectively observe the position of the party who appoints them.

Competent Jurisdiction

In accordance with Art. 15 of the IAA, the action to set aside shall be filed with the civil court of first instance. IAA Art. 3, on the other hand, govern the competent court jurisdiction. Pursuant to such article, the competent court and the court having jurisdiction is the civil court of first instance located in the same place as his/her settlement or the ordinary domicile or the workplace of the respondent; and in cases where the respondent does not have a settlement, ordinary domicile or workplace in Turkey, the competent court having jurisdiction shall be the Istanbul Civil Court of First Instance. Commercial lawsuits (TCC Art. 4) are filed with the commercial court of first instance (TCC Art. 5). In cases where the action to set aside has a commercial characteristic, the action should be filed with the commercial court of first instance[7].

7 15th Civil Chamber of the Court of Cassation, dated 21.9.2010, 4040/4663.

The concerned party shall file the action to set aside within 30 days. In order for this period of 30 days to start, the parties shall be notified of the arbitral award, the decision regarding amendment, interpretation or completion.

Conclusion

Within the scope of the IAA, the action to set aside is the sole legal remedy to be pursued against arbitral awards, and it suspends the execution of the arbitral award at hand. In the Doctrine whether suspension of the arbitral award is an appropriate consequence for the action to set aside is disputed. The consequence expected to be obtained from the arbitral proceeding, which consists procedural vulnerabilities and extensively includes wills of the parties, shall be deemed void and shall not be enforced, if the reasons that are regulated under the IAA and mentioned, above, exist. Within this context, during the initiation and continuation processes of the arbitration, the attention to be shown by both the arbitrators and the parties on the procedural issues bear significance in terms of enforceability of the arbitral awards.

Enforcement of Interim and Conservatory Measures Ordered by Arbitrators*

Att. Ezgi Babur

The importance of interim and conservatory measures ordered by arbitrators has been widely recognized in international arbitration, since the important sets of rules regulating arbitrations set forth provisions enabling the arbitral tribunal to rule on these measures. Interim and conservatory measures are more commonly used in practice, with the adoption of fast-track proceedings by the important set of rules regulating arbitration. As there is a possibility that the parties will not abide by these measures in all of the cases, there is an emerging need to enforce these measures outside of the seat of the arbitration. The issues arising out of enforcement of these measures will be analyzed in this article.

In General

The parties to an arbitration proceeding may request interim and conservatory measures from the arbitrators, as well as from the national courts. Despite the fact that arbitrators lack the powers to enforce such measures, there are advantages to request these measures from the arbitrators. One of these advantages may be the fact that arbitrators are in a better position than the national judges, as they can better evaluate the legal issues related to the dispute to be resolved through arbitration. Additionally, the request for interim and conservatory measures may be denied by the national judges, based on the view that the requests are related to the substance of the cases.

As this need to request interim and conservatory measures from arbitrators is being recognized, the most important sets of rules pertaining to arbitral proceedings have recognized the possibility to request these measures from arbitrators, as well as a different fast-track

---

* ***Article of August 2015***

proceeding to obtain such measures. The Emergency Arbitrator Rules that are adopted by the 2012 ICC Rules of Arbitration are an example for such fast-track proceedings.

In most cases, the parties will most likely follow arbitrators' orders as they relate to interim measures, since the arbitrators may look upon the parties unfavorably if they were not to do so, during the course of the ongoing proceedings. On the other hand, there may be cases in which the non-complying party may disburse the assets, or may aggravate the dispute, in order to place a heavier burden on the other party, or may render the arbitration proceedings ineffectual. In such cases, the enforceability becomes necessary for effective protection of rights[1].

Enforcement pursuant to New York Convention

The decisions made by arbitrators that order interim or conservatory measures may be subject to enforcement requests pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). At this point, it should be emphasized that the text of the New York Convention does not address the issue of its application to interim and conservatory measures that are ordered by arbitrators, and it is reported that the interim measures, even in the form of awards, are not usually enforceable under the New York Convention[2].

The New York Convention, under Article 5/1/e, sets forth that the request for recognition or enforcement of the award may be refused if the award is not binding on the parties. The fact that the interim or conservatory measures ordered by arbitrators may be amended or rescinded by the arbitrators[3] may pose an obstacle for enforcement under the New York Convention.

---

1 **Ali Yeşilırmak**, Provisional Measures in International Commercial Arbitration (Dissertation submitted to Queen Mary College, University of London, for the degree of doctor of philosophy), London 2003, p. 314 ("**Yeşilırmak**").

2 **Jason Fry, Simon Greenberg, Francesca Mazza**, The Secretariat's Guide to ICC Arbitration, ICC Publication 729 (Paris 2012), p. 291 ("**Secretariat's Guide**").

3 For instance, pursuant to Art. 29/3 of the ICC Arbitration Rules, the Arbitral Tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator. Additionally, pursuant to Art. 6/8 of Appendix V of ICC Arbitration Rules, upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal, pursuant to Art.16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

However, it should also be emphasized that the enforceability under New York Convention is controversial, both amongst commentators, as well as amongst state courts. For instance, there is a "pragmatic approach" taken by some courts in the United States, based on the fact that these measures are severable from the merits, and require affirmative action, and they would become a moot exercise of the arbitrators' powers, if they were not enforced[4].

On the other hand, the qualification of the measures ordered by arbitrators may not be "an award," but "an order"; however, the qualification of the measure ordered should not be determinative of its enforceability, and state courts are not bound by this characterization[5].

Lack of Multilateral Treaties

It should be emphasized that there is no multilateral treaty that specifically regulates the enforcement of arbitrator-granted interim and conservatory measures. This means that the matter would be governed by bilateral treaties, if any, as well as national laws regulating the enforcement of such measures.

It is reported that there are bilateral treaties which permit the enforcement of provisional measures[6].

Possibility of Enforcement pursuant to National Laws

National laws of some states regulate court intervention for the enforcement of interim and conservatory measures ordered by arbitrators, when the seat of arbitration is within these states[7]. This intervention may be in the form of direct enforcement, or some executory assistance from the national courts. On the other hand, enforcement may be necessary outside of the seat of arbitration, as well. Considering the fact that the seats of arbitration are chosen from amongst the venues that are neutral to both parties, the decision will require enforcement outside the seat of the arbitration.

---

4 **Yeşilırmak,** p. 335, 338.

5 **Secretariat's Guide**, p. 291.

6 It is reported that the arbitral provisional measures are made enforceable through an annex to a tripartite treaty between Azerbaijan, Georgia and Turkey. Please see **Yeşilırmak**, p. 331.

7 For detailed information about these states, please see **Yeşilırmak**, p. 317-330.

UNCITRAL Model Law on International Commercial Arbitration

With the amendments made in 2006, the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") covers the enforcement of interim measures, under Article 17 H. The relevant article sets forth that an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17 I[8].

Additionally, the Model Law, under Article 17 I, provides for the grounds to refuse recognition or enforcement of interim measures. The Model Law also emphasizes that these conditions are intended to limit the circumstances in which national courts may refuse to enforce an interim measure, and the states may adopt fewer circumstances in which enforcement may be refused by the national courts.

Conclusion

The enforcement of arbitrator-granted interim or conservatory measures is worth analyzing, based on the absence of harmonized solutions on the issue. The application of the New York Convention for the enforcement of these measures is controversial, both among national courts and commentators. The Model Law suggests that states adopt national law provisions, which would permit the enforcement of these measures by national courts. Even though there is no harmonized solution for the problem of arbitrators' lack of coercive powers, the parties tend to abide by the measures, since it would give a negative message to the arbitrators when a decision on the merits is pending.

---

8 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. Source: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

Gazprom Decision of the Court of Justice of the European Union on Anti-Suit Injunctions*

Att. Ezgi Babur

Anti-suit injunctions are issued by national courts or arbitral tribunals, used especially in common law jurisdictions, in order to protect the jurisdiction of arbitral tribunals, or to prevent the tribunal from assuming jurisdiction. The general explanations on anti-suit injunctions are analyzed in our Newsletter article published in February[1].

With regard to anti-suit injunctions, the Court of Justice of the European Union ("CJEU") rendered a decision on May 13th, 2015, in case numbered C-536/13. The case concerned the questions addressed to the CJEU by the Lithuanian Supreme Court that arose in a lawsuit between Gazprom OAO ("Gazprom") and the Republic of Lithuania, with respect to the enforcement of anti-suit injunctions issued by arbitral tribunals. The Gazprom decision of the CJEU is analyzed in this article.

Legal Background

The recognition and enforcement of anti-suit injunctions has always been an issue of debate. Anti-suit injunctions may be considered as an infringement of the mutual trust principle within the European Union, when filed by the court of a member state, concerning the proceedings to be initiated in another member state.

In 2009, the CJEU, in its West Tankers decision, ruled that anti-suit injunctions issued by courts of member states, which deprive the courts of another member state of the ability to rule in their own jurisdiction,

---

* ***Article of May 2015***

1 Please see Anti-Suit Injunctions in International Arbitrations, in our February 2015 Newsletter. Link: http://www.erdem-erdem.com/en/articles/anti-suit-injunctions-in-international-arbitration/.

would be inconsistent with Council Regulation No. 44/2001 ("Brussels I Regulation").

The Brussels I Regulation sets forth that the Regulation does not apply to arbitration; however, it does not clarify the scope of this exception. On the other hand, the Recast Brussels Regulation that entered into force on January 10th, 2015, clarified that proceedings ancillary to arbitration agreements are not within the scope of the Brussels I Regulation. The Gazprom decision of the CJEU should be considered within this framework.

Summary of the Facts

The facts giving rise to the Gazprom decision are related to a dispute between Gazprom and the Ministry of Energy of Lithuania[2] ("Ministry"). The dispute arose out of a shareholders' agreement entered into by and between Gazprom and the Ministry. Pursuant to the arbitration clause in the shareholders' agreement, any claim, disputes or contravention with the agreement or its breach, validity, effect, or termination shall be finally determined through arbitration.

In spite of the arbitration clause in the agreement, the Ministry filed a lawsuit before the Vilnius Regional Court in Lithuania, seeking initiation of an investigation in respect of the activities of a legal person. The lawsuit related to some members of the board of directors of Gazprom. The Ministry also claimed that coercive measures provided under the Lithuanian Civil Code should be imposed, if the actions of the company or the board of directors were found to be improper.

In reaction to the lawsuits filed by the Ministry, Gazprom took the view that the application was in breach of the arbitration clause, and initiated arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce. Gazprom also requested that the arbitral tribunal should order the ministry to discontinue the proceedings initiated before the Lithuanian courts.

---

2 The Judgment of the court may be accessed at the following link: http://curia.europa.eu/juris/document/document.jsf?text=&docid=164260&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=461949.

The arbitral tribunal, in its award dated 31.07.2012, declared that the Ministry partially breached the arbitration clause, and ordered the Ministry to withdraw or limit some of the claims that it had brought before the Lithuanian court. Gazprom initiated recognition and enforcement proceedings in Lithuania, in order to enforce the award. The request of enforcement was denied by the Lithuanian court, based on the grounds that the award limited the Ministry's capacity to bring proceedings before a Lithuanian court, and also denied the national court the power to determine its own jurisdiction. Therefore, it was decided that the arbitral tribunal infringed upon the national sovereignty of Lithuania, in contradiction with Lithuanian and international public policy.

Upon the appeal of the decision, the Supreme Court of Lithuania declared that it was uncertain, based on the case law of the CJEU and under the Brussels I Regulation, whether recognition and enforcement of the anti-suit injunction may be refused by the Lithuanian courts, and addressed to the CJEU three questions on the relevant issue.

Decision of the CJEU

In its decision, the CJEU stated that anti-suit injunctions ordered by a member state court requiring a party not to continue proceedings before a court of another member state is contrary to the principle that every court seized of itself determines, under its applicable laws, whether it has jurisdiction. The Brussels I Regulation does not, except in a few limited exceptions, authorize the jurisdiction of a member state court to be reviewed by another member state court.

Considering the above issue, the CJEU clarified that arbitration does not fall within the scope of the Brussels I Regulation, since the latter governs conflicts of jurisdiction between the courts of member states. Concerning the principle of mutual trust, the CJEU pointed out that as the order has been made by an arbitral tribunal, and not by a state court, the principle of mutual trust has not been infringed in the case at hand.

In its decision, the CJEU stated that the Brussels I Regulation does not preclude the courts of European Union member states from giving effect to anti-suit injunctions given by arbitral tribunals. As a result of

this determination, whether anti-suit injunctions would be enforced or not should be determined by the national arbitration legislation of the state of enforcement, and by the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), if applicable.

It should also be emphasized that the CJEU pronounced the Gazprom decision under the Brussels I Regulation, and not the Recast Brussels Regulation. Even though the Gazprom decision is given under the Brussels I Regulation, it would also be applicable under the Recast Brussels Regulation, since the latter has established a clearer separation between court proceedings and arbitration proceedings.

Conclusion

The decision of the CJEU should be welcomed with regard to arbitrations with the seat of arbitration within the European Union. In light of this decision, anti-suit injunctions ordered by arbitrators will not be impeded by the Brussels I Regulation, and there will be no mutual trust concerns between European Union member states concerning arbitrator-granted anti-suit injunctions. Pursuant to the Gazprom decision, each member state court will lean on its own arbitration laws, in respect of the effect to be given to anti-suit injunctions. Accordingly, if the relevant jurisdiction is party to the New York Convention, the latter should be applied.

CAPITAL MARKETS LAW

Prohibition on Hidden Income Shifting*

Att. Tuna Colgar

Prohibition on hidden income shifting is one of the most important issues that is broadly regulated under Capital Markets Law No. 6362 ("CML"). In conjunction with CML Article 21, which has a broader context than Article 15 of the abrogated Capital Markets Law No. 2499, another significant step has been taken regarding one of the most primary aims of the Capital Markets Board ("CMB" or "Board"), a public regulatory authority, which is to provide protection on the rights of shareholders of public companies.

By virtue of the managerial abuses of joint stock companies that are subject to the capital markets legislation, the prevention of, particularly, the potential damages of the shareholders/minority shareholders, apart from the persons or group which hold the control of the company, in other words, the account owners who are capital market investors, is the primary purpose of the CML, and one of the preeminent duties and authorities of the CMB[1].

The hidden income shifting problem has been regulated in the tax legislation in a more broad, but tax-oriented concept, at first, due to the fact that it triggers tax losses. On the other hand, the CML regulates this issue more distinctively, and within a narrower context, with regard to investing shareholders[2]. The components of the hidden income shifting prohibition are determined in the first paragraph of CML Article 21, entitled, "Prohibition of the Hidden Income Shifting."

The first paragraph of CML Article 21 states that "It is prohibited to the shift income of public companies and collective investment

---

* ***Article of January 2015***

1 **Arslan Kaya** İÜHFM C. LXXI, S. 2, p. 193-204, 2013.

2 **Arslan Kaya** İÜHFM C. LXXI, S. 2, p. 193-204, 2013.

schemes, and their subsidiaries and affiliates, to real persons or legal entities with whom they have a direct or indirect relationship in terms of management, audit, or share capital, through reducing their profits or their assets, or preventing the increase of their profits or their assets, by virtue of performing transactions, such as forming contracts or commercial practices comprising different prices, fees, costs or conditions, or via producing a trading volume that is in violation to market practices (the arm's length principle[3]), according to prudence and honesty principles of commercial life."

A remarkable point in this provision is that its scope of application with respect to applicable persons is widened, in comparison to abrogated Article 15. In this Article, along with public companies' collective investment schemes, their subsidiaries and affiliates have been included in the scope of the Article. The opposite party of the transaction is regulated as the real or legal entity, with whom the persons as listed under four categories in the Article are either in a direct, or an indirect, relationship in terms of management, audit or share capital.

The Article, as a rule, specifically prohibits hidden income shifting. The first paragraph of the Article sets forth that such shifting can be executed through four different methods. These are; (i) the reduction of profits (ii) the reduction of assets and (iii) the prevention of the increase of profit or (iv) the prevention of the increase of assets.

The Article also sets forth that prohibited income shifting may be performed through forming contracts or commercial practices comprising different prices, fees, costs or conditions that are in violation of market practices, the arm's length principle, or prudence and honesty principles of commercial life, or through concluding transactions, such as producing transaction volumes.

The meaning of the word "transaction" as defined in CML Article 21 is accepted in the doctrine to include the avoidance of a typical or atypical agreement, such as service, attorney, work, sale/purchase or shareholders agreement, or avoidance of a behavior. Accordingly, it is concluded that income may also be shifted through the non-entrance into tenders that are in favor of the concerned persons,

---

3 Please see Corporate Tax Law Article 13.

quotation of high prices, or the transfer of certain businesses to certain persons[4].

The second paragraph of CML Article 21 states that the hidden income shifting prohibition can also be passively violated. The second paragraph of CML Article 21 sets forth that " In the cases where public companies and collective investment schemes, along with their subsidiaries and affiliates, do not perform the activities expected from them as prudent and honest merchants in accordance with their articles of association or their internal rules, or if they do not perform activities in order to conserve or increase their profits or assets in accordance with market practices, providing the increase of the profits or assets of real persons and legal entities with whom they are related shall also be deemed as hidden income shifting transactions."

The second paragraph of CML Article 21 prohibits the reduction of assets, along with the reduction of the profits of the company through transactions concluded by the company through a certain method and, accordingly, foresees a broader approach than Article 15 of the abrogated law.

When the first two paragraphs of the Article are jointly evaluated, it is clear that the active operations stipulated in the first paragraph as (i) the reduction of profits (ii) the reduction of assets and (iii) the prevention of the increase of profits or (iv) the prevention of the increase of assets, are prohibited, along with the passive operations as stipulated in the second paragraph of the Article, as (i) the non-performance of the activities that are expected to be performed in order to protect or increase the profit, and (ii) the non-performance of the activities that are expected to be performed in order to protect or increase the assets.

In this context, the new regulation not only aims to prohibit the reduction or prevention of increase the profits or assets through active behavior. Additionally, damaging the company through passive behaviors shall also be assessed within the scope of the hidden income shifting prohibition.

In accordance with CML Article 21, it is not necessary for the source shifting to be performed by the public company in person,

---

4 **Ünal Tekinalp**, Sermaye Piyasası Hukukunun Esasları, İstanbul 1982, p. 77.

and/or directly. The hidden income shifting may be performed via public company's subsidiary and/or affiliate, in person, or through its subsidiary and/or affiliate. Accordingly, along with direct income shifting, damages may occur within a public company, by virtue of the transactions conducted within the scope of the group relation[5].

Together with the protection of the incomes of publicly held joint stock companies, another impact of the aforementioned regulation is that it introduces a provision parallel to the protection of the assets principle, which is also regulated under the Turkish Commercial Code ("TCC"). Through this provision on the prohibition of the hidden income shifting, the assets of the public company are protected, and the opportunity for the minority shareholders to obtain efficient and necessary amount of dividend is enabled. Additionally, it should be noted that the hidden transactions that result in the reduction of company's profits or assets, in other words, those transactions that cause damage, are generally considered as collusive transactions[6].

The third paragraph of CML Article 21 imposes documentation and safekeeping obligations, and sets forth that "The public companies and collective investment schemes are obliged to certify that the related party transactions have been performed in accordance with arm's length principles, market practices, prudence and honesty principles of commercial life, and to preserve the documents and information so certifying for at least eight years. The Board shall determine the principles and procedures to be followed where a violation of the principles set forth under paragraph 1 occurs."

In the third paragraph of the said Article, the public companies and collective investment schemes shall be obliged to provide certification that the related party transactions have been performed under the conditions that are in conformity with the arm's length principle, market practices and prudence and honesty principles of commercial life, and are obliged to keep the documents and information so certifying this for at least eight years.

The fourth and last paragraph of CML Article 21 regulates the sanction that shall be applied where hidden income shifting occurs. In

---

5 **Arslan Kaya** İÜHFM C. LXXI, S. 2, p. 193-204, 2013.

6 **Akbulak/Akbulak**, Sermaye Piyasası Araçları p. 386-387.

accordance with this paragraph, the public companies, collective investment schemes, together with their subsidiaries and affiliates, shall request from the parties to which an income transfer has been made, to return the transferred amount and its legal interest to the company or collective investment scheme whose assets or profits have been reduced, within the timeframe determined by the Board, where the income transfer has been detected by the Board. Moreover, the parties that have received an income transfer are obliged to return the transferred amount with its legal interest within the period determined by the CMB. Additionally, civil, penal and administrative sanctions may be applied in accordance with Articles 94 and 110 regarding the violation of the prohibition of hidden income shifting.

Within this context, the public company may request the repayment of the transferred amount, with interest, and disclose the audit results to the public, where income shifting is detected by the CMB. Sanctions, such as filing a restitution lawsuit, requesting compensation for the breach, filing lawsuits regarding annulment-nullity-invalidity, revocation of signatory authority, and/or dismissal may be applied with regards to the said transaction. "Abuse of Confidence" and "Administrative Fines" may be applied with regard to criminal liability.

In conclusion, as far as hidden income shifting is concerned, company assets will be negatively affected, and the subsequent decision of the investor will be negative as a consequence of the low profits. Additionally, the value of the securities will also be low. Therefore, the shares should be exchanged more frequently, and generally, the circulation should be in a manner that would result in the shares being transferred to major shareholders. Within this context, as per the regulation of Article 21 of the CML, the protection of the public company and, accordingly, the investing shareholders, and the prevention of company sources to be transferred to the related persons that have a controlling power, is intended. By virtue of this provision, the intervention to the source transfers/hidden income shifting transactions, directly, or indirectly executed, and whose execution is procured through the board of directors by those persons with the controlling power over the company, will reduce or prevent the increase of the company profits or assets[7].

---

7 **Arslan Kaya** İÜHFM C. LXXI, S. 2, p. 193-204, 2013.

Market Abuse Actions In Accordance With Capital Markets Law*

Att. Nilay Celebi

Introduction

The Capital Markets Board adopted the Communiqué on Market Abuse (VI-1.104.1) ("Communiqué") in order to determine the acts and transactions that result in the distortion of the reliability, transparency, and stability of stock markets and other organized markets, which cannot be justified through reasonable economic or financial grounds, and sanctions upon those persons who do such acts and transactions. The Communiqué was published in the Official Gazette on 21.01.2014, and came into effect the same day. The Communiqué sets forth market abuse actions, and actions that are not deemed as market abuse.

Market Abuse with respect to Inside or Periodic Information

Persons that have inside or periodic information prior to the public disclosure of such information pursuant to the capital markets law, shall keep such information confidential until the disclosure thereof. The disclosure of such information by the persons in question before the public disclosure, and the execution of capital markets transactions based on direct or indirect knowledge of such information shall be deemed as market abuse.

Transactions regarding relevant capital market instruments by persons having inside or periodic information, or by the spouse, children, or cohabitants of such persons during the period starting from the day after the end of the accounting period regarding financial statements and reports of issuers, or independent audit reports, until the date of

---

* ***Article of March 2015***

disclosure of those statements and reports to the public in accordance with legislation, is considered and treated as market abuse.

Transactions regarding relevant capital market instruments by persons having inside or periodic information or by the spouse, children, or cohabitants of such persons, during the period starting from the date of the finalization of inside or periodic information until the date of disclosure of such information to the public in accordance with legislation, is considered and treated as market abuse.

Market Abuse Actions with respect to the Orders or Transactions

Actions and acts by persons acting alone, or together, through stock markets, or in other organized markets, which may be deemed as material or effective, taking into account the determined value of the capital market instruments, price variations, transaction volumes, transaction amounts, transaction rates, order amounts, order rates, order cancellation amounts, order cancellation rates or order execution rates, distorting the reliability, transparency and stability of stock markets and other organized markets, or creating wrong or false impressions regarding prices, price variations, supply and demand of capital market instruments, or preventing competitive environments of the market, or formation of fair or correct prices:

a) by selling and purchasing, executing account activities, giving orders, or cancelling or changing orders; or

b) transmitting orders at different price levels; or

c) by giving reverse orders within a period of less than one minute, such as a selling order at a price equal to or lower than the best purchase price in the market, or a buying order at a price equal to or higher than the best sale price; or

d) executing transactions with itself or reciprocal transactions; or

e) by executing transactions with the purpose of affecting opening or closing prices;

f) executing transactions with the purpose of affecting the end-of-day or end-of-maturity settlement prices; or

g) executing transactions with the purpose of increasing, decreasing, or maintaining the price; or

h) exceeding the position limits provided for all accounts associated with a registry, or on a market basis in futures and options markets; or

i) executing transactions that are similar to transactions executed in the relevant underlying asset market in futures and options markets

are considered and treated as market abuse actions.

Market Abuse through Communication or Correspondence

To indicate false, wrong or misleading information, spread rumors, inform, make material disclosures, make comments, or prepare reports that can affect prices, values of capital market instruments, or the decisions of investors, or which are capable to effect market indicators that may affect relevant indicators, is considered as market abuse. Furthermore, the execution of such action by persons who know, or should have known, that such actions are false, wrong or misleading, is considered as market abuse (For instance: board of director's members, managers, specialists, etc.).

Non-disclosure of information that is required to be disclosed pursuant to the Regulations by the Capital Markets Board regarding material disclosure, and which may affect the prices, values of capital market instruments, or the decisions of investors are also considered as market abuse.

In addition, selling a capital markets instrument despite giving a recommendation to purchase or hold, or purchasing a capital markets instrument despite giving a recommendation to sell, after making comments, or giving advice about such capital market instruments through newspapers, television, internet, or similar other media instruments, until the date of revising such comments or advice, or in any event, within 5 business days thereafter, is deemed as market abuse.

Other Market Abuse Actions

Prior to the transmitting of orders to investment companies, relevant stock market, or other organized markets that are capable of affecting the price or value of capital market instruments, to give orders regarding the capital market instrument in question or other rel-

evant capital market instruments with advance knowledge on order of the investors, or to change or cancel such orders, or to transfer the information on the orders in question to third parties are considered as market abuses.

Following transactions in stock markets or other organized markets that are absent a power of attorney issued by a Notary Public, are considered as market abuse:

a) to transmit orders, execute transactions, or make transfers by using the account of another person; or

b) to allow other persons to transmit orders, execute transactions, or make transfers by allowing others to use his/her account.

In the event that the shareholders having control plans to sell their shares in the stock market, which exceed 10% of its share capital, or 50% of the value of their shares on de facto circulation in any twelve month (12) period, the relevant shareholders shall issue an information form in accordance with the legislation, and the form shall be approved by the Capital Markets Board prior to the sale. The form approved by the Capital Markets Board shall be announced through a Public Disclosure Platform. Non-compliance with aforementioned Article 27 of the Communiqué on Shares (VII-128.1) and the principal decision of the Capital Markets Board shall be deemed as market abuse.

If a person who is prohibited from concluding transactions by Capital Markets Board trades in stock markets, or in other organized markets, by using his/her own account, or the account of other persons during the prohibition period, the person in question shall be deemed to have committed market abuse.

Actions Not Considered As Market Abuse

The following transactions are not considered as market abuse actions:

1. Transactions in order to ensure the financial stability or implementation of the policies on money, rates of exchange, and management of public debts by the Central Bank of the Republic of Turkey, and other authorized administrative authorities, or those persons who act on their behalf,

2. Allocation of shares regarding repurchase programs, share acquisition programs to personnel, or other allocations of shares to the personnel of the issuer or subsidiaries under the regulations of the Capital Markets Board,

3. The sale or purchase of capital markets instruments, or giving orders, or cancellation of orders in order to maintain the market price of such instruments in a determined period, provided that such transactions are concluded in conformity with the provisions of Capital Markets Law No. 6362 regarding the transactions on price stability and market making,

The professional activities of journalists conducted in accordance with journalism ethics and standards provided that;

a) an unfair advantage is not directly or indirectly obtained through the publishing of news or comments; or

b) news or comments are not published in agreement with, or under the guidance of, persons who have committed abuses of information or market manipulation crimes; or

the relevant capital markets instrument are not traded with, or such information is not disclosed to, third parties before publishing the news or comments.

Conclusion

The Communiqué of the Capital Markets Board provided for the acts and actions distorting the reliable, open, and stable functioning of stock markets and other organized markets, and the Communiqué defines actions that affect the price of capital market instruments, the decisions of investors, distorting the competition, and the fair and correct functioning of the transactions.

Legal Remedies for Corporate Bondholders in the Event of Default*

Att. Ali Sami Er

Those following the Turkish economy in the past months have observed hot debates that are ensuing on the correlation between interest and inflation. In the midst of the ongoing deliberations between President Erdoğan and the Central Bank Governor, Mr. Başçı, the Turkish Lira has been devalued 27% against the USD since April 2014. While some dispute that excess TL devaluation to the tune of approximately 10% as compared to other emerging market currencies is the result of the uncertainty due to the upcoming June 7 general elections, the economists emphasize that the Turkish economy, undoubtedly, entered a period of stagflation where growth has been muted between 2-3% per year while inflation remains high at 6-7%. In capital markets, we watch the effects of the liquidity crunch, as well, both in debt, and in equity products. Thus, CDS rates are increasing compared to previous years[1]. Although these figures may not be indicative of corporate bond defaults, we see that the legal remedies that are available under Turkish law and the current regulatory trends may be of practical importance for investors.

Nature of Corporate Bonds and Rights of Bondholders

A bond is a negotiable instrument that indicates a monetary right of a creditor to be issued only by following a special procedure[2]. Despite the special issuance procedure, there is no exceptional remedy available through which investors may be protected by the credit or default risk of the issuer.

---

* ***Article of April 2015***

1 http://www.bloomberght.com/piyasa/TURKEY%20CDS%20USD%20SR%205Y%20CORP.

2 **Domanic, Hayri** p. 313; Corporate Bonds, Banking and Commercial Law Journal December 1973 Volume VII/2.

As per Article 206/4 of the Law on Enforcement and Bankruptcy numbered 2004, if the issuer goes bankrupt, unlike the covered bond and sukuk holders[3], the bondholders' rank is subordinated to privileged creditors, such as employees, the state, and other creditors determined under the law. Therefore, unless the issuer, the controlling shareholder of the issuer, or the underwriter (if any) provides an extra guarantee or security to the bondholder, the chances are less likely that bondholders will be able to recover their unpaid coupons and the principal.

Bondholders are characterized as mere creditors of the company so they may only benefit from those provisions under Commercial Code numbered 6102, as with any other creditor[4]. The Capital Markets Law numbered 6362 does not provide any special rights to bondholders other than those available for misrepresentations in the prospectus. Unlike the former Commercial Code that granted bondholders the right to convene general assemblies in certain matters, the new Commercial Code does not include such opportunity[5]. Therefore, in the event of bankruptcy, bondholders will claim their investments, either individually or collectively as there is no provision hindering them to act as a group[6]. However, such lawsuit is not a class action, as it is only introduced for legal entities, such as associations provided in Article 113 of Code of Civil Procedure numbered 6100.

Current Regulatory Trends

As per Article 4/7 of Communiqué Regarding Debt Securities numbered II-31.1 ("Communiqué"), the Capital Markets Board ("CMB") is entitled to request from the issuer a guarantee for payment obligations given by a local bank or third party, or limit the sale to the qualified investors, only. Despite such broad power, the CMB has exer-

---

3 As per Article 59/3 and 61/3 of the Capital Markets Law, if the issuer goes bankrupt, the collateral for covered bonds and sukuk holders, respectively, is not included in the bankruptcy estate, and the bondholders have the privilege to benefit from the sale proceeds of the collateral.

4 The following articles of the Turkish Commercial Code will be relevant for the creditors: 202/1/c, 395/2, 474, 513/1, 530, 541/1, 549/1, 550, 551, 553, 554, 556, 557/1.

5 **Erdem, Ercument**; Jouissance Shares For The Founders In The Turkish Commercial Code available at http://www.erdem-erdem.com/fr/articles/jouissance-shares-for-the-founders-in-the-turkish-commercial-code-2/.

6 **Pulasli, Hasan** p. 1732; Commentary on Company Law, 2nd Edition 2014.

cised such authority in seven applications thus far since the entry into force of the Communiqué, the first one starting with the bond offering of Fenerbahçe FC, raising funds to eliminate the effects of the controversial match-fixing investigation.

The latter approvals of the CMB introduced other conditions that were not present in the Communiqué. The clearance for issuance is given, provided that the sale is structured as a private placement, or backed by a bank guarantee, if made to qualified investors[7]. Although the Communiqué prescribes that the CMB is entitled to request either a guarantee or limit the sale to the qualified investors, it went beyond its powers and requested both by requiring a bank guarantee in a bond sale to qualified investors. In response to another application, the CMB requested a bank guarantee regardless of the sale structured as a private placement or being directed to qualified investors[8]. Lately, the CMB even restricts sales to collective investment institutions and pension investment funds[9]. We believe that the regulatory aim in the last approach is to prevent the investors of the aforementioned institutions from investing in non-guaranteed bonds.

Above all, the standards applied by the CMB through this catch-all provision seem to be exercised beyond power. Thus, since the reasoning of the CMB approval is not transparent, it causes uncertainty for the issuers as it is not clear when such guarantee will be requested. Additionally, investors may be misled by such approvals because the CMB in some applications, requests the issuer to obtain a bank guarantee while not in the others. Consequently, not exercising such power to request a guarantee from the issuer may create a mind of protection for an investor despite the fact that the CMB has a disclaimer in offering documents indicating that its approval does not qualify as a representation and warranty of the financial condition of the issuer. It is noteworthy to mention that after such decisions, except for Fenerbahçe, none of the issuers were able to launch the bond offering.

---

7 CMB Bulletins numbered no. 2014/28 and 2014/35.

8 CMB Bulletin numbered no. 2014/35.

9 CMB Bulletins numbered no. 2014/35 and 2015/10.

Will G.Ç.S. issuance become a milestone in corporate bond offerings?

Approximately four months after the approval of the CMB of the sale of 35 million TL bill to 17 qualified investors, G.Ç.S. Metal Çatı İzolasyon Taahhüt Ticaret ve Sanayi A.Ş. announced that it obtained from the court a bankruptcy postponement decision[10]. This news has raised many questions with the market participants as to how the CMB permitted such issuance, when the issuer was on the verge of bankruptcy. The bonds mature on July 15th. In a scenario of non-payment, the liability of the CMB will also be under scrutiny.

Conclusion

In reaction to the unsuccessful equity IPO boom in the former CMB president's period that resulted in many investors' loss, the newly formed CMB promulgated many regulations to the benefit of the investors, while stringent rules have slowed down the IPOs. We now see a similar approach in the CMB's approval on debt issuances and, in light of the above, one may expect more regulation and even changes in the law to come with exceptional guarantees and expedited enforcement procedures for the sake of investors.

---

[10] For further information regarding this type of decision, please visit: http://www.erdem-erdem.com/en/articles/postponement-of-bankruptcy/.

Communiqué on the Principles Regarding Security Investment Companies*

Att. Ozgur Kocabasoglu

The Communiqué on the Principles Regarding Security Investment Companies (III-48.5) ("Communiqué") published in the Official Gazette dated 27.05.2015 and numbered 29368. The Communiqué abolishing the Communiqué on the Principles Regarding Security Investment Companies (III-48.2) sets forth provisions on Investment Companies with Variable Capital ("ICVC") for the first time in Turkish law. The Communiqué regulates the investment companies with fixed capital and also introduces provisions on those with variable capital. Except for regulating investment companies with fixed capital, the Communiqué regulates the establishment and shareholders, issuance of the shares, transfer and redemption of founding shares, redemption of the investment shares, the required qualifications of the holders of the founding shares and directors, governance principles, activity principles, restriction regarding portfolio, custody and utilization of the assets of the portfolio, liabilities on public disclosure and informing investors, distribution of the dividends, liquidation and dissolution of the ICVC, and transformation of investment companies with fixed capital to the ICVC, along with the principles and procedures regarding other relevant liabilities. Art(s). 50 and 51 of the Capital Markets Law ("CML") provides certain principles regarding the ICVC; however, the Communiqué sets forth detailed provisions on security investment companies with variable capital. We will assess these reforms adopted by the Communiqué in general in this newsletter.

---

* ***Article of May 2015***

Definition and Portfolio of the Companies

Pursuant to Art. 41 of the Communiqué, the ICVC "*is a capital market institution, of which the capital is always equal to its net asset value, and which is established in the form of a joint stock company to operate its portfolio comprised of the following assets and instruments, and may conduct activities that are permitted by this Communiqué.*" Art. 50 of the CML defined a net asset value as "*the value reached by subtracting the total of the debts from the total of the assets.*" The assets and the instruments which may be included in the portfolio of the ICVC are similar to the assets and instruments that are permitted to be included in the portfolio of investment companies with fixed capital and security investment funds; such assets and instruments are provided by Art. 41/1 of the Communiqué.

Pursuant to Art. 42 of the Communiqué, the portfolio of the ICVC shall be kept by the portfolio custodians, and shall be managed by the portfolio managers having adequate information on the assets to be included in the portfolio, and those with at least 3 years of experience in the field of capital markets; such manager shall manage the portfolio for the benefit of the investors and in a manner that protects the interests of the investors. The debts and the liabilities of portfolios before the third parties shall not be set off by the receivables of the portfolio from the same third parties. Additionally, the portfolio of the company shall not be mortgaged nor have been provided as security. However, it may be mortgaged or provided as security for a loan, transactions regarding derivative instruments, or other similar transactions concluded by a party on behalf of the portfolio, provided that the transaction is concluded on account of the portfolio, and a provision is included in the articles of association and prospectus.

Establishment

Art. 45 of the Communiqué sets forth conditions for establishment of the ICVC.

Accordingly, the following conditions shall be fulfilled contrary to the investment companies with fixed capital: The initial capital of 2 million TRY, undertaking to the Capital Markets Board ("Board") by the founders to increase the net asset value at least to TRY 4 million by

issuance of the shares, determination of the general director and the board of directors' members, except in the case of procurement of all services to external entities in accordance with Art. 60, reference to the portfolio type of the company, and the "ICVC" abbreviation in the company name in the event that the company wishes to use a company name. Except for those stated, the ICVC shall fulfill certain other conditions that are similar to the investment companies with fixed capital, such as establishment in the form of a joint stock company, issuance of the shares in exchange of cash, and the full payment of the share prices, in cash, etc.

In addition, Art. 46 of the Communiqué sets forth the required qualifications for the founders; such qualifications are substantially similar to those provided to investment companies with fixed capital.

Issuance and Types of Shares

The shares of the ICVC may be in the form of founding shares or investment shares. In accordance with Art. 48 of the Communiqué, after the establishment of the company, the founding shares shall be issued by drafting an application, and delivering the documents stated in such form to the Board.

On the other hand, Art. 49 of the Communiqué sets forth the procedure for issuance of the investment shares. Accordingly, investment shares shall be publically offered, allocated to a determined investor group that is formed in respect to the workplace, profession, sector or other similar criteria, or sold to qualified investors. In order to issue investor shares, a prospectus and investor information form shall be prepared in accordance with the standards provided by the Board, and the company shall apply to the Board with other documents and information as required by the Board within 30 days after the registration of the articles of association regarding its establishment with the trade registry. In the event of sale to an investor group or qualified investors, an issuance document shall be prepared instead of a prospectus; however, preparation of the investor information form is facultative.

Pursuant to Art. 53 of the Communiqué, although the investment shares may be nominative or bearer, the founding shares shall be nominative. Holders of the founding shares are entitled to dividends and

liquidation shares, they may participate general assembly meetings, vote in general assembly meetings, have right to be informed, and examine, demand special audits, initiate a process for annulation of the General Assembly's resolutions, and have minority rights. However, holders of investment shares are only entitled to dividends and liquidation shares, and the holders shall neither participate in the general assembly meeting, nor vote in the General Assembly. None of the holders of these shares have a pre-emption right.

Direction and the Services Permitted to be Procured by Other Entities

Election and operation of the board of directors is subject to the relevant provisions of the Turkish Commercial Code ("TCC"). Nevertheless, the Communiqué sets forth certain qualifications to be fulfilled by the board of directors' members.

In accordance with Art. 60/1 of the Communiqué, the ICVC's portfolio shall be managed by a portfolio management company. However, Art. 60/2 provides that services such as inspection, intern control, accounting and operation may be provided by investment companies; services regarding a risk management system may be provided by the investment companies or other specialized companies authorized by the Board, provided that the board of directors controls and supervises such activities. In addition, abovementioned activities may also be provided by a portfolio management company, provided that these companies have the relevant departments. Furthermore, in order for the relevant activities and relevant personnel to be procured by other entities, a special provision shall be included in the articles of association and the board of directors shall adopt a resolution.

Application of the TCC

Pursuant to Art. 91/2 of the Communiqué, "*the provisions of the TCC regarding share capitals in joint stock companies, the amount of minimum capital, minimum content of the articles of association, capital contribution in kind, nominal value, acquisition of the company's shares by the company itself, capital increase and decrease procedure, share subscription and payment of the share price, restrictions on*

share transfers, profits and loss accounts and distribution of dividends, legal reserves and liquidation, shall not apply to the ICVC." Such issues are governed by their specific regulations.

Conclusion

The Communiqué introduces to Turkish law a company model enabling a more flexible structure similar to investment funds under a legal personality and a less determined capital structure. The Communiqué sets forth detailed provisions on an ICVC. Such reforms cover, in particular, the definition of a ICVC, the portfolio of the company and its management, establishment, issuance and types of shares, as well as the services permitted to be procured by the other entities. Except for as stated, those areas that the TCC shall not apply are explicitly stated; therefore, the scope of application of the special provisions on capital markets is rendered clear.

Intermediation of Investment Companies for Derivative Transactions under New Capital Markets Law*

Att. Kerem Tayhac Sagocak

In today's financial markets, derivative instruments comprises an essential part of capital market activities, both for banks and intermediary institutions, as well as the companies aiming to manage their portfolio risk. Furthermore, almost 90% of such derivative transactions are being carried out over the counter (OTC), meaning that the derivative instruments are traded in a context other than through a formal exchange (e.g. Borsa İstanbul). The new Capital Markets Law numbered 6362 ("CML") and the regulations issued thereunder, while setting out the framework in which derivative transactions can be carried out over the counter without any intermediation, also introduce new rules so as to allow intermediary institutions to take part as dealers in this market.

New Communiqué on Principles Regarding Investment Services and Activities and Ancillary Services

Derivative Transactions

Derivative transactions are sub-categorized essentially under two different headings based on the market where such transactions are affected. In this respect, (i) transactions that are effected under organized markets with the standardized agreements are deemed as exchange transactions; whereas (ii) transactions that are effected between the parties based on their mutual agreement, and specifications of which are determined based on the needs and understanding of the parties, are deemed as over the counter (OTC) transactions. Even though such derivative transactions pose disadvantages when com-

---

* ***Article of November 2015***

pared to exchange transactions in respect of liquidity and risk, they also provide much more flexibility due to lack of requirement, such as membership, collateral and centralized exchange. In this respect, it should further be noted that as per Article 36 of the new Communiqué on Principles Regarding Investment Services and Activities and Ancillary Services numbered (III-37.1) issued on 11 July 2013, which came into effect on 1 July 2014 ("Communiqué") of the Capital Markets Board ("CMB"), CMB is authorized to determine the derivative instruments that are to be transacted in an exchange, and the specific rules and principles regarding the execution of such transactions pursuant to the proposal of the centralized execution institute, and also based on the limits to be set for these transactions, and within the framework of the principle of reducing the systemic risk. The CMB can also require that the over the counter transactions of investment institutions are executed in an institution that is to be authorized as the centralized counter party.

Requirement for Intermediation under New Communiqué

The CML defines the capital market instruments as securities, derivatives, and other capital market instruments (including investment agreements) that are to be determined as such by the Capital Markets Board ("CMB"). Further, as per Article 37 of the CML (i) receipt and transfer of orders in relation to capital markets instruments; (ii) execution of orders of capital market instruments in the name and on behalf of the client, or in its own name and on behalf of the client; (iii) sale and purchase of capital market instruments on behalf of itself are deemed as investment services. As such, since these activities are deemed as investment services, they can solely be carried out by authorized investment companies under the CML in accordance with the Article 39 of the CML. In this respect, as the derivatives are also deemed as capital market instruments, the intermediation of an investment company will be required regardless of whether the transaction is executed in an exchange or over the counter.

Exemption under the Communiqué

Article 25 of the Communiqué stipulates that the activities of transfer of order, intermediation of transaction, or portfolio, in relation

to derivative instruments other than leveraged transactions shall be carried out in exchanges, institutionalized market places, or over the counter depending on the type of the transaction contemplated to be engaged in. Article 26 of the Communiqué, on the other hand, sets out that (i) the physical sale and purchase of the exchange, precious metals, precious stones, goods and other assets; and (ii) the derivative transactions effected between real and/or legal persons without the intermediation of an investment company that cannot be deemed as the commercial or professional activity, are not deemed as derivative instruments. Within such legal framework, it can clearly be set out that there is no obligation to use intermediary institutions imposed upon the parties engaging in any kind of derivative transaction, provided that such transaction (i) is not executed in an exchange platform (i.e. Borsa Istanbul); (ii) is engaged in by the parties in their own name and behalf; (iii) cannot be deemed as a commercial or professional activity of the parties (e.g. parties aim to hedge their own risks). In cases where such exemption does not apply, the parties have to use an authorized investment institution as the intermediary, although no specific reporting requirement arising solely from such transaction is imposed upon the parties.

Intermediary Institutions as Dealers

Until the issuance of the Communiqué, the intermediary institutions were not allowed to act as the counterparty to the derivative transactions, with the main concern that such prohibition would also prevent the counterparty risk that may have to be assumed by the intermediary institutions. The new Communiqué, on the other hand, allows for the intermediary institutions to engage in such transactions by defining a new activity as "intermediation for portfolio." In this respect, Article 21 of the Communiqué defines "intermediation for portfolio" as the activity that allows intermediary institutions to effect the orders of purchase and sale in relation to capital market instruments as the counterparty to such transactions. As such, the intermediary institutions granted with the specific authority "portfolio intermediation" can act as dealers under the new Communiqué.

Conclusion

Within the scope of such regulatory framework, the new CML and the Communiqué, while requiring the intermediation of investment companies for derivative transactions also aims not to set limits on the commercial activities of the parties by paving the way for engaging in such transactions so long as the conditions set out under the CML and the Communiqué are satisfied.

LAW OF OBLIGATIONS

Formation of Contracts under CISG*

Att. Mehves Erdem

Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") regulates the formation of contracts under Part II, Articles 14 to 24. Articles 11, 13 and 29 also provide insight for formation of contracts. In general terms, with regard to contract formation, the CISG adopted the 'traditional' concept of contractual obligations, similar to Turkish and Swiss Law of Obligation principles. Both Turkish and Swiss laws provide that contracts shall be formed as a result of two declarations of intent - offer and acceptance.

In the doctrine it is accepted that in cases where complex negotiation processes have taken place, and where it is difficult to distinguish between offer and acceptance, substantive consensus can generate solutions, and the CISG will establish the scope of application[1].

Offer

An offer is an act of law; therefore, it has to comply with the applicable national laws, aside from the CISG. Pursuant to CISG, Article 14, "a proposal for concluding a contract addressed to one or more specific persons constitutes an offer, if it is sufficiently definite, and indicates the intention of the offeror to be bound in the event of acceptance." It can be derived from this definition that in order to establish an offer, two conditions should be present, the intention of the offeror to be bound, and a sufficiently defined proposal.

---

* ***Article of November 2015***

1 **Schwenzer, Mohs**, *Sözleşmenin Kurulması* in Yeşim M., Atamer (eds), Milletlerarası Satım Hukuku, Volume I, 2008, p. 85.

Sufficient Definiteness

Article 14 provides that "a proposal is sufficiently defined if it identifies the goods, and expressly or implicitly fixes, or makes provision for, determining the quantity and the price." Another component of the proposal is the intention of the offeror to sell the product. An offer does not always seem like a proposal. It can be in the form of an invoice or a letter of acknowledgement.

Articles 8 and 9 will also find its place in understanding the principles surrounding formation. In a general sense, Article 8 stipulates that the intent of a party is interpreted in accordance with his intent. Article 9 provides that parties are bound by usages and practices that have been agreed upon between them.

Other articles of the CISG can also be in question in relation to Article 14. Scholars have discussed the relationship between Articles 14 and 55, in depth. Article 14 can be interpreted as an offer not being made where the price is not designated. On the other hand, it can be derived from Article 55 that a contract can be validly established without determining the price, expressly or implicitly. In these cases, it is accepted that the price is determined with reference to the same products sold under similar cases. In the doctrine, it is accepted that if the price can be established when all of the terms and conditions are considered, it must be accepted that a valid offer has been made.

Intention of the Offeror to be Bound

Offers that are not addressed to one or more specific persons are considered as invitations for offers. Mass distribution of catalogues, brochures and websites will not constitute an offer, but will be accepted as invitations, unless it is clearly established to the contrary.

In cases where it is difficult to establish the intent of the offeror, Article 8 can be taken into consideration. In considering the third subsection, "in determining the intent of a party or the understanding that a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices that the parties have established between themselves, usages and any subsequent conduct of the parties."

Effectiveness of the Offer

An offer will become effective when it reaches the offeree. Article 24 provides that an offer will reach the addressee when it is orally made to the addressee, or delivered in any way personally to his place of business, or to his mailing address or to his habitual residence. In cases where the contract is formed through electronic messaging, the ICC's eTerms, 2004, Article 2, states that the addressee accepts an electronic message when it enters the addressee's information system, and in order to apply this provision, the addressee must have an information system. If the electronic message is sent to another information system designated by the addressee, the message is deemed to be received when the addressee becomes aware of the message[2].

Withdrawal and Revocation of the Offer

In order for an offer to be withdrawn, Article 15 states that the withdrawal should reach the offeree before or at the same time as the offer. It should be noted that revocation and withdrawal are distinct terms from each other, having different meanings under the CISG.

Revocation of an offer is regulated under Article 16 of the CISG. An offer is revocable when it reaches the offeree before the acceptance is dispatched. In some instances, the offer cannot be revoked if there is a fixed time, or it has been established that it is not irrevocable, and if the offeree relies on the offer and has acted in reliance thereof, the offer cannot be revoked.

Rejection of an Offer

Rejection of an offer is stipulated under Article 17; accordingly, a rejection must reach the offeror in order to terminate an offer, even if the offer is irrevocable.

Acceptance

Acceptance is regulated under Articles 18 to 22 in line with the Turkish and Swiss laws of obligation provisions. An acceptance can be made as a statement or by other conduct. It is important to note that

---

2 See also UN Convention on Electronic Convention Article 10 (2).

silence or inactivity is not considered as an acceptance under Article 18. As is indicated, above, Article 8 and 9 play an important role when interpreting offers and acceptances. In cases where any usage or practices agreed upon between the parties suggest otherwise, silence or inactivity can also be interpreted differently.

Effectiveness of the Acceptance

An acceptance is effective when it reaches the offeror. If an oral offer is in question, it should be accepted immediately, unless circumstances imply otherwise. In some instances, there is a fixed time within which to accept the offer. Pursuant to Article 20, for those periods that are stated in a letter or a telegram, the time begins to run when the telegram is handed over for dispatch, or the date indicated in the letter, or if not so stated, the date shown on the envelope. Official holidays and non-business days are included in this period. Only if the last day of the fixed period is an official holiday or a non-business day the period shall be extended to the first business day. If such a fixed time is not regulated, then the acceptance shall be made within a reasonable time. A late acceptance is not effective unless an oral statement or notification is made to the offeree.

In order for a contract to be formed under the CISG, Article 23, an acceptance to an offer should become effective. Once the contract is formed, all of the following engagements can only be interpreted as amendments to the offer.

Counter-offer

A Counter- offer is regarded as a rejection of the offer when it includes additions limitations and modification. However acceptance, which is intended to be a reply to an offer, includes additions, modifications, or limitations, which do not materially effect the terms of the offer is considered to be an acceptance unless the offeror objects thereto otherwise, orally, or through a notification. Factors that can materially effect the terms of an offer are listed under Article 19, subsection 3, and are the price, payment, quality, quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes.

Conclusion

In order to validly form a contract under the CISG, there has to be two declarations of intent - acceptance and offer. This traditional approach is parallel to Swiss and Turkish laws of obligations. The offeror should have a definite proposal and the intention to be bound by that proposal. The offeree, on the other hand, can accept the offer by a statement, or through its conduct. Both Articles 8 and 9 play an important role while interpreting an offer and acceptance. It should be emphasized that when formation is interpreted, the CISG should be considered as a whole.

Surety Rights to Recourse in Independent Collateral Suretyships*

Assoc. Prof. H. Murat Develioglu

Introduction

Independent collateral suretyships (also known as "*auxiliary suretyship*"), happens when more than one person becomes a surety for the same obligation without prior knowledge. As these sureties are unaware of other existing sureties, each of the sureties is responsible for the entire obligation. Auxiliary suretyships may be established as either simple, or joint and several suretyships[1].

In independent collateral suretyships, it is accepted that a given surety does not hold certain rights that are normally held by sureties in real collateral suretyships where the sureties are aware of each other.

For instance, when an independent collateral suretyship is in question, a surety may not claim that he/she will only pay his/her share, as long as the creditor initiates an enforcement action against other sureties.

Again, different from real collateral suretyships, TCC 587 I does not apply to independent collateral suretyships; in other words, none of the sureties shall be responsible for the other's share in the capacity of surety of the surety.

As a matter of course, when the sureties are unaware of each other, TBK 587 III shall not apply. In other words, if sureties undertake a suretyship without the knowledge of other existing or future sureties, the surety may not be released from its debt by claiming that this assumption was not realized, or that one of the sureties was released by the creditor, or that the suretyship has been declared null and void.

---

* ***Article of November 2015***

1 **Alper GÜMÜŞ**, p. 360.

The greatest issue concerning independent collateral sureties is the possibility to seek recourse from other sureties, provided that the creditor only applies to one of the sureties, and that the surety in question fulfills the obligation, wholly. In other words, how shall the question of whether the remaining sureties are released from their debts under the assumption that the creditor solely (and maybe coincidentally) initiates enforcement actions against one of the sureties be answered? This issue is addressed, below.

History

Code of Obligations numbered 818 neither regulated the possibility of seeking intra-group recourse, nor independent collateral suretyships, in general.

The majority view in the doctrine opined that if one the sureties fulfills its obligation, wholly, they may seek recourse from other sureties as a result of the principle of equity. Certain scholars who share this view state that it is inequitable for only one of the sureties to be responsible for the whole debt, and that this surety may seek recourse from others on the grounds of unjust enrichment[2].

The other view claims that unjust enrichment provisions are not even necessary. In accordance with Art. 496 of the Code of Obligations numbered 818, the surety who fulfills their debt becomes a successor to the creditor's rights. Thus, the surety has the right to seek recourse from others according to this provision, even though he/she is unaware of the existence of other sureties[3].

The Regulation of Turkish Code of Obligations Numbered 6098 on Independent Collateral Suretyships

Turkish Code of Obligations numbered 6098 which entered into force on July, 2012 includes a regulation on independent collateral

---

2 For example, **Halûk TANDOĞAN**, Borçlar Hukuku, Özel Borç İlişkileri, Cilt: II, Ankara 1987, p. 771, **Seza REİSOĞLU**, Türk Hukukunda ve Bankacılık Uygulamasında Kefalet, Ankara 1992, p. 126. It must be mentioned that, with the amendments made to Swiss Code of Obligations in 1941, a similiar provision has been introduced to Swiss Law. Before such amendment, the Swiss doctrine, contrary to Turkish doctrine, accepted that no right to recourse exists in this type of suretyships.

3 **Burak ÖZEN**, 6098 sayılı Türk Borçlar Kanunu Çerçevesinde Kefalet Sözleşmesi, İstanbul 2012, p. 308.

suretyships.

As per TCC 587 IV, "*Each of the sureties who independently provide a surety shall be responsible for the whole obligation. However, the surety who paid shall have the right to recourse to the extent of his share within the whole obligation, unless otherwise agreed.*"

As per the open wording of the provision, unless otherwise agreed upon by the parties, the surety who has paid shall have the right to recourse to the extent of his share within the whole obligation. The example given in the doctrine to illustrate this provision states as follows[4]: "*For instance, if the principle obligation for which the sureties are given amounts to 150 TRL; and for this amount (K1) independently provided a surety for 200 TRL, (K2) for 50 TRL and (K3) for 50 TRL, the surety sum amounts to 300 TRL. When (K1) pays the whole 150 TRL, in calculation of recourse to other sureties, the ratio will be 2/3 and the responsibility of (K1) from the principal debt will be 100 TRL, the amount that corresponds to this ratio. In this case, (K1) shall provide recourse to (K2) and (K3) for the outstanding 50 TRL; each of them for 25 TRL, which corresponds to 1/6, determined by the same method.*"

The dates on which the suretyship agreements are executed are irrelevant for a ratio-based distribution to be adopted. Hence, the right to recourse exists, irrelevant of the fact that the suretyship agreement to which the paying surety is a party has been executed earlier or later.

Finally, since the above explained provision is not mandatory, other solutions, for example the waiver of the right to recourse, may be agreed upon by the parties.

Conclusion

In Code of Obligations numbered 6098, the right to recourse in independent collateral suretyships is regulated. The views in Turkish doctrine have been taken into consideration when the related provision was formed, and it is regulated that all of the sureties are pro rata responsible for the whole of the obligation, although the sureties are unaware of each other's existence in this type of suretyship.

---

4 **Seza REİSOĞLU**, Türk Kefalet Hukuku, Ankara 2013, p. 175-176.

The Liability of More Than One Person for the Same Damage Pursuant to Turkish Code of Obligations numbered 6098*

Assoc. Prof. H. Murat Develioglu

Introduction

In the event that more than one person is liable for the same damage, the relationship between the injured party and the liable persons – referred to as the "exterior relationship," – and the relationship between the liable persons - are regulated differently under the abrogated Code of Obligations ("aCO") numbered 818 and Turkish Code of Obligations ("TCO") numbered 6098. Below, the liability of more than one person will be dealt with and, then, the differences under the said two codes will be explained.

The Concept of Liability of More than One Person

The liability of more than one person primarily means the liability of more than one person on the grounds of general tort law, or multiple grounds for responsibility. In accordance with tort law provisions, neither mutual fault nor wrongful intention is required for the liability to arise. The examples regarding multiple grounds for responsibility are listed as follows:

- General tort law liability and instances of objective liability may occur at the same time. The most typical example is an employer's liability for damages caused by one of its employees pursuant to TCO Art. 66 (aCO Art. 55), and said employee's liability pursuant to TCO Art. 49 (aCO Art. 41).
- Objective liability of more than one person may be in question. For instance, in the case of damages caused by a window that

---

* ***Article of March 2015***

falls onto a car due to a defect in the window's frame while an employee of a cleaning company is cleaning the window, the cleaning company shall be liable in accordance with the provisions governing the employer's liability (TCO Art. 66; aCO Art. 55), while the building owner shall be liable in accordance with the provisions governing the building owner's liability (TCO Art. 69; aCO Art. 58).

- Along with the liability arising from tort law, contractual liability may be in question. To further explain, in the event that (A) has an accident with a car rented from (B), and another driver (C), is also faulty in the occurrence of the car accident, (A) shall be liable towards (B) on contractual grounds, whereas (C) shall be liable pursuant to the provisions of the Highway Traffic Laws.

The Provisions of aCO Governing the Liability of More than One Person from the Same Damage

This issue was regulated under aCO Art(s). 51 and 52. The said provisions set forth two differing collective responsibilities, and a differentiation is made between "partial solidarity" and "absolute solidarity."

Accordingly, commitment of a tortious act by more than one person –for instance, a robbery committed collectively by three people- was identified as absolute solidarity; whereas, the responsibility of more than one person – as explained, above– on multiple (different) legal grounds, is classified as partial solidarity. The practical consequences of this division were as follows;

- In instances of absolute solidarity, interruption of prescription for one liable person meant the same for the others. In cases where the liable persons were in partial solidarity, this was not accepted. In other words, even though the prescription was interrupted for one of the liable persons, it was accepted to continue for others.
- In absolute solidarity, one of the liable persons used to be the successor of the creditor insomuch as he/she fulfil his/her obligations towards the creditor, which is not possible in partial solidarity cases.

- The responsible persons could not rely on legal grounds for reduction of compensation –i.e. instances of slight negligence– in absolute solidarity cases, while in partial solidarity cases, they might do so.

In addition to the abovementioned differentiation between absolute and partial solidarity, in the event that more than one person was liable for the same damage in accordance with the provisions regulating absolute solidarity, the TCO regulates recourse in a manner differently than aCO. Indeed, as per aCO Art. 50 –the same as how the TCO stipulates– the person who abetted, meaning the person who aided the wrongdoer after the unlawful act is committed, used to be liable only if he/she received a share of the profit, or if he/she caused the damage by this aid.

A hierarchical structure is created by the aCO regarding the recourse in partial solidarity cases: As a rule, it is accepted that the primary responsible party is the wrongdoer, followed by the person who is contractually liable, and ultimately, the person who is objectively liable.

The TCO Provisions Governing the Liability of More than One Person for the Same Damage

The TCO governs the liability of more than one person for the same damage in a manner that is very different manner from the aCO, the most important of which is the abrogation of the differentiation between absolute and partial solidarity –more precisely, being left to a solely theoretical dimension. Indeed, as per TCO Art(s). 61 and 62, the persons who mutually commit a tortious act and cause damage, then the persons who are liable on multiple legal grounds are made subject to the same provisions. Consequently;

- This prescription is interrupted for all of the liable persons if interrupted for one of them, even though their liability stems from different legal grounds.
- In accordance with the TCO, the succession of the liable person who fulfils his/her obligation for more than what fell to his/her share, his/her right of recourse to all of the severally responsible persons for the excess payment is accepted for the partial

solidarity instances, as well –since absolute/partial solidarity differentiation is abolished–.

- The TCO is ambiguous as to whether or not the responsible persons may rely on the reduction of the compensation clauses. However, it should be noted that, the draft TCO stipulated that the limit of responsibility for each of the liable persons was the compensation amount that they shall be obliged to pay, given that they were the only responsible. In other words, the provision in the draft TCO allowed them to rely on the reduction of compensation grounds for themselves. This provision was later removed from the draft, and the possibility that they may rely on reduction grounds for themselves became controversial.

The below-mentioned regulations are introduced concerning the liability of more than one person, apart from those which relate to the consequences of absolute/partial solidarity division:

- The differentiation relating to the tasks of the collective wrongdoers is abolished, and the responsibility of those who aided and abetted is regulated in parallel with the others.
- The hierarchical structure of the right to recourse concerning the liability of more than one person from the same damage is abrogated. It is accepted that the judge shall take into account all circumstances and conditions, in particular, the negligence of each of the liable persons, and the severity of the damages suffered while deciding on the distribution of liability.

Conclusion

Turkish Code of Obligations numbered 6098 introduced a brand new regime significantly different from the one accepted by the abrogated Code of Obligations numbered 818 concerning the liability of more than one person from the same damage, the most important of which being the abolishment of the absolute/partial solidarity division.

Assignment of Receivables as Security*

Att. Nilay Celebi

Introduction

The assignment of receivables, which constitutes an important security method under the obligations law, is regulated under Articles 183 to 190 of the Turkish Code of Obligations, No: 6098 ("Code"). The Code does not specifically define assignment of receivables. Pursuant to Art. 183 of the Code, the assignor assigns its receivables arising from an obligation under a contract to a third party without the necessity of the consent of the debtor. We will hereby briefly explain the voluntary assignment of receivables under Turkish law and banking practice.

Assignment of Receivables

Legal Nature, Scope

The receivables right is assigned to the assignee under the assignment of receivables[1]. The assignment of receivables is a way of disposal; therefore, the assignor should have the rights arising from these receivables[2]. For example, an assignment of receivables over an asset having attachments or injunctive relief is invalid since there is no power of disposition over it.

The assignment of receivables is subject to the validity of the main agreement, and this is commonly accepted by the scholars[3]. In other

---

* ***Article of July 2015***

1 **Prof. Dr. Fikret Eren**, 6098 sayılı Türk Borçlar Kanununa Göre Hazırlanmış Borçlar Hukuku Genel Hükümler, 14. Baskı, Yetkin Yayınları, Ankara, 2012, p. 1224.

2 Eren, p. 1228.

3 Pls see **Prof. Dr. Kemal Oğuzman/ Prof. Dr. M. Turgut Öz**, Borçlar Hukuku Genel Hükümler Cilt-2 for an opposite opinion, 9. Bası, Vedat Kitapçılık, İstanbul, 2012, s.534.

words, if the transaction between the assignor and assignee is invalid, then the assignment of receivables that is based on the main agreement, shall be invalid, as well.

The assignment of receivables that is used as security under banking practices, and is generally enforced if the party fails to duly fulfill its obligations (in the event of default). If the assignment of receivables is contingent upon the occurrence of an event, then the relevant receivables shall be paid to the assignor after the occurrence of such condition or event.

Form of the Assignment of Receivables Agreement

Pursuant to Art. 184 of the Code, the assignment of receivables agreement shall be made in writing. An assignment of receivables agreement that is not executed shall be void. The express intention, declaration, and signature of the assignor are the key points, and the intention of the assignee is neither required, nor necessary, for the assignment of receivables agreement to be valid[4]. In practice, the assignment of receivables agreement is mutually executed by the assignee and the assignor. Moreover, in transactions where a bank is the assignee, the bank will generally prefer and require the execution of the assignment of receivables agreements to be notarized, by stating that this method strengthens the proof mechanism, and determines the time for such an assignment. Thus, the debtor is notified by the notary public.

The terms and conditions regarding the assigned receivables are set forth under the assignment of receivables agreement; the assigned receivables shall be determined as specifically set forth under the agreement.

Effects and Consequences

The subject of the assignment of receivables also includes affiliated rights (Art. 189 of the Code). Interest accrued on the assigned receivables shall also be deemed to have been assigned. However, the

---

4 **Eren**, p. 1233.

parties may mutually determine to omit the accrued interest within the scope of the assignment of receivables[5].

The right of filing a law suit and enforcement rights arising from the assigned receivables shall also be assigned to the assignee. Compensation claims and penalty claims, as well as securities, such as pledges and suretyships, arising from the assigned receivables, are also to be transferred with the assigned receivables[6]. The right of selection is one of the transferred rights that are aligned with the assigned receivables to the benefit of the assignee. The assignor shall deliver all documents evidencing the assignment of receivables and other information in order to request and claim the assigned receivables to the assignee (Art. 190 of the Code).

The consent of the debtor is not required to validate the assignment of receivables (Art. 183 of the Code). The assignment of receivables agreement is executed between the assignor and the assignee without the consent of the debtor that is attached to the subject assigned receivables. However, the debtor, who has no knowledge of the assignment (has not been notified of the assignment of receivables agreement), shall be released of its obligations when he makes a bona fide payment to the assignor (Art. 186 of the Code). According to banking practices, the assignor is requested to notify the debtor of the execution of the assignment of receivables agreement. This requirement is generally regulated under the assignment of receivables agreement, and it is usually deemed that the assignment of receivables agreement is duly perfected when the notification is made to the debtor. Moreover, in practice (mostly in the cases where the banks' are the assignee) confirmation by the debtor to receive such a notification with regard to the assignment of receivables agreement is requested. Some debtors may submit confirmation with no questions raised; however, the confirmation process may be troubled, and may not be smoothly effected. Upon the notice of assignment, the payment obligation of the debtor is to the assignee[7].

---

5 **Oğuzman/**Öz, p. 549.

6 **Eren**, p. 1239-1240.

7 **Oğuzman/**Öz, p. 552.

The debtor may raise defenses against the assignor to the assignee at the time of notice of the assignment of receivables (Art. 188 of the Code). Such defenses may include a plea (e.g. non-payment plea) and objection rights[8].

Conclusion

The assignment of receivables is one of the most important and commonly used security methods, and will be continued to be applied in banking practices. Two key points are that the assignment of receivables agreement shall be executed in writing, and the debtor is to be notified with regard to the assignment. The assignee generally requests a letter from the debtor confirming that the assignment of receivables agreement is in place, and that he is aware of the assignment.

8 **Eren**, p. 1241.

Court of Cassation Decisions Regarding the Scope of the Application of Article 138 of the Turkish Code of Obligations of Indebtedness in Foreign Currencies*

Assoc. Prof. H. Murat Develioglu

Introduction

Turkish Code of Obligations No. 6098 ("TCO") that entered into force on 01.07.2012 has a provision entitled "*hardship,*" which was not found in the former Code of Obligations No. 818. It can be deduced from the limited number of Court of Cassation decisions that such provision has a rather controversial implementation. Such implementation shall be briefly evaluated, below.

TCO Art. 138 with regard to Foreign Currency Debts

As per the first paragraph of Art. 138 of the TCO, if an unexpected event occurs that was unforeseen and not expected to be foreseen during the execution of the agreement, due to reasons that are not caused by the obligor, the performance becomes excessively burdensome for the obligor because of such unexpected event in light of the principle of good faith, and the obligor performs his obligation by reserving the right of hardship, or has not yet performed his obligation, the obligor may request that the agreement be adapted in accordance with the circumstances, as changed, or may revoke the agreement, if adaptation is not possible.

The second paragraph of the aforementioned Article explicitly allows for such provision to be applied to foreign currency debts.

---

* ***Article of July 2015***

The Reason Underlying the Issue in Implementing TCO Art. 138 Regarding Foreign Currency Debts

TCO Art. 138/f.2 explicitly enables the hardship provision to be applied to foreign currency debts, as well. The underlying causes of controversial decisions regarding foreign currency debts, in spite of the existence of such explicit provision, are the other implementation conditions of the provision.

Indeed, in spite of the fact that this Article does not include detailed explanations on implementation conditions[1], in order to claim adaptation or revocation of the agreement as per Art. 138 of the TCO, the basis of the agreement shall be changed and the performance shall become excessively burdensome for one of the parties because of such change; additionally, these changes shall be "*unforeseeable.*" At this point, the critical question is: Do the sudden changes in foreign exchange rates in foreign currency debts require adaptation as per Art. 138 of the TCO or not?

Diversity in Court of Cassation Decisions

There are two dissenting opinions regarding the abovementioned question. According to the first opinion, if the increase in the foreign exchange rate is "*unforeseeable,*" there shall be no reasons not to apply Art. 138 of the TCO. However, according to the opposing view, by taking Turkey's economic conditions into consideration, it cannot be argued that the sudden and eminent increase in the foreign exchange rates is "*unforeseeable.*" Pursuant to such view, the obligor of foreign currency is considered as he also undertakes the risk of change in the foreign exchange rates.

Decisions that are in accord with both of the aforementioned opinions can be observed in the latter decisions of the Court of Cassation that are rendered as of the entry into force of Law No. 6098.

For instance, in accordance with the decision (11149/26086) of the 13th Civil Chamber of the Court of Cassation, dated 28.10.2013: "*The lawsuit is about a claim of adaptation to a Japanese Yen indexed mortgage loan which is being used by the claimant, due to the changes that*

---

1 Please see the Newsletter article of August, 2013, http://www.erdem-erdem.av.tr/.

have occurred in the foreign exchange rates. It is understood that the claimant initially had the opportunity to freely choose the type of the loan and, accordingly, chose the type of loan by electing to become indebted by an allowed foreign currency, and signed a long term agreement; the assertion that the respondent bank is manipulating the claimant has not been proven. On the other hand, the lawsuit is filed 3 years and 7 months later than the initiation of the loan repayment; and given that the obligor has not lapsed into default in terms of installments, it should be accepted that the claimant has acknowledged the agreement."

According to the decision (1042/31247) by the same chamber, dated 12.12.2013: "*In the lawsuit concerning the adaptation claim, despite the fact that the claimant had the opportunity to foresee the risk beforehand, he made use of the loan. Moreover, the lawsuit in question is filed three years later than the initiation of the loan repayment; hence, it should be accepted that the claimant has acknowledged the agreement. Taking everything into consideration, it is understood that the requirements of adaptation are not fulfilled in the case at hand. By considering these mentioned facts, the Court shall refuse to hear the lawsuit in its entirety.*"

However, the same chamber of the Court of Cassation came to different conclusions in its other decisions. For instance, a decision (16898/18895) dated 13.06.2014 explicitly found as follows: "*The claimant initially requested the determination of the validity of the agreement and, if so, the adaptation of the conditions of the agreement by alleging that he used a Swiss Franc (CHF) indexed mortgage finance loan, an extreme difference in the foreign exchange rate has occurred between the date of usage of the loan and the current date, and therefore, the payment of the installments has become extremely burdensome for him. Due to the fact that the Turkish Code of Obligations No. 6098 is in force as of the date of the lawsuit, adaptation may be claimed. The Court has emphasized that the possibility of devaluation of Turkish Lira in foreign currency debts can easily be foreseen. However, the Court has not explained the objective criteria in drawing such conclusion, and solely evaluated the latest economic depressions. The judge is obliged to intervene and adapt the agreement in the case of an extreme and unforeseeable change in the agreement conditions.*"

Conclusion

In the Court of Cassation decisions, the issue is whether the implementation of Art. 138 of the TCO is necessary, and in the cases where foreign exchange rates change, this remains unresolved. In our opinion, rather than our assumption be grounded on the predictability of changes in foreign exchange rates, conclusions reached for each period, and even each case, will stand to reason.

Liquidation of Ordinary Partnerships in Light of Court of Cassation Decisions*

Att. Suleyman Sevinc

Introduction

Ordinary partnerships, as regulated by Article 620 et seq. of the Turkish Code of Obligations numbered 6098 ("TCO"), are a type of a partnership in which two or more persons undertake to combine their endeavors and assets in an effort to achieve a certain purpose. Partnerships that are not vested with a legal personality that do not meet the distinguishing criteria of partnerships, and which are regulated under specific legal provisions, are deemed to be ordinary partnerships. Unless otherwise contractually agreed to, the contributions of the partners of ordinary partnerships should be equal and in the character and significance as required by the goal of such partnership[1]. These are two consequences of terminating ordinary partnerships, and are the finality of managers' duties and liquidation of the ordinary partnership. The liquidation procedure of ordinary partnerships is regulated under the TCO. Through its recent precedents, the Court of Cassation introduces issues to take into consideration by the courts in the liquidation procedure of ordinary partnerships in addition to the provisions of the TCO. This article analyzes the liquidation procedure of ordinary partnerships.

Liquidation of Ordinary Partnerships within the Framework of the TCO

Pursuant to Art. 639 of the TCO, an ordinary partnership may be terminated due to (i) the achievement of the goals stipulated in the part-

---

* ***Article of May 2015***

1 Please see; http://www.erdem-erdem.av.tr/articles/adi-ortakliklar/ for the Newsletter article dated April 2014.

nership agreement, or if the goals of the partnership become impossible to achieve, (ii) the death of a partner, (iii) a partner being declared legally incapacitated, a partner's insolvency or foreclosure of a partner's liquidation share, (iv) an unanimous decision of all partners, (v) the expiry of the term of the partnership agreement, (vi) the termination by a partner upon notice, if either the right of termination is reserved, or the partnership is formed for an indefinite period of time, or it is decided that the partnership shall operate throughout the lifetime of a certain partner, or (vii) a court decision rendered upon request, based on just cause.

Pursuant to Art. 644 of the TCO, the liquidation shall be conducted by all of the partners unless otherwise agreed under the partnership agreement. The partners may appoint a liquidator in order for him/her to conduct the liquidation procedure. The payment to be made to the liquidator will be covered by the assets of the partnership, and if that is not possible, jointly by the partners. Pursuant to the fourth paragraph of the same article, the disputes arising from the liquidation procedure or the distribution of the liquidation residuals will be resolved by the judge, upon the request of those concerned.

Pursuant to Art. 643 of the TCO entitled "Partition of Profit and Loss," the remaining profit and loss will be shared among the partners, following the discharge of the partnership's debts, refund of the advances and expenses borne by the partners, and the return of the partners' contributions. It should be noted that pursuant to the TCO, termination or liquidation will not extinguish the debts of the partnership, conversely, even after the termination, the partners shall remain jointly and severally liable from partnership's obligations against third parties.

Liquidation of Ordinary Partnerships within the Framework of Decisions of the Court of Cassation

Pursuant to recent decisions of the Court of Cassation[2], liquidation is defined as the process of identifying partnership assets, finalization of the partnership by disengaging all relations of the partners within the scope of the partnership, disposition of partnership assets via shar-

---

[2] Y3HD, E.2014/11009 K.2014/15095, T.18.11.2014 (Yargıtay Kararları Dergisi, Volume: 41, Number: 1, January 2015).

ing or sell-out. In other words, liquidation is a refinement procedure, having the aim of differentiation of the assets and liabilities of the partnership by evaluating the accounts and transactions of the company and by drawing a balance[3].

The Third Civil Chamber of the Court of Cassation ("Court of Cassation") recently rendered three different decisions regarding the termination and liquidation procedures of ordinary partnerships. By means of these decisions, the Court of Cassation sets the framework and orders the procedure to be applied in liquidation of ordinary partnerships. Pursuant to the decision of the Court of Cassation numbered 2014/11009 E., 2014/15095 K. and dated 18.11.2014, the claimant and the respondent formed an ordinary partnership with the aim to construct the building which that is the subject matter. However, according to the expert report, the construction of the building has been finalized and the aim of the partnership has been fulfilled. The Court of Cassation has indicated that the request of the claimant regarding his contribution to the ordinary partnership shall require termination and liquidation of the partnership. Within this context, the Court of Cassation has set a course of action for the courts to pursue in termination of ordinary partnerships.

Pursuant to these decisions, the court will initially determine whether or not the partnership agreement contains a clause on the liquidation procedure. Where such clause is available, the court will carry out the procedure, accordingly. If no termination clause is available, the court will require the partners to appoint a liquidator. If the partners do not come to a conclusion in appointing the liquidator, the court will *ex officio* appoint a single liquidator, or three liquidators who are experts on the scope of the partnership activity. The liquidation procedure will be carried by the liquidator.

In the decision stated above, the Court of Cassation ordered that all of the liquidation operations will be concluded within three stages, comprising of three months each (these three-month periods may be shortened or extended if required) and listed the liquidation operations that will be conducted by the courts via liquidators. Pursuant thereto,

---

3 Y3HD, E.2014/10535 K.2014/15088, T.18.11.2014 (Yargıtay Kararları Dergisi, Volume: 41, Number: 2, February 2015).

the court will initially request the managing partner to produce a list of expenses. If the managing partner does not produce this list, he will be deemed to have avoided this obligation.

In the event of a dispute amongst the partners of the accounting list, this dispute will be resolved by evidence collected from the partners. The income and expenses, as well as the assets and liabilities of the partnership, will be determined as per the final accounting list. The compatibility of the documents used in this determination, as well as the aim of the partnership, will be assessed. Consequently, the asset value of the partnership will be determined. The liabilities will be deducted from the assets. The advances and expenses borne by the partners will be refunded, and the partners' contributions will be returned. Following the completion of these stages, the profit and the loss of the partnership will be shared amongst the partners, and liquidation will be finalized. In its same decision, the Court of Cassation stated that the non-fulfillment of a partner's obligation of contribution will not inhibit the liquidation, and will only constitute a point to consider in the course of the liquidation procedure.

In the Court of Cassation decision numbered 2014/10535 E., 2014/15088 K. and dated 18.11.2014, an ordinary partnership established with the aim of collection and the trade of textiles residuals is in question. The claimant requests his share in the partnership income, and the immovable property acquired by partnership assets, but to be registered in the name of the respondent. The Court of Cassation specified that the partnership incomes cannot be shared prior to the liquidation, and that there is co-ownership of the partnership incomes; for this reason primarily, the liquidation procedure should be carried out.

In its decision, the Court of Cassation clarified the three stages of liquidation that were referred to in its previous decision. Accordingly, in the first stage, all assets of the partnership are to be identified, the partnership account is to be requested from the managing partner, the parties are to be notified of the balance of the assets determined by the liquidator, and the objections thereof are to be assessed in accordance with the evidence collected from the partners. In the second stage, sell-out and cashing operations should be carried out, via application by analogy of the "official liquidation" provisions set forth under the

Turkish Civil Code, and if the partnership assets are not available, their valuation should be made via an expert. In the third and last stage, initially, the debts of the partnership are to be paid from the amounts that are identified, in conclusion of the first and second stages, the advances and expenses borne by the partners are to be refunded, the partners' contributions are to be returned and, consequently, the remaining profits and losses are to be distributed to the partners. The Court of Cassation established stages in the liquidation process, and set a course of action for the courts regarding the liquidation of ordinary partnerships.

In its decision numbered 2014/13639 E., 2015/1168 K. and dated 20.01.2015, the Court of Cassation determined that the parties have established an ordinary partnership with the intention to construct a building, and upon the completion of the construction, the parties have requested termination and the liquidation of the partnership. The Court of Cassation again explained the liquidation operations and stages thereof in its decisions. In addition to the procedure stated in its two former decisions, the Court of Cassation clarified the valuation method for the expenses of the partnership that will be used in the event of a dispute. If the partners do not settle the expenses for the construction of the buildings, or upon the sales of the independent sections of such buildings, the construction costs will be determined pursuant to the current value of the date of the completion of the construction, but not pursuant to the unit rate of the Ministry of Public Works and Settlement. In its decision, the Court of Cassation resolved that the valuation of the expenses made in relation to the aim of the partnership are to be determined based upon current values.

Conclusion

The termination and liquidation procedure of ordinary partnerships is set forth under Article 639 et seq. of the TCO. The Third Civil Chamber of the Court of Cassation establishes the framework of the liquidation procedure, in addition to the procedure provided for in the TCO. Accordingly, the courts should conduct and finalize the liquidation procedure within three stages, each one usually comprised of three months. The Court of Cassation's successive publication of three decisions regarding the termination and liquidation process of ordinary partnerships can be interpreted as an effort to create a precedent.

Sublease Agreements within the Context of the Turkish Code of Obligations*

Att. Ece Yilmaz

Introduction

Lease agreements are amongst the most common types of agreements, organizing property usage, as regulated under the Turkish Code of Obligations numbered 6098 ("TCO"). Authority to sublet a leased property to third parties is one of the authorizations of the TCO granted to the lessee, who is to use the property subject to the lease agreement, in lieu of a certain rent amount. Within this scope, Art. 322 of the TCO allows subleasing under certain circumstances. As per the provision in question, the lessee may fully or partially sublet the leased property to third parties, provided that he/she does not give rise to damaging modifications to the property. This newsletter article evaluates the rather complex concept of sublease that embodies various diversified views, in practice.

Legal Characteristics of Sublease

The TCO does not necessarily require the lessor to be the owner of the property; on the other hand, it enables persons other than the owner to conclude a lease agreement acting as the lessor, as well. Sublease agreements attain their scope of applications arising from this opportunity. In essence, sublease agreements are considered to be lease agreements. They are synallagmatic agreements executed via the mutual and consentaneous declarations of intent of the parties.

In accordance with Art. 322/I, "*The lessee may fully or partially lease out the leased property and transfer her right of usage to third persons, given that such transaction does not give rise to any damages*

---

* ***Article of December 2015***

for the lessor". This provision is considered as a reiteration of Art. 259 of the Abrogated Code of Obligations numbered 818 ("ACO") and renders subleasing possible for all lease relations. Within the scope of this provision, the lessee may fully or partially lease out the leased property, given that he/she does not damage such property by any means. However, it should be noted that the sublessee shall not be able to use the subleased property for purposes other than those envisaged under the main lease agreement. The sublessee shall not make damaging modifications to the subleased property, as well. This rule, as set forth particularly under TCO Art. 322/III, is as follows: "*The lessee shall be liable to the lessor if the sublessee uses the leased property for purposes other than those envisaged under the lease agreement*". This provision that governs subleases is a mandatory and unilateral provision in favor of the lessee; thus, it shall not be amended to the detriment of the lessee[1].

The Relation between Sublease and Lease Agreements

In terms of form and type, a sublease agreement is no different than a lease agreement. Despite the fact that sublease and lease agreements are similar in terms of their parties, a sublease agreement is not considered as an ancillary agreement that hinges upon the main lease agreement. A sublease agreement is independent from the main lease agreement in terms of execution and termination. Within this context, a sublease agreement shall not be affected by the invalidity of the main lease agreement.

Sublease agreements resemble lease agreements with regard to their subject, term and content. The property, being the subject matter of the lease agreement, should be the exact same property as the subject matter of the sublease agreement; or in the case of a partial sublease, it should at least comprise such property. The sublessee shall not give any undertaking via sublease, other than those stipulated under the lease agreement. Similarly, the term of the sublease agreement shall be limited to the term of the lease agreement. With respect to content, the provisions of the lease agreement shall also be applied to both the sublessee and the sublessor.

---

1 **Fikret EREN**, Borçlar Hukuku Özel Hükümler, Ankara 2015, p. 361-362.

Parties of the Sublease Agreement

In a sublease transaction, the usage of a leased property is transferred to a third person by the main lessee. Pursuant thereto, in sublease transactions, such lessee of the main lease agreement is called the sublessor, and such third person is called the sublessee. A sublease relationship is formed and established between the sublessor and the sublessee; thus, it does not affect the relationship between the lessor and the lessee of the main lease agreement. Consequently, in principle, it can be stated that no contractual relation is formed between the main lessor and the sublessee.

Sublease of Residential Premises and Covered Workplaces

TCO Art. 322/I endows the lessee with the authority to sublet the property in all types of lease agreements. Within this context, the lessee is vested with the freedom to lease out the leased property to third persons. However, such freedom to lease out is interpreted quite narrowly with regard to certain lease types, such as the leasing of residential premises and covered workplaces, as well as usufruct leases.

Article 12 of the Law Pertaining to Real Estate Leases numbered 6570 ("LPREL") embodies the provision of "*Lessee shall not partially or fully lease out the leased property or transfer the right of usage or agreement to use, unless otherwise is envisaged in the lease agreement…*". Within this context, during the validity period of the ACO, a sublease was prohibited for residential premises and covered workplaces, unless otherwise was agreed to in the lease agreement.

As opposed to this provision under the LPREL, the TCO currently requires permission of the main lessor in order to execute a sublease agreement for residential premises and covered workplaces. As per Art. 322/II of the TCO, "*the lessee shall not sublet the leased property and shall not transfer the right of usage to third persons in residential premises and covered workplaces, unless the written permission of the lessor is obtained*". On the other hand, the parties may eliminate this sublease provision, subject to the permission rule via the lease agreement, given that such elimination is not to the detriment of the lessee. Consequently, while it is necessary to explicitly allow subleasing in the lease agreement, during the validity period of the LPREL,

currently, solely the written permission of the lessor is required as per the TCO.

If the parties prescribe under their lease agreement that the lessor's permission is required for the establishment of a sublease, the main lessor shall object to such sublease if and only valid reasons thereof are established. Otherwise, the lessee may request a court order allowing the establishment of sublease. The court order rendered in such a case shall be deemed to be the consent of the lessor[2].

The application scope of the sublease prohibition for residential premises and roofed workplaces is quite contradictory among academics and within the practice. According to the prevailing view, the cases in which the lessee gets married and commences cohabitation with his/her spouse, accommodates his/her sibling(s) in her property[3], or gratuitously hosts a family member or a close friend as a guest, permanently or temporarily, in the leased property, shall not be counted as a sublease. Such types of temporary accommodations are usually considered to be commodatum or fulfillment of a moral obligation[4]. Nonetheless, accommodation of a distant relative or an acquaintance, for a certain period of time, is usually considered as a sublease.

Conclusion

A sublease, which is a quite common concept in both leases of residential premises and covered workplaces, and in any other lease types, is regulated under Art. 322 of the TCO. Sublease agreements that share similar features with lease agreements in terms of subject and parties, are in fact separate lease agreements themselves. Despite their independent nature, it should be considered that sublease agreements are limited to the terms of the main lease agreements, and no undertakings exceeding those indicated under the lease agreement shall be granted via sublease agreements.

---

2 **EREN**, p. 363.

3 **Alper GÜMÜŞ**, "Yeni" 6098 Sayılı Türk Borçlar Kanunu'na Göre Kira Sözleşmesi, Istanbul, 2012, p. 220.

4 **EREN**, p. 362.

ENERGY LAW

Share Transfers under Electricity Market Legislation*

Att. Tuna Colgar

Introduction

Electricity Market Law numbered 6446 ("EML" or "Law") entered into force through publication in the Official Gazette dated March 30, 2013 and numbered 28603. Share transfers of companies that operate in the energy market became one of the newly regulated issues with the publication of the Electricity Market Licensing Regulation ("Regulation") in the Official Gazette dated November 2, 2013 and numbered 28809, upon the enactment of the EML.

This article will focus on the new regulations regarding share transfers introduced by the new Electricity Market Law and the new Electricity Market Licensing Regulation.

In accordance with the current legislation in force, prior to the commencement of their market activities, all legal entities to be engaged in market activities must obtain the relevant license for each activity, and for each facility, if the market activity in question is to be performed in more than one facility, excluding the exceptions stipulated by the Law and the Regulation. Furthermore, pursuant to Art. 6 of the EML, a preliminary license is required for generation activities. In accordance with Art. 5(2) of the Regulation, all legal entities to be engaged in generation activities must obtain a preliminary license for each facility if the generation activity is performed in more than one facility.

Generation activities that are exempt from the obligation to obtain preliminary licenses and licenses, and to establish a company, are listed in the Communiqué on the Implementation of the Regulation.

---

* ***Article of May 2015***

As per Art. 12(3) of the Regulation, legal entities that submit an application to obtain a preliminary license shall be established as a joint stock company or a limited liability company in line with the relevant provisions of the Turkish Commercial Code numbered 6102, and remain as such while it holds its license.

Share Transfers

In accordance with the electricity market legislation, the share transfers of the electricity energy license holder joint stock, or limited liability companies, are subject to the permission of the Energy Market Board ("Board"), provided that certain conditions are met. Thus, the Board aims to prevent real persons or legal entities that are not qualified to obtain licenses to later become the shareholders of the license holder companies through share transfers. At the preliminary license stage, in principle, the shares of the preliminary license holder company shall not be transferred.

Essentially, a license enables the realization of a public service by the private sector that is normally provided by the state. The public administration requires legal entities that are selected in accordance with various predetermined criteria in the licensing stage, to put the services they have undertaken into practice. Therefore, the license holders are both selected with care, and supervised by the public administration for due fulfillment of their relevant undertakings[1].

Similar to the banking and insurance sectors, the share transfers, as well as mergers and demergers, of the license holder company are conditional pending the Board's permission because the state requires that the identities of the shareholders be provided, so long as the company holds the license[2].

As per Art. 5, paragraph 3, of the Regulation, the license shall not be transferred. However, the subparagraphs of the same paragraph of Art. 5 stipulate that under certain conditions, share transfers, mergers and demergers of the license holding companies, as well as the trans-

---

1 **ÖZDAMAR Mehmet**, Elektrik Piyasasında Faaliyet Gösteren Şirketlerde Pay Devri, Energy Law Journal 2014/1, p. 119.

2 **ÖZDAMAR Mehmet**, Elektrik Piyasasında Faaliyet Gösteren Şirketlerde Pay Devri, Energy Law Journal 2014/1, p. 116.

fer of the facilities that are the subject of the license, shall not be deemed as transfer of the license.

In accordance with the Turkish Commercial Code, shares of joint stock and limited liability companies shall be transferred freely unless a special restriction is stipulated, either by law or through the articles of association. The EML and the Regulation restrict share transfers of the companies by introducing a share transfer restriction provided by the law.

Share transfers are dichotomously stipulated by the electricity market legislation, based on the licensing process. Different restrictions are provided for the share transfers of the preliminary license holder companies, as well as the license holder companies.

Transfer of Preliminary License Holder Company Shares

Preliminary license holder companies are expected to solely operate in electricity energy investments; therefore, the public administration tends to restrict them from being active in different fields. Hence, the share transfers of preliminary license holder companies are prohibited under the law[3].

In accordance with Art. 6(3) of the EML, "*A preliminary license shall be cancelled if, the shareholding structure of the preliminary license holder company directly or indirectly changes for a reason other than succession or bankruptcy, its shares are transferred,, or the company concludes a transaction that will result in the transfer of its shares or the company does not comply with its obligations laid down by the Board.*"[4].

As is clear from the wording of the provision, the transfer of the preliminary license holder companies' shares is prohibited by the law.

In parallel with these provision of the Law, Art. 57(3) of the Regulation reads as follows: "*Until the license is obtained, no transaction shall be made by the company that will directly or indirectly*

---

[3] **ÖZDAMAR Mehmet**, Elektrik Piyasasında Faaliyet Gösteren Şirketlerde Pay Devri, Energy Law Journal 2014/1, p. 121.

[4] Official Gazette. D. 30.03.2013, No. 28603.

change its shareholding structure, transfer its shares, or result in transfer of its shares."[5].

In addition, in order to restrict the freedom of share transfer foreseen by the Turkish Commercial Code, above, Art. 12(5) of the Regulation stipulates that such restriction shall be incorporated into the articles of association of the preliminary license holder company. Thus, third persons are prevented from claiming *bona fides* in the event that they acquire the shares[6].

The exceptions to this restriction are listed under the subparagraphs of Art. 57(1) of the Regulation. Accordingly, this restrictive provision does not apply to (a) the changes in the shareholding structure of the publicly listed legal entities with regard to their publicly listed shares, and the changes in the shareholding structure of legal entities that have publicly listed shareholders; however, limited to the publicly listed shares of the publicly listed shareholder in question, (b) the preliminary license holder companies that are granted such license for those facilities established in line with international agreements, (c) the indirect changes in the shareholding structure of the preliminary license holding companies as a result of the changes of their foreign shareholder's shareholding structure[7].

The Transfer of License Holder Company Shares

As stated in the Introduction section of this Article, the legislator makes the transfer of the shares conditional upon the permission of the Board, provided that the transferred shares in question exceed a certain percentage, therefore securing the public administration's inspection and supervision over the shareholding structure of the company to which a certain public service is conveyed through licenses.

Accordingly, Art. 5(3) of the EML stipulates that "*The below-mentioned transactions of the legal entities operating in the market are conditional to the Board's permission. The principles and procedures*

---

5 Official Gazette. D. 02.11.2013, No. 28809.

6 **ÖZDAMAR Mehmet**, Elektrik Piyasasında Faaliyet Gösteren Şirketlerde Pay Devri, Energy Law Journal 2014/1, p. 121.

7 Official Gazette. D. 02.11.2013, No.28809.

regarding obtaining the Board's permission are established under the regulation enacted by the Authority. a) the capital share changes that amount to five per cent or more in publicly listed companies, ten per cent and more in other companies, b) any transaction that will result in a change in the shareholding structure and c) the transactions that will change the ownership or usage rights over the facilities"[8].

When this provision is observed, it can be inferred that the requirement to obtain the Board's permission is introduced in three different instances.

The first instance is the percentage of the capital share to be transferred. The five per cent or more capital share for publicly listed companies, and ten per cent or more capital share for other companies are required to enjoy minority rights under the Turkish Commercial Code. The minority shareholders have certain additional rights that enable them to affect the functioning and sometimes even the control of the company. Thus, the above-mentioned percentages and their transfers are deemed important and made subject to the Board's permission.

Secondly, any transaction that will result in a change in the shareholding structure of the company is conditional upon the Board's permission. The legislator aims to control the adoption of decisions that can affect the company or any interference with such decisions. An example can be the transfer of privileged shares. Even though they do not amount to the percentages stipulated by the legislation, the transfer of the privileged shares is also subject to the Board's permission. In addition, by using the phrase "*any transaction,*" the legislator includes the share pledge agreements and usufruct agreements into the scope of the requirement to obtain the Board's permission.

The last criterion for the permission requirement is the transactions that will change the ownership or usage rights over the facilities. Apart from share transfers, a transfer of the facilities or usage rights that can be referred to as the transfer of assets are subject to the Board's permission for the supervision of the public service conveyed.

Art. 57(2) of the Regulation expands the provisions laid down by the Law regarding share transfer restrictions. The said provision reads:

---

8 Official Gazette. D. 30.03.2013, No. 28603.

"*The direct or indirect acquisition of the shares representing ten per cent (five per cent in publicly listed companies) of the license holder companies' capital or more by a real person or a legal entity, and independent from the share transfers stated, above, shares transfers resulting in the change of control over the shareholding structure of the legal entity and the establishment of a pledge over the shares of the legal entities whose tariffs are subject to regulation, and the establishment of an account pledge in relation to these companies are subject to the Board's approval each time. Any type of direct changes in the shares in the shareholding structures of the legal entities holding market operation licenses are subject to the Board's approval independent from the above-stated capital share changes. The approval is granted to the legal entities whose tariffs are subject to regulation by the Board, others are granted by the relevant main service unit.*"[9].

The Regulation includes two points that are dissenting from the Law. The first of these is that share pledges are listed among transactions that require the Board's permission along with share transfers; however, usufruct rights are not included. In accordance with the clear wording of the Law, the establishment and transfer of usufruct rights are also subject to the Board's permission. Another dissenting point included in the Regulation is the usage of the word "approval" instead of "permission." Permission and approval differ with respect to the time period that they can be obtained. Permission is required prior to the transaction; whereas an approval is the confirmation of the compliance of an already existing transaction. In this case, instead of the wording of the Regulation that must be in compliance with the Law, the phrase utilized in the Law shall prevail, and the transactions listed in the Regulation shall be submitted to the Board's permission prior to their conclusion[10].

Conclusion

It is a legal obligation for the companies operating in the electricity market to obtain licenses, excluding the exceptions laid out, above.

---

9 Official Gazette. D. 02.11.2013, No.28809.

10 **ÖZDAMAR Mehmet**, Elektrik Piyasasında Faaliyet Gösteren Şirketlerde Pay Devri, Energy Law Journal 2014/1, p. 124 -125.

In order for this obligation to be fulfilled, these companies shall be established as either a joint stock or a limited liability companies. The free transfer of shares that are stipulated by the Turkish Commercial Code for these types of companies are restricted in the electricity market field, a market where public service is conveyed, in order to ensure administrative supervision. It is important for investors that will be active in the electricity market to consider the legal restrictions set forth in this article while planning the investments regarding credit supply and project finance in order for their investments to be well-grounded and durable.

Pre-License Tender Regulation for Wind and Solar Energy Projects*

Gaye Spolitis

Introduction

Technical insufficiencies of the transmission system in Turkey provide limited connection capacity to transmission systems. These limitations eventually prevent renewable energy generation facilities to be connected to the grid subject to the availability of the transformer station in a particular region. Over the years, Turkey's Energy Market Regulation Authority ("EMRA") has taken steps to overcome the shortcomings of capacity limitations by implementing a selection process through tenders.

In accordance with the "Tender Regulation on pre-License Applications for Wind and Solar Energy Generation Facilities" issued by the EMRA dated 6 December 2013 ("Tender Regulation"), the EMRA sets forth the principles and procedures that are applicable to the tenders to be made under the mandate of the Turkish Electricity Transmission Corporation ("TEİAŞ") for multiple applications submitted for the same transformer station and/or the same region.

The Tender Regulation requires each participant to submit a contribution fee ("Contribution Fee") to be paid for each unit's MW by the winning participant to the TEİAŞ following the pre-approval of the operation of the energy generation facility for a maximum period of three years.

Tender Process

Renewable energy generation facilities may be constructed in designated regions with identified transformer stations or sub-stations.

---

* ***Article of June 2015***

Tenders for renewable energy generation facilities will be held in the event of multiple license applications with respect to the same region[1] and/or the transformer stations[2] that are submitted to the EMRA.

Announcement of the Tender: The EMRA will set up a list of pre-license applications for the same region, and/or for the same transformer station. The applications will be submitted to the TEIAŞ where the date and place of the tender and certain information concerning the application will be announced online including the name of the project, region and transformer stations, installed capacity of the project and the available capacity of the transformer station.

Invitation Letter[3]: Following the Tender Announcement, the TEİAŞ will send the applicants invitation letters including (i) the standard form of proposal for the Contribution Fee; (ii) a standard form undertaking[4]; and (iii) a standard form of letter of guarantee that shall be irrevocable and unconditional.

Bidding Process: Each tender participant shall submit its proposal for the Contribution Fee in Turkish Liras in a sealed envelope on the date of the tender as specified by the TEİAŞ.

In the event the same Contribution Fee is submitted by more than one tender participant and hence requires a selection from among them, the participants are required to submit a second revised Contribution Fee in accordance with the foregoing, provided that the second revised Contribution Fee shall not be less than the first Fee submitted.

---

1 The same region is defined as the region that covers the connection line and the transformer station as announced by the EMRA for the purposes of renewable energy generation facilities or in the event of power plant fields that are defined by coordinates, the intersecting or overlapping regions.

2 The same transformer station is defined as a transformer station announced for which more than one license application is submitted.

3 The standard forms are attached to the Tender Regulation and shall be strictly complied with; and are not subject to negotiations.

4 The undertaking refers to accuracy of the information and documents submitted by the tender participant and the acknowledgement of the tender participant to that effect and that the letter of guarantee will be recorded as revenue if the tender participant does not comply with its obligations under the Tender Regulation.

Post Tender Process: It is critical to note that the winning participant does not automatically qualify for a pre-license by the EMRA. It is therefore required from the TEİAŞ and the winning participant to take the following actions prior to the granting of the pre-license by the EMRA:

- The results of the tender shall be submitted by the TEİAŞ to the EMRA, including the official opinion received from TEİAŞ concerning the connection to the grid;
- The TEİAŞ shall inform the EMRA of the companies that did not participate in the tender and those participants that were disqualified due to incomplete documentation, as well as the highest Contribution Fee offered;
- The letter of guarantee of the tender participants that were not granted pre-licenses shall be duly returned to the disqualified participants;
- The letter of guarantee of the winning participant shall be returned to the winning participant in the event thatthe pre-license is rejected by EMRA due to force majeure or other reasons deemed acceptable by EMRA. The letter of guarantee shall be recorded as revenue once the winning participant fails to fulfill its obligations under the Tender Regulations and/or fails to execute the Contribution Agreement.

Contribution Fee Agreement

Following the official announcement of the results of the tender and within 15 days of the receipt of the result of the tender by the winning participant, the winning participant shall apply to the TEİAŞ to execute the Contribution Agreement in the form attached to the Invitation Letter.

The total contribution fee is calculated by multiplying the installed capacity with the Contribution Fee proposed by each unit's MW. The total Contribution Fee may be paid in installments over a maximum period of three years.

The letter of guarantee submitted by the winning participant for the tender process shall be replaced by the winning participant with an

irrevocable and unconditional letter of guarantee corresponding to the total Contribution Fee on the date of the execution of the Contribution Agreement. Following the tender, the winning participant may apply for a capacity increase whereby the Contribution Agreement shall be revised in accordance with the increased installed capacity.

Energy Investments and Right of Construction*

Att. Fatih Isik

Introduction

Power generation facilities are established, in general, over publicly owned or expropriated properties. However, it is also possible to build energy projects over lands that are owned by private law persons. In such cases, projects are generated by means of an agreement between the project developer and the land owner. An agreement is entered into between the parties in the event the acquisition of land, or establishing a long-term usage right in favor of the project developer comes into question. At this point, due to its characteristics and various advantages, obtaining a right of construction over the land is generally preferred. Therefore, the beneficiaries' rights and the effects of the right of construction will be briefly examined herein.

Right of Construction

As per Art. 826 of Civil Law numbered 4721 ("CL"), the right of construction is defined as "*an easement right that grants its third party beneficiary the authority to build construction on or underneath the land, or to preserve an existing construction.*" Hence, the right of construction entitles a person to build and own construction on a third party person's property. The owner of the servient estate holds ownership of the land; yet, is obliged to respect the presence and preservation of the construction of beneficiaries' over the land.

Right of Construction and Lease Agreement

As stated, the land may be brought into a project developer's use with methods other than transfer of the ownership. The first method is

---

* ***Article of August 2015***

to sign a lease agreement. However, due to the fact that the lease agreement grants personal rights (*right in personam*) to the parties, they do not provide sufficient protection for the project developer; in particular, when weighing the necessity of a long-term operation for a profitable energy investment against the possibility of the land owner's possible demise, or transfer of the land to third parties. At this point, annotation of the lease agreement with the land registry may be a solution. Unless the agreement is annotated with the land registry, it shall not grant any right against third persons, and the future of the land shall be jeopardized by the risks of transfer of the land and title through descent. However, although the annotation creates an effect of right in rem and servitude attached to the property, it does not render the rights arising from the lease agreement as real rights (*right in rem*)[1], and the lessee shall not benefit from certain protection mechanisms vested with the beneficiary of a real right.

On the other hand, establishment of a right of construction is quite efficient for energy projects due to the fact that it provides a right to construct over the land, as well as the ownership of the construction, throughout the duration of the right of construction. Furthermore, while the lessee is only authorized to file actions for protection of possession against the third parties' unlawful interventions, the beneficiary of the right of construction shall be authorized to file real actions (*actio in rem*) as well, which is explained below.

Protection of the Right of Construction

The rights of a beneficiary of a right of construction for protection of its authority to construct on the land, and to preserve such construction, should also be considered. This issue bears importance, especially with regard to preventing unlawful intervention of the owners of the servient estate or the previous owners facing expropriation.

There are no explicit provisions regarding the protection of the beneficiaries of the right of construction against unlawful interventions of third parties. However, the right of the beneficiary to file real actions against the offenses of third parties is an acknowledged principle aris-

---

[1] **Kemal Oğuzman/Özer Seliçi/Saibe Oktay-Özdemir**, Eşya Hukuku, Istanbul, 2013, p. 253, n. 1037.

ing from Roman law[2]. Leading scholars on the matter defend that Art. 683/2 of the CL, which entitles the owner to file a possessory action, might be applied to easement rights by analogy, as well. As per this Article, in cases where the unlawful intervention prevents the easement right beneficiary from executing his right, such beneficiary can file a possessory action[3].

Within this context, the beneficiaries of a right of construction may file a possessory action (or *actio negatoria*). A possessory action aims to prevent on-going unlawful intervention against a land owner's possession and ownership right. The intervention does not need to be faulty in order for this action to be filed. Additionally, as this action is an action *in rem*, it is not subject to a time-bar, but the intervention needs to be ongoing.

The Court of Cassation has also decided that all beneficiaries of a right in rem can file a possessory action[4]. The General Assembly of Civil Chambers of Court of Cassation, dated 21.06.2006, clearly states as follows[5]: "*However, this right in rem may be claimed against anyone. Even though there are no special provisions in the Civil Law protecting easement rights, in this regard, the provisions regarding ownership shall be applied by analogy. As such, the beneficiary of easement right may file a possessory action as per Article 638 of the Civil Law.*"

In addition to the possessory action, the beneficiary of the right of construction may request prevention of any potential unlawful intervention, and may file an action for damages if the requirements of the law of torts are met. Moreover, the beneficiaries of easement rights may oppose the claims *in rem* of third persons, as well. In cases where

---

2 In order to obtain further information regarding (Actio de Superficiebus), an action *in rem* by which the beneficiary can file actions against both the land owner and the third persons, please see Nadi Günal, Roma Hukuku'nda Üst Hakkı (Superficies), Ankara University Law Faculty Journal, 1998, Volume 47 Numbers 1-4, p. 114-115.

3 **Oğuzman/Seliçi/Oktay-Özdemir**, p. 784, n. 2760-2762.

4 Court of Cassation 14th Civil Chamber, 15.3.2011, E. 2011/1699, K. 2011/3284; Court of Cassation 14th Civil Chamber, 6.12.2005, E. 2013/13320, K. 2014/1459; Court of Cassation 14th Civil Chamber, 5.2.2014, E. 2005/9293, K. 2005/10983 (www.kazanci.com.tr).

5 General Assembly of Civil Chambers of Court of Cassation, 21.6.2006, E. 2006/14-454, K. 2006/459, (www.kazanci.com.tr).

a third person claims a right over the servient estate that prevent the beneficiary from exercising his easement right, the beneficiary may file a negative declaratory action, or if there are new registrations that conflict with the easement right, the beneficiary may claim the annulment of these registrations[6].

Right of Construction on Pledged Immovables

Prior to the implementation of the project, it is common to check whether the servient estate is subject to any encumbrances. Particularly, for the cases in which the right of construction is established on land that is owned by private law persons through an agreement, the existence of a pledge should be checked. If a right of pledge is already established over the land prior to the establishment of the right of construction, the beneficiary of the pledge may request the sale of the land, free from the right of construction. Article 132 of Enforcement and Bankruptcy Law numbered 2004 is quite clear: "*If the debtor establishes an easement right or a right of encumbrance over the land without consent of the creditor, this establishment shall not affect a creditor's right, and the creditor may request the sale of the land with or without such right.*" In such case, the beneficiary shall face the risk of losing all of his rights over the land. Furthermore, the beneficiary of the right of construction shall not be able to argue having acted in good faith since the pledge is registered with the land registry. Therefore, the consent of the creditor of the pledged land should be obtained in order to avoid unfavorable outcomes for the beneficiary of the right of construction.

Conclusion

Energy investments are high-cost projects that are profitable in the long term. Throughout this term, a right of construction may be established over the land in order to provide protection for a project developer's rights against the land owner and third persons. However, during the establishment of a right of construction, the presence of a previously established pledged should be seriously considered.

---

6 **Oğuzman/Seliçi/Oktay-Özdemir**, p. 784, n. 2765-2766.

Evaluation of Reimbursement to Consumers of Lost and Illegal Electricity Costs within the Context of Precedents Set by the Court of Appeal and the Legislation*

Att. Ozen Odev

In this newsletter, we evaluate the reimbursement of lost/illegal electricity costs, a subject that, from a legal perspective, is of particular concern to consumers.

Lost/Illegal Electricity Costs

The judgment of the Court of Appeal Assembly of Civil Chambers ruling that lost/illegal electricity costs reflected on electricity bills "cannot be demanded from subscribers," has provided said subscribers with the opportunity to request reimbursement of the charges they have paid over the last ten years.

The event surrounding this Court of Appeal's judgment began in 2012, following a subscriber's application to the Consumer Arbitration Tribunal seeking reimbursement of lost/illegal electricity costs that had been added to the subscriber's bill. The Arbitration Tribunal found the consumer's request to be justified. At the conclusion of the proceedings, and upon application to the court by the distribution company requesting annulment of the said decision, the Court of Appeal Assembly of Civil Chambers passed judgment on the subject matter.

This Court of Appeal's judgment is summarized is as follows:

Nature of Lost/Illegal Electricity

The lost/illegal electricity cost reflects the difference between the amount of energy input to the distribution system and that of the energy billed to the consumers. In other words, the cost of lost/illegal elec-

---

* ***Article of January 2015***

tricity as determined will, pro rata, meet the costs of lost/illegal electricity that arise as a result of technical and non-technical losses of the electricity system.

Jurisdiction of Energy Market Regulatory Authority

Under item 1 of Article 4 of Law No. 4628 on the Electricity Market ("Law"), it states that the Energy Market Regulatory Authority is established in order to perform the duties authorized under the said Law and under item 2 of the same Article, in which it states that "The Authority is responsible for the issuance of Authorized Licenses that set forth the permitted activities of the corporate persons, and the rights and obligations arising out of the said activities, existing contracts within the sphere of transfer of those operational rights to be regulated in accordance with the provisions of the Law, monitoring of the market performance, composing of performance standards, as well as the amendment, and enforcement of regulations on distribution, consumer services, establishment of principles of pricing covered by this Law, structure of pricing codes to be applied in the sale of electricity to dependent consumers in line with market requirements, and the application and control of the formulas in relation to adjustments that are needed to be made to the said prices as a result of inflation, and to ensure that the market complies with the provisions of this law …'

Although the Court of Appeal stated that the Authority has the duty to determine the principal elements for the pricing to be applied to electricity sales made to consumers, it also pointed out that the limit of this authority is the cost and profit share for 1KW electricity energy until it reaches the consumers, and that the Authority is not delegated with the power or duty to determine an unlimited pricing element.

The Authority has sought recompense of lost/illegal costs from consumers to date under the "Communiqué on Retail Sales Service Revenues and Setting up of Sales Price of Retail Electricity Sales" ("Communiqué"), published in Official Gazette 24843 of 11.08.2002. However, the Authorities can only issue regulatory procedures for the purpose of determining the principles and procedures of the rules imposed by the Law. As to this case, the Authority assumed the right to demand payment for lost/illegal electricity from consumers under a

communiqué it issued, despite there being no lawful basis for doing so. To that end, in parallel to this notion, the Court of Appeal pointed out that under Article 4 of the Law, which was used as grounds for the communiqué, the Authority is not granted with unlimited powers to set up rates, and, therefore, the Authority may not collect lost-electricity costs on the basis of the subject matter communiqué.

This practise is not compatible with the notions of the rule of law and jurisprudence

The Court of Appeal does not correlate the collection of the costs of losses that occurred whilst transferring electricity, nor the costs of electricity theft by others, from subscribers who are law abiding.

This opinion of the Court of Appeal is pertinent because, in line with the principle of "individual criminal responsibility," which is one of the general principles of criminal law, and is stipulated under Article 38 of the Constitution, it is required that punishment for this crime shall only be imposed on the perpetrator of the crime, and that only the perpetrator of the crime is affected by the penalty imposed. In other words, invoicing the non-defaulting, rule abiding subscriber for the costs that do not arise from the neglect of the subscriber is not in compliance with the principle of individual criminal responsibility and, additionally, such an act betrays trust under the law.

This practise prevents the authority from keeping in pace with technology

The Court of Appeal further states that the collection of costs for lost/illegal electricity from the law-abiding subscribers prevents the Authority not only from applying necessary technological innovations to combat loss of electricity, but also from expending the efforts necessary to identify the perpetrators and, yet, the Authority has the duty to prevent loss of electricity and theft, and to collect the costs from the perpetrator.

Non-disclosure of the cost of lost/illegal electricity in the itemization of the bill is incompatible with the principle of transparent state.

In addition to the above, the Court of Appeal noted that due to the fact that consumers are unaware as to the amount they are paying as a

result of non-disclosure of these amounts on the bills sought for the lost/illegal electricity, this practise is in breach of the notion of transparent state.

What is the course to be taken in collecting the cost of lost/illegal electricity?

Individual subscribers may submit a petition to their supplier company requesting a document detailing the cost of lost/illegal electricity included in their bill. Subsequently, the electricity supply company is obligated to provide the subscriber with a document detailing the electric energy consumption for the past 12 months, retrospectively, and free of charge. This obligation is based on Article 19 of the "Regulation of Electricity Market Consumer Services." The subscriber then applies to the Consumer Arbitration Tribunal with the said document. Thus, the legal process begins.

At this point, it is important that the applicant and the owner of the installations are the same persons, or that the application is made by a person authorized to act on behalf of the owner of the installations. In accordance with the provisions of the aforementioned regulation, due to the fact that the subscribers may obtain the breakdown of the bills for the past 12 months, whether the calculation of reimbursement is applied, retrospectively, for the last 10 years, and how much that amount will be is determined by the judiciary.

Can the legal entities' subscribers request reimbursement of lost/illegal use costs?

Under the provisions of the Electricity Market Consumer Services Regulation, the consumer is defined as "The person who purchases electricity for their own use" without any distinction between real or legal entities. Under the provisions of Law 6502 on the Consumer Protection Law (the "CPL"), the consumer is defined as a "real or legal entity who acts for purposes other than commercial or occupational purposes." As is evident, both in the Regulation, as well as in the CPL, corporate persons are considered to be consumers. It is stipulated under the decisions numbered E. 2014/12810, K. 2014/12352 and E. 2014/7207, K.2014/14473 of the 3rd Civil Chamber of Court of

Appeal Chamber that corporate persons may request and collect reimbursement of lost/illegal use costs. In this case as well, the authorized representative of a corporate person may obtain the details of the electric energy consumption, retrospectively, for 12 months from the supplier company and, subsequently, request reimbursement of lost/illegal use costs through the Court.

Conclusion

Although this positive judgment by the Court of Appeal befits the principles of the state of law, the precedents set by this judgment may be blocked under a parliamentary bill brought before the Turkish Grand National Assembly.

A provision proposed under the said parliamentary bill paves the way to add the payments made as reimbursements, as well as the court costs of all cases in regard to reimbursement of the cost of lost-electricity, to date, to new bills issued in the future and, therefore, collect them from the consumers. Under temporary Article 19 that is stipulated to be added to the Law, the provision that "the reimbursements and the expenses specified in the court judgments that have been made by the distribution company or the supplier on the basis of the judgment by the court and consumer arbitration tribunal, shall be realized through the distribution tariffs." This provision does not comply with the abovementioned principles of law, and betrays the trust in the state of law.

LABOR LAW

Collective Dismissal of Employees under Turkish Law*

Att. Fatih Isik

Introduction

The collective dismissal of employees is regulated under Art. 29 of the Labor Act numbered 4857 ("Act"). There are certain criteria to be met in order for a given lay-off to be identified as collective dismissal under Turkish Law.

The subject matter of this article will be the definition of collective dismissal, the employer's obligations, and the sanctions applicable concerning breaches of collective dismissal rules.

Definition

Art. 29 of the Act defines collective dismissals in quantitative and qualitative terms that must be collectively present for a given lay-off to be deemed as a collective dismissal. Art. 29 (1) describes the qualitative measure as "…*collective terminations for reasons of an economic, technological, structural or similar nature necessitated by the requirements of the enterprise, the establishment or activity…*"

In a quantitative dismissal, an employer shall dismiss a certain number of employees specified in the said provision in order to be subject to collective dismissal rules: (i) a minimum of 10 employees for workplaces where 20 and 100 employees are employed, (ii) at least 10% of the employees for workplaces where 101 and 300 employees are employed, (iii) a minimum of 30 employees for the workplaces where 301 or more employees are employed.

It must be noted that even though the employees may be dismissed on the same date or on different dates, all dismissals must be affected

---

* ***Article of September 2015***

within one month. Moreover, as can be observed from the numbers provided by the Act, the collective dismissal rules apply only if there are at least 20 employees within the workplace.

Obligations of the Employer

The employer intending the collective dismissal of employees has additional obligations to those which arise in the termination of individual employment contracts.

Obligation to Notify the Contemplated Collective Dismissal to Relevant Authorities: In accordance with Art. 29 (1) of the Act, the employer shall deliver its notification of its intention to collectively dismiss its employees, in writing, to the workplace labor union representatives, the relevant regional directorate of the Ministry of Labor and Social Security (*Çalışma ve Sosyal Güvenlik Bakanlığı*), and the Turkish Employment Organization (*Türkiye İş Kurumu - İŞKUR*) 30 days prior to such dismissal. Such written notification shall include the reason for the contemplated lay-off, the number of persons and groups to be affected by the lay-off, as well as its timing.

Obligation to Notify the Employees of Termination of Employment Contract: Apart from the notifications to be made to the above-mentioned persons and bodies, pursuant to Art. 17 of the Act, the employer is required to provide separate notices to each of the employees whose labor contract will be terminated. This "notice of termination" will include the notice periods applicable to each employee. It must be emphasized that notices of termination served upon the employees shall be effective 30 (thirty) days after written notification is given to the relevant regional directorate of the Ministry of Labor and Social Security as per Art. 29 (1) of the Act. In other words, the notice periods granted to the employees for termination specified under Art. 17 of the Act shall start only after the said 30-day period expires. Once the 30-day period expires, the employer may choose to wait for the expiry of the notice period applicable to a given employee, or it may choose to compensate the employee (notice pay), in lieu of a notice period, together with the notice of termination and, therefore, terminate the employment contract with immediate effect.

Obligation to Hold a Meeting with Labor Union Representatives: As per Art. 29 (4) of the Act, the employer shall hold a consultative meeting with the workplace labor union representatives, if any. The measures to be taken to avert or to reduce the layoffs, as well as measures to mitigate or minimize their adverse effects on the concerned employees are the subject matters of this meeting. Pursuant to the last sentence of Art. 29 (4) of the Act, minutes of this meeting confirming that the said consultations have been held shall be drawn up at the conclusion of the meeting.

Obligation to Notify the Closure of a Workplace: If the collective dismissal of employees is due to the closure of the workplace, which means a definite and permanent ceasing of activities, the employer shall solely notify the relevant regional directorate of the Ministry of Labor and Social Security and Turkish Employment Organization 30 days prior to the closure, pursuant to Art. 29 (6) of the Act. In this case, there is no obligation of the employer to notify the labor union representatives or to conduct a consultative meeting of the impending collective dismissal.

As per Art. 29 of the Act, if the employer wishes to hire persons for positions of the same nature within six months from the finalization of the collective dismissal, the employer must initially offer the position to his former employees who have the relevant qualifications.

Sanction for the Breach of Obligations

In accordance with Art. 100 of the Act, the employer who dismisses employees contrary to its obligations arising from Art. 29 of the Act shall be liable for an administrative fine for each employee whose labor contract was unlawfully terminated. In accordance with the chart provided by the Ministry of Labor and Social Security in relation to the applicable labor law administrative fines, the said fine is TL 554 per employee for 2015.

At this point, one may claim that the employer is not obliged to respect Art. 29 of the Act, provided that it pays the administrative fine. This is controversial in the doctrine. One of the experts considers such terminations to be null and void, by claiming that stipulating only an administrative fine does not rule out legal sanctions that are applicable

to an unlawful act[1]. The precedents of the Court of Cassation vary on this issue. In one of its judgments, the Court rejected the view that the collective dismissals violating Art. 29 of the Act are null and void, by stating that "*…the sanction for the violation of the rules concerning collective dismissals is the administrative monetary fine…*"[2]. Another judgment of the Court accepted that along with the administrative sanctions, the termination of the labor contracts of the employees who were subject to collective dismissal shall be deemed as null and void: "*… The fact that the violation of the collective dismissal rules is sanctioned by administrative monetary fines does not mean that the terminations are valid…*"[3]. Therefore, in the event that a collective dismissal does not fulfill the obligations set under Art. 29 of the Act, it may be argued that the terminations are null and void, and that the employer must pay the administrative fine.

Conclusion

In the light of the foregoing, it may be concluded that (i) in order for a lay-off to be considered as a collective dismissal, the qualitative and quantitative conditions that are specified under Art. 29 of the Act must be met; (ii) the employer who intends to collectively lay-off its employees in line with Art. 29 of the Act must notify the relevant authorities and the employees of the collective dismissal. The notice periods for employees commence following the expiry of 30 days as of the notification of the collective dismissal to the relevant authorities. (iii) the obligation of the employer to make payments that the employee is entitled to due to the termination of its employment contract remains valid; (iv) administrative monetary fines apply for each employee who was dismissed in breach of Art. 29 of the Act. However, payment of these administrative fines does not necessarily deem the collective dismissal as valid. In the event that the obligations are not fulfilled, the termination may be deemed to be null and void in addition to the payment of the administrative fine.

---

1 **Sarper Süzek**, Labor Law, Istanbul 2013, p. 621.

2 Court of Cassation 9th Civil Chamber Decision dated 26.01.2004 and numbered 1320/1174 (www.kazanci.com).

3 Court of Cassation 9th Civil Chamber Decision dated 19.10.2009 and numbered 37726/27756 (Süzek, p. 621-622).

Mobbing under Turkish Law pursuant to the Jurisprudence of the Court of Cassation and Turkish Code of Obligations No. 6098*

Att. Suleyman Sevinc

Under Turkish Law, mobbing is a recent concept defined and developed by the jurisprudence of the Court of Cassation. Emotional abuse (*mobbing*) consists of all types of ill treatment, threats, violence, humiliation, etc., conducted and repeated systematically by other employees, or by the employer to an employee[1]. Besides being a violation of personal rights, mobbing may also mean a violation of liabilities of the employer in accordance with the labor law.

An article entitled "Emotional Abuse in the Workplace According to Turkish Labor Law" that examines mobbing was published in our Newsletter of January, 2010. The present article will assess this notion in accordance with the provisions of new Turkish Code of Obligations No. 6098 ("TCO") and the Court of Cassation's recent jurisprudence.

Explicit Provision Adopted by the TCO

Abolished Code of Obligations No. 818 did not contain any specific provision regarding mobbing. However, in practice, claims against mobbing were based on Art. 332 of the Code setting forth the protection of the employee, and abolished Art. 77[2] of the Labor Code ("Labor Code") that set forth health and safety matters concerning employees.

---

* ***Article of January 2015***

1 **TINAZ, Pınar/BAYRAM Fuat/ERGİN Hediye**, Çalışma Psikolojisi ve Hukuki Boyutlarıyla İşyerinde Psikolojik Taciz (Mobbing)'den naklen Süzek, İş Güvenliği Hukuku, Beta Yayınları, İstanbul, 2008, p. 7.

2 The provision in question is abolished by Art. 37/ç of Law No. 6331 dated 20.6.2012 published in the Official Gazette dated 30.6.2012 and numbered 28339. The article entered into force six months after its publication in the Official Gazette.

An explicit provision regarding mobbing is adopted through the TCO. Thus, "*the employer is liable to protect and respect the personal safety of the employee, and assure a workplace environment with respect to the principles of fairness, especially to take necessary measures for the employees not to be sexually or emotionally assaulted, and to prevent further damages to those who had been assaulted." With respect to the third paragraph of the same provision, "compensation of the damages arising from death, violation of physical integrity or personal rights of the employees as a result of breach of contract, law or aforementioned provisions is subject to the provisions regarding liability arising from breach of contract.*"

Accordingly, the TCO adopted specific grounds in order to claim mobbing and, therefore, the employer shall respect and protect the personal rights of its employees. Furthermore, an employee's right to claim compensation by reason of violation of liabilities arising from the labor law in addition to the violation of personal rights, is explicitly regulated.

Elements of Mobbing in Light of the Court of Cassation's Jurisprudence

The Court of Cassation rendered several decisions regarding mobbing subsequent to the entry into force of the TCO, and there are three significant decisions in which the Court has stated certain principles regarding mobbing.

General Principles

The first principle is the decision of the General Assembly of Civil Chambers of the Court of Cassation dated 25.09.2013[3]. This decision concerns a lawyer who had been working in the legal department of a bank for 14 years; after her assignments to 30 different cities within nine months, she claimed moral and material compensation by reason of mobbing.

---

[3] The decision of the General Assembly of Civil Chambers of Court of Cassation dated 25.09.2013, numbered E. 2012/9-1925, K. 2013/1407.

Both the decisions of the 9th Civil Chamber[4] and the General Assembly firstly state general explanations and principles concerning mobbing. The Chamber defines the concept of mobbing by referring to the Federal Labor Court of Germany as *systematic hostility, willfully causing difficulties, ill-treatment among the employees or by superiors, especially the employer*. On the other hand, the General Assembly of Civil Chambers defines the concept of mobbing by referring to the doctrine as *all types of ill-treatment, threats, and violence applied and repeated systematically by the other employees to an employee*. In this respect, in order for treatment to be considered as mobbing, *an employee should have been targeted, and the treatment should have been applied systematically and repeatedly for a certain period of time*.

While applying the principles to the case at hand, both the 9th Civil Chamber and the General Assembly of Civil Chambers require the employer to prove two issues. Accordingly, first of all, the employer shall prove that the assignment in question has a general application and that other employees have been subjected to the same treatment; and, secondly, it satisfies a concrete necessity. As a result, the General Assembly of Civil Chambers ruled that the practices against the lawyer, as claimed, constitutes mobbing, and the employer acted with the intent to cause the employee's retirement or demotion and, therefore, reversed the judgment of the district court.

In addition, the 22nd Civil Chamber of Court of Cassation states another principle in its decision dated 27.12.2013[5] that *unjust treatment towards personal right is sufficient for mobbing, and substantial violation of the relevant right is not required*.

With respect to these decisions, in order for a practice to be considered as mobbing, the Court of Cassations requires that the employee was targeted, the treatment was repeated systematically, and constitutes an unjust practice to the personal rights of the employee.

---

4 The decision of the 9th Civil Chamber of Court of Cassation dated 28.02.2012, numbered E. 2009/30916, K. 2012/6093.

5 The decision of the 22nd Civil Chamber of Court of Cassation dated 27.12.2013, numbered E. 2013/693, K. 2013/30811.

Difficulties Regarding Evidence

A substantial problem in practice is the difficulties regarding evidence of the mobbing. Most of the time, it is impossible to prove mobbing by conclusive evidence, due to the nature of the practice. Therefore, the Court of Cassation states in several decisions that the employee may prove the practices concerning mobbing without presenting conclusive evidence, and determines the main principles in this respect.

According to the aforementioned decision dated 25.09.2013 of the General Assembly of Civil Chambers[6], it is sufficient to present consistent and strong indications regarding the claimed practices. By considering the ordinary flow of life, the indications shall be assessed and, by virtue of this assessment, if it is concluded that mobbing has most probably occurred, the case shall be deemed to be proven.

The decision dated 21.02.2014 of the 22nd Civil Chamber of the Court of Cassation[7] sets forth certain stipulations regarding the evidencing process. In this decision, the Chamber, in accordance with the aforementioned decision, states that conclusive evidence is not required, and the personal persuasion of the judge is sufficient. In addition, considering the difficulties regarding the evidencing of mobbing practices, the principle of interpretation in favor of the employee shall be applied in the case of doubt. In the case at hand, the witness statements affirming and completing each other, several conclusive medical reports that are in accordance with each other, and the witness statements are deemed to be sufficient by the Chamber to prove that the personal rights of the employee have been violated, and that the treatment constitutes mobbing.

Conclusion

With the TCO, the obligation of the employer to protect and respect the personal rights of the employee is explicitly regulated, and

---

6 See footnote 3; the decision of the General Assembly of the Civil Chambers of Court of Cassation dated 25.09.2013, numbered E. 2012/9-1925, K. 2013/1407.

7 The decision of the 22nd Civil Chamber of Court of Cassation dated 21.02.2014, numbered E. 2014/2157, K. 2014/3434.

a clear provision concerning mobbing has been adopted. Previously, mobbing was illegal under Turkish law, however; it was the obligation of the employer to protect its employees against mobbing. In this respect, for the first time under Turkish Law, an explicit provision has been adopted in accordance with the principles of international law and the requirements of professional conduct.

Furthermore, the concept of mobbing is developed by the practice of the courts, and the main principles are set forth. Accordingly, in order for a practice to be considered as mobbing, the employee shall have been targeted, and the treatment shall have been repeated systematically. In addition, unjust practices concerning the personal rights of the employee are sufficient, and a major violation is not required. Lastly, considering the difficulties in proving mobbing, and the principle on interpretation in favor of the employee, it is sufficient to present indications showing that mobbing has most likely occurred.

Employers' Competence of Email Supervision and Right of Termination*

Att. Yesim Tokgoz

Employers must provide convenient working places and conditions for their employees by taking advantage of many possibilities. For this purpose, employers provide personal computers and e-mail addresses for their employees; however, these personal computers and e-mails may be supervised by the employers. As a result of these supervisions, if an employee's action breaches the commitment to perform properly or subordinately towards its employer is determined, the employer has the right to terminate the employment agreement for just cause. This article focuses on employers' competence of supervision over e-mails and the right of immediate termination for just cause as a result of their right to govern.

Employment Agreements and Subordinancy

Pursuant to the Article 8/1 of Labor Law numbered 4857 ("Law"), an "*employment agreement is an agreement whereby one party (the employee) undertakes to perform work in subordination to the other party (the employer) who undertakes to pay him remuneration.*" As is clear from this definition, employment agreements are formed by three subjects, which are performance, remuneration and subordinancy. The main difference between employment agreements and remaining agreements is subordinancy. Within this scope, the employee is bound by the orders and instructions of its employer, and is supervised by him[1]. Thus, the employer has the right to govern and control, and the employee has the obligation to adhere to the employer's orders and instructions.

---

* ***Article of August 2015***

1 **Prof. Dr. Nuri Çelik**, İş Hukuku Dersleri, Yenilenmiş 25. Baskı, Beta Yayınları, İstanbul 2013, p. 86.

Employer's Right to Govern

The right to govern allows the employee to give instructions in accordance with laws, collective labor agreements, and employment agreements to regulate the work and the behavior of employees in the workplace[2].

Generally, employment agreements regulate work roughly. Non-regulated work is filled within the scope of employer's right to govern. Nevertheless, employers should use this right justly by treating employees who are equal, equitably. Hence, the duties of employees must be clearly defined, and they must work within the scope of these definitions. Furthermore, "personnel regulations" or "workplace instructions" that are formed by the employer, and which include the working place rules, must be disclosed to the employees.

As an example to these regulations, some companies prohibit access to various internet addresses so that the employees do not 'surf' in social media during working hours. This prohibition is a reflection of the employer's right to govern; therefore, it is legal. Likewise, employers may prohibit making personal phone calls, unless it is an emergency, or certainly necessary for work.

Employer's Right to Supervise

As a natural result of the right to govern, employers have the right to supervise their employees to determine whether their orders and instructions are being followed. Supervision is necessary to provide the layout of the working place. Employers may use different methods for supervision, such as examination of the files, or performance tests. Reviews of the files are made through computers and e-mails since all communications are realized via the internet. Pursuant to the principle of good faith, employers must inform their employees prior to these kinds of reviews, and the supervision must be made openly. However, in accordance with the decisions of the Court of Cassation, employers are competent to utilize their right to supervise at will.

---

2 **Prof Dr. Sarper Süzek**, İş Hukuku, 3. Bası, Beta Yayınları, İstanbul 2006, p. 61.

E-mail Supervision

In today's world all types of communications are realized in virtual platforms. Therefore, employers must provide computers to their employees as a result of their obligation to provide convenient working conditions. Generally, companies create personal e-mail address accounts to whom they provide a computer. Naturally, employers may require their employers not to use these computers, e-mails or passwords apart from working purposes, or to abstain from behaviors that may harm the employer. Accordingly, despite these computers and e-mails that are used by employees, they belong to the employer, and are provided for the realization of work as defined in the employment agreements, and are not to be used for storing personal data; therefore, they form a part of the working organization.

Pursuant to decision numbered 2009/447 E of the 22th Civil Chamber of the Court of Cassation ("Decision Numbered 2009/447")[3], it is clearly stipulated that "*the employer has the right to supervise the computers at any time, as well as the e-mail accounts, and incoming emails that belong to him.*" In the case that is the subject of this decision, even though the Claimant alleged that the correspondence is related to private life and must legally be protected, the Court of Cassation did not accept this argument, finding that the relevant correspondences had been realized by the computer and email accounts that had been provided to the employee to perform his work. Through this decision, one may conclude that the data stored in the computers and email accounts of the employer are not protected as personal data under Constitutional Law.

Research conducted by the American Management Association exhibited that 77.7% of the employers save and supervise phone calls, e-mails, internet access, and computer files of their employees in the USA. Such monitoring occurs in Turkey, as well. Therefore, employees who work in private sector must be aware that these computers and e-mail accounts are under the control of their employers and may be monitored at any time.

---

3 Please see the decision of the 9th Chambers of the Court of Cassation, dated 13.12.2010, numbered 2009/447 E, 2010/37516K. in the relevant matter.

Employer's Right of Termination

An employer has the right of immediate termination, which is also referred to as summary termination, in the event that the reasons, as stipulated under Article 25 of the Law, exist. These reasons are categorized under the topics of health, immoral, dishonorable, malicious conduct, or other similar behavior, as well as force majeure. Within the scope of immoral, dishonorable, or malicious conduct topics, sub-Article I, which stipulates the breach of the commitment to perform properly, sub-Article E, which stipulates the breach of the commitment to perform subordinately, and sub-Article B, which governs speech or actions that constitute an offence against the honor or dignity of the employer, constitutes just causes for the employer.

Therefore, in the event that the employer obtains proof of one of the above-mentioned reasons as a result of e-mail and computer monitoring, he may immediately terminate the employment agreement[4]. However, the employer may not exercise this right after six working days of having become aware of these facts, and in any event, after one year following the commission of the act has elapsed. The "one year" statutory limitation shall not be applicable if the employee has extracted material gains from the act concerned. In the event that the employer terminates the agreement by just cause, the employee shall not be entitled to severance and notice pay. He shall not be entitled to initiate a reemployment lawsuit, as well.

Indeed, in the matter that is subject to Decision Numbered 2009/447 E., the employer made note of several e-mails contain revilements against the employer, and which e-mails denigrate the company. The Court found these emails sufficient to terminate the agreement for just cause, and the employee was, therefore, not entitled to severance and notice pay.

To avoid the results of these sudden supervisions, firstly the employees should not use company computers and e-mails for their personal purposes. As well, it may be legally useful that employers reg-

---

4 Decisions of the 9th Chambers of the Court of Cassation, dated 4.5.2009, numbered 2008/36305 E., 2009/12393 K.; dated 17.03.2008, numbered 2007/27583 E., 2008/5294 K. may be given as example in the relevant matter.

ulate the use of the computers, internet and telephone calls, and disclose them to their employees; unfortunately, these types of regulations are uncommon in Turkey.

Conclusion

Within the scope of employment agreements, employers have the right to govern and supervise. Employers are competent to monitor computer and e-mail accounts as provided by them to their employees for the performance of the work and instructions that were provided under the right to govern by the employer. Even though the principle of good faith is such that the employer would provide notice of monitoring, pursuant to Decision Numbered 2009/447 E., employers may use this right at will. In the event the employer determines a reason regulated under Article 25 of the Law as a result of its supervision, it may terminate the employment agreement with immediate effect for just cause. In this case, the employee shall not be entitled to severance and notice pay; therefore, employees must be very mindful when they use such computers and e-mail accounts and to avoid any actions that may be deemed as a breach of the commitment to perform properly and subordinately.

INTELLECTUAL PROPERTY LAW

Remedies under Decree-Law on Trademarks*

Att. Yesim Tokgoz

Property is a constitutional right. Intellectual property is its integral part. Turkish legislation protects the rights regarding trademarks under Decree-Law on the Protection of Trademarks numbered 556 ("Decree-Law"). Within this scope, the protection of a symbol under the Decree-Law commences at the time (the date and hour) of the application to the Turkish Patent Institute ("TPI"). In this article, the civil and penal remedies that the right holders may apply against unfair registrations and usages under the Decree-Law, such as the process of objection, actions of nullity, invalidity, repeal, infringement, compensation and penal cases, will be emphasized.

Process of Objection

Pursuant to Articles 7 and 8 of the Decree-Law, the entrance of other symbols may abuse the rights of the registered trademark holders in business life can be prevented[1]. Within this scope, the TPI examines the objections against its decisions regarding the registration applications, or the refusal of the applications, and accepts or reject the application. Partial rejection or acceptance is possible, as well. In this case, persons may appeal the TPI's decision. The TPI's related department will first examine the appeal, and may change its decision. If the appeal is found to be unacceptable by the related department, the appeal shall be forwarded to the Re-examination and Evaluation Board ("REB") by the department without comment as to its merits. The decision of the REB is absolute. The REB may decide whether to register the trademark or reject the registration application. Partial rejection or partial

---

* ***Article of October 2015***

1 For more information http://www.erdem-erdem.com/en/articles/protection-of-local-and-globally-well-known-trademarks/ (accessed on: 28.10.2015).

acceptance is possible, as well. It should be emphasized that until this stage, these processes are fulfilled by trademark representatives on behalf of the right holders.

Action of Nullity of the REB's Decision

The applicant, or the person who objects to the application, may initiate an action of nullity in response to the decision of the REB within 2 months, with the Ankara Civil Courts for Intellectual and Industrial Property Rights ("CCIIPR"). This action does not automatically prevent the usage of the rights that have arisen from the registration. Therefore, the claimant shall request a cautionary judgment to halt the usage of the trademark and the rights that have arisen from this action.

In this action, the defendant is the TPI. Aside from the TPI, in accordance with the situation at hand, the applicant, or the person/s who object/s to the application may be the defendant, as well. The CCIIPR shall accept, reject, or partially accept or reject the case. An appeal with the Court of Cassation is possible in connection with this decision.

The CCIIPR is not entitled to register or cancel the trademark. Therefore, the claimant shall execute the decision after it becomes absolute. For example, in the event that the trademark is registered wrongfully at the end of the proceeding, the claimant shall initiate the below-mentioned action of invalidity to cancel the trademark.

Action of Invalidity

This case aims to withdraw the trademarks that are registered wrongfully, and/or whose protections lose their grounds because of various events that occur after the registry. Invalidity reasons are counted conclusively under Article 42 of the Decree- Law. However, in accordance with the established case law[2], registrations that are made in bad faith became a reason for invalidity. Nevertheless, the Court of Cassation provides contradictory decisions, as well.

---

[2] Decision of the Assembly of Civil Chambers of the Court of Cassation, dated 16.07.2008 and numbered 2008/11-501 E. 2008/507 K. may be given as an example in the relevant matter.

Any person who has suffered, the State Prosecutor or related official authorities may initiate an action of invalidity. The defendant of this case shall be the proprietor of the wrongfully registered trademark with the trademark registry. Although an exact foreclosure period in which to initiate such an action has not been regulated under the Decree-Law, pursuant to the established case law[3], 5 years is foreseen as the foreclosure period. In the event that bad faith actions have occurred, time limits shall not apply. The competent court is the CCI-IPR of the domicile of the defendant.

The competent courts for the action of nullity and action of invalidity that completes the process of action of nullity differ. Since this situation is contrary to the principle of appropriate procedure, the Court of Cassation allows these actions to be initiated with the Ankara CCIIPR at the same time.

A final decision of the declaration of invalidity has retroactive effect. Therefore, with the decision, the trademark shall be deemed removed from the date of the registration. However, in the event that the wrongful right holder has acted in good faith, the retroactive effects of invalidity shall not be extend to any final decision reached concerning the infringement of the trademark enforced, and contracts concluded and executed prior to the decision of invalidity.

The claimant shall enforce the invalidity decision with the TPI after it becomes absolute. In the event of a registration that has been made in bad faith, the court may rule for the defendant to compensate within the scope of this action.

Action of Repeal

These actions are regulated under Article 14 of the Decree-Law. If, within a period of five years, following the registration, a trademark has not been put to use without a justifiable reason, or if the use has been suspended during an uninterrupted period of five years, the trademark shall be repealed. These cases aim to prevent the formation of protective trademarks and cautionary trademark garbage. The final decision has no retroactive effect. In the event the non-usage depends

---

[3] Decisions of the 11th Chamber of the Court of Cassation, dated T. 11.9.2000, 2000/5607 E., 2000/6604 K. may be given as an example in the relevant matter.

on just cause, the trademark shall not be repealed. The provisions of the action of invalidity regarding the regulations of claimants, defendants, competent courts and decision shall apply to action of repeal.

Cases of Trademark Infringements

Trademark infringements shall be determined as "*the usage of rights arising from a registered trademarks protected in Turkey and during the time of protection without the permission and/or consent of the right holder.*" The Decree-Law recounted acts of infringement under Articles 9 and 61, in detail. Within this scope, cases aiming to determine proof, cases of determination of infringement, negative declaratory actions to determine the non-existence of the infringement, and actions for performance[4] shall be initiated. In these cases, the following precautionary measures may be requested; cessation of the acts of infringement, maintaining custody of the produced or imported goods that have infringed the trademark rights, ordering the placement of security for damages to be recompensed, or other measures that are ordered by the court. In addition, confiscation by the customs authorities may be requested in the event that the infringed goods are confiscated by the customs authorities[5].

Actions for Compensation

The above-mentioned actions do not require the presence of negligence or damage. However, it is obvious that in the event of negligence or damage, the right holder is entitled to initiate an action for compensation. Within the scope of these actions, the burden of proof is on the claimant and compensation regarding material, moral damages and/or loss of reputation shall be requested.

Penal Actions

Article 61/A of the Decree-Law enumerated acts that are punishable within the scope of penal law[6]. These acts are recounted conclu-

---

4 For more information: http://www.erdem-erdem.com/en/articles/infringement-of-trademark-rights// (accessed on 28.10.2015).

5 For more information: http://www.erdem-erdem.com/en/articles/international-protection-of-intellectual-property-and-confiscation-by-customs/ (accessed on 28.10.2015).

6 For more information: http://www.erdem-erdem.com/en/articles/infringement-of-trademark-rights// (accessed on 28.10.2015).

sively because of the principle of legality regarding crime and punishment. Prosecution of the punishment shall be subject to complaint. Conciliation is possible. An accused may benefit from the provisions of effective repentance in the event that s/he reveals where s/he purchased the goods on the condition that those persons are apprehended.

Conclusion

In business life, every day, the rights of trademarks or the symbols that have not been registered, but are frequently used, are infringed upon. The legislation regulates civil and penal remedies to protect the right holders. Sometimes, people are unaware that they have breached another person's rights. Therefore, more stringent remedies are assessed towards individuals who have acted in bad faith. All of these regulations aim to create a just competitive environment where intellectual property rights are not breached. With our following article, we will comment on the provisions of unfair competition which serve to create this environment.

Protection of Local and Globally Well-known Trademarks*

Att. Yesim Tokgoz

Trademarks are symbols that indicate capability to distinguish goods and services of one undertaking from the goods and services of other undertakings. Trademarks also allocate goods or services to an enterprise, and remove the risk of confusion with other goods. Some trademarks increase their economical value with their popularity created for various reasons, such as their marketing politics, product range etc. Turkish legislation and international regulations cover various precautions against unfair advantages sought by third persons who wish to benefit from the reputation of the trademarks. In this article, the notion of well-known trademarks, their protection methods and monopoly rights of globally well-known trademarks without registration under Decree-Law on the Protection of Trademarks numbered 556 ("Decree-Law") will be emphasized.

The Notion of Well-known Trademarks

Popularity appears differently within the scope of each case. Therefore, the notion of well-known trademarks is not specifically defined under Turkish trademarks legislation as it is not identified through the international organizations. This mission is granted to jurisdiction and doctrine. The World Intellectual Property Organization ("WIPO") prepared an advisory jurisdiction numbered A/34/13 to clarify this notion, and determined various qualifications with respect to the methods to identify a well-known trademark. These qualifications are adopted by the Turkish Court of Cassation, as well. Within this scope, the Court of Cassation, in its judgments, defined a well-known trademark as "*the symbol that appears automatically in the minds of people who are from same environment, and which closely depends on*

---

* ***Article of March 2015***

a person or an enterprise, that is irrelevant in relation to geographical areas, culture or age, and which includes quality, assurance, and promotion value among everybody without making distinction."[1].

Within the scope of relevant advisory jurisdictions, and jurisdictions of the Court of Cassation, the Turkish Patent Institute ("TPI") developed 17 measures to allow the identification of well-known trademarks that can be found on the web-site of TPI[2]. In accordance with all of these identifications, to determine the reputation of a trademark, the geographical area, the duration, and the capacity of usage, the degree of knowledge or recognition of the trademark in the relevant public sector, the target area of the trademark's promotions, the duration and capacity of promotions, the third-party recognition or awards of the formal authorities proving the popularity of the trademark that expires through time, and the economic value of the trademarks are essential. As stated, above, each case must be examined separately.

The Protection of Well-Known Trademarks at Registration

Well-known trademarks are under the protection of general rules. Within this scope, applications are examined by the TPI to the extent of absolute grounds for refusal under Art. 7 of the Decree-Law, and relative grounds for refusal under Art. 8 of the Decree-Law, to determine whether new applications abuse the rights of registered trademarks. This examination is made by commissions that are formed by brand experts of the TPI. In the event that the TPI determines absolute grounds for refusal, such as trademarks that are identical, or which are confusingly similar to a registered trademark, or those which were previously filed for registration in respect of an identical or confusingly similar type of product or service, it will directly reject the application.

If the TPI does not ascertain absolute grounds for refusal, it publishes the application. The right holders of registered trademarks, or those who filed for registration earlier, may object to the registration of the published application within 3 months after the publication, claim-

---

1 Decisions of the Assembly of Civil Chambers of the Court of Cassation, dated 21.9.2005 and numbered 2005/11-476 E. 2005/483K. may be given as example in the relevant matter.

2 http://www.tpe.gov.tr/TurkPatentEnstitusu/resources/temp/14FB57CE-E638-4606-A282-3CF89431CE1D.pdf (accessed on: 27.03.2015).

ing that their rights have been infringed according to the relevant grounds for refusal as regulated under Art. 8 of the Decree-Law. The process of objection is regulated under Art(s). 35, 36 and Art(s). 47 to 53 of the Decree-Law. In the event that the objections are accepted, the application of the later trademark is rejected. Thus, the rights of registered trademarks are protected.

According to the Decree-Law, a trademark may be used for different goods and services even though it is identical or similar to a registered trademark, or to a trademark with an earlier application date. However, an exception is regulated under Art. 8/4 of the Decree-Law. In addition to the above-mentioned rules, the well-known trademark owners may object to new applications even if they are for use in connection with goods or services that are not similar to those for which the earlier trademark is registered. The well-known trademarks' proprietor may use this opportunity only if i) the use without due cause of a trademark filed for registration would take unfair advantage of, ii) or be detrimental to the distinctive character, iii) or reputation of the registered trademark. The similarity between well-known trademarks are insufficient for the use of this objection right. The existence of at least one of the above-mentioned conditions is required to prevent the registration[3].

Rights Conferred to Well-Known Trademarks

The infringement of rights is regulated under Art. 61 ff. of the Decree-Law. According to these provisions, proprietors of the trademarks may prevent only the infringements caused by other trademarks that belong to the same classification, and which are registered in Turkey[4]. Aside from these regulations, Art. 9/1/c of the Decree-Law grants an exception for well-known trademarks. According to this provision, the proprietors of well-known trademarks that are registered in Turkey shall be entitled to prevent third parties from using any symbol that is identical or similar to the registered trademark in relation to

---

3 Decisions of the 11th Chambersof the Court of Cassation, dated 18.06.2008 and numbered 2007/5927 E., 2007/9302 may be given as example in the relevant matter.

4 For more information: http://www.erdem-erdem.com/en/articles/infringement-of-trademark-rights// (accessed on 27.03.2015).

goods or services that are not similar to those for which the trademark is registered, if one of the above-mentioned conditions, i, ii, iii exists. In this case, a well-known trademark proprietor may require the prohibition of facilities that are considered under Art. 9/2.

In addition, all of the trademark proprietors, without distinction between well-known or normal trademarks that are registered in Turkey, and the below-mentioned globally well-known trademarks not registered in Turkey, shall initiate an invalidity case according to Art. 42 ff. of the Decree-Law. A registered trademark shall be declared invalid by the court in cases that are considered under Art. 42, including grounds for refusal regulated under Art(s). 7 or 8.

The Protection of Globally Well- Known Trademarks under the Decree-Law

Although the protection of the Decree-Law is provided by registration, Art. 7/ı grants an exception to this regulation. According to this Article, well-known trademarks within the meaning of Art. 6bis under the Paris Convention (6bis) that have not been authorized by their proprietors shall not be registered as trademarks. This grants to relevant well-known trademarks a monopoly right without any local registration. Within this scope, the TPI examines applications before the examination commissions through its own data base. If the application is similar to globally well-known trademarks, the TPI rejects the application with regard to the absolute grounds for refusal, even though the globally well-known trademark is not registered in Turkey. The fact that the globally well-known trademark has a reputation in Turkey is sufficient to benefit from this protection.

Art. 6bis is regulated such that the countries of the Union undertake to refuse or to cancel the registration of a trademark which constitutes an imitation liable to create confusion of a trademark considered to be well-known in that country and that is used for identical or similar goods. Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) Art. 16/3 amended 6bis. In accordance with the amendment, 6bis shall apply, mutatis mutandis, to goods or services that are not similar to those in respect of which a trademark is registered, only if those goods or services would indicate a connection

with the proprietor of the registered trademark and the interests of the proprietor of the registered trademark are likely to be damaged by such use.

These provisions appear in two different regulations in Turkish legislation. 6bis is regulated as absolute grounds for refusal, TRIPS 16/3 is regulated as relative grounds for refusal. Therefore, there are different aspects and applications regarding the application of Art. 7/ı. Pursuant to one aspect, since TRIPS 16/3 amended 6bis, the TPI shall examine absolute grounds for refusal within the scope of different classifications, as well regarding globally well-known trademarks. Pursuant to the other aspect, the TPI shall limit the absolute grounds for refusal with the first version of 6bis, and the examination, within the scope of TRIPS16/3, shall occur in the event of an objection. In practice, the TPI does not consider different classes of goods and services while examining applications.

Conclusion

Creating a trademark provides the stability of quality standards of the goods and services in addition to consumers' trust. As a result, the reputation – and, directly in line with this - the income, increase. The intention to benefit from this popularity without providing any contribution cannot be accepted. The above-mentioned regulations aim to create a system that protects intellectual property rights, locally and globally, by intervening unfair advantages and reputation losses of the well-known trademarks. To realize this purpose, the TPI must work prudently, and the proprietors of well-known trademarks must be aware of their rights, and react immediately in the event of an abuse.

Intellectual Property Rights as Capital in Kind*

Att. Ecem Cetinyilmaz

Introduction

Shareholders may contribute capital to their companies in cash or in kind. Capital in cash can be subscribed and paid in Turkish Liras, whereas capital in kind can be formed from different items. Any appraisable and transferrable assets that are not subject to encumbrances, attachments or measures can be contributed as capital in kind.

Types of Capital in Kind

Article 127 of the Turkish Commercial Code[1] ("TCC") specifies the assets that can be contributed as capital as follows:

(i) Cash, receivables, negotiable instruments and shares belonging to commercial companies[2],

(ii) Intellectual property rights,

(iii) Movables and any type of immovable,

(iv) Usufruct rights pertaining to movable and immovable properties,

(v) Personal effort,

(vi) Commercial reputation,

(vii) Commercial enterprises,

---

* ***Article of October 2015***

1 Turkish Commercial Code No. 6012 was published in the Official Gazette dated February 14, 2011 and numbered 27846, and entered into force on July 1, 2012.

2 Please see previous Newsletter article on receivables as capital: The Contribution of Receivables as Capital in Commercial Companies, http://www.erdem-erdem.av.tr/en/articles/the-contribution-of-receivables-as-capital-in-commercial-companies/; Tuna Çolgar (accessed on 19 October 2015).

(viii) Transferable and rightfully used assets, such as electronic media, domains, names and signs,

(ix) Mining licenses and other rights having such economic value,

(x) Any kind of asset that is transferable and appraisable.

The TCC does not limit these rights numerus clausus. Any other rights that are transferable and appraisable may be subject to capital in kind. Notwithstanding the above, articles 342 and 581 bring restrictions with respect to joint stock and limited liability companies: service performances, personal effort, commercial reputation and undue receivables cannot be contributed as capital to such companies.

Intellectual Property Rights as Capital in Kind

Articles 342 and 581 of the TCC regulating capital in cash contribution in joint stock and limited liability companies specifically set forth that transferable and appraisable assets that are not subject to encumbrances, attachments or measures, including intellectual property rights and electronic media can be contributed as capital. This also creates the understanding that electronic assets are deemed as property rights[3]. However, the TCC does not clarify whether or not rights of use pertaining to such electronic assets are also eligible for capital in kind subscription, yet does not set forth any restrictive provision in this regard[4].

The preamble of the TCC clarifies that the former scope of the law that was limited to patent rights only has been replaced by the term "intellectual property," which is also preferred by TRIPS and WIPO, as it covers a wide range of rights, including rights related to intellectual and artistic works, trademarks, designs, utility models, plant types (i.e. plant breeders' rights), etc. However, it is further stated that some intellectual property rights, especially related rights, such as record producers' rights may not be proper as contributions in kind, or there might be problems in evaluation and valuation thereof. This is one of

---

3 **Ünal Tekinalp**, Sermaye Ortaklıklarının Yeni Hukuku, 3. Bası, İstanbul 2013, p. 156.

4 **Tekinalp**, p. 156.

the reasons why experts appointed by the court are required to comment on the acceptability of the assets as capital in kind.

It is also important to note that in order for contribution of intellectual property rights to be considered as capital in kind, it is mandatory that they are already registered. Even if an intellectual property right is protected, *e.g.* in accordance with unfair competition regulations, it cannot be contributed as capital in kind if it is not registered[5].

Valuation

Valuation is an important step of contributions in kind, since the monetary value of the contribution in Turkish Liras must be stated in the articles of association of the subject company.

An expert appointed by the commercial court of first instance located in the district of the company headquarters is the competent authority to determine the monetary value of the contribution in kind. This regulation is an extension of the principle of maintenance of capital, as it provides safety with respect to the monetary value of the contributed capital[6]. The value determined by the expert must be exactly stated under the articles of association of the subject company.

In the expert's valuation report, it must be stated that the applicable valuation method is the fairest and the most appropriate choice for everyone, and that the reality, validity and conformity with Article 342 of the TCC of the receivables to be contributed in cash have been determined. The report must further specify the collectability and the exact value of the subject assets, the amount of shares that should be allocated for each asset that is contributed in kind, and its equivalent in Turkish Liras. The report must be based on satisfactory grounds and conform to the principle of accountability. Founders and beneficiaries are entitled to object to the report.

Valuation of intellectual property rights is complex and unique in each case. Over the past few years, this has become an area of increasing interest to related experts. The European Commission formed an

---

5 **Tekinalp**, p. 157.

6 Preamble of Article 343 of the TCC.

expert group on intellectual property valuation, who, in their final report, explained the reasons for complexity being the fact that no two intellectual property assets are the same[7]. According to the said report, "the uniqueness of intellectual property makes comparisons with other intellectual property difficult, thereby limiting the usefulness of comparison based pricing. As a result, valuations are often based on assumptions about the intellectual property asset's future use, what important milestones will be met and what management decisions will be taken." Accordingly, the valuation of intellectual property rights must be made by its related experts and be specific to each case.

Registration

Another step to be taken for contribution of capital in kind is the annotation of the same with the relevant registry, if any. More specifically, the TCC requires that the subject intellectual property right contributed as capital in kind is annotated within the record of such right with the value determined by the expert. With respect to this procedure, Article 4/6 of the Communiqué on the Cooperation between Registries for Structure Changes in Companies and Contribution of Capital in Kind[8] provides that upon a transfer or restriction of the assets and rights that have been contributed as capital in kind to or by third parties until their registration, despite their annotation with the relevant registry as capital in kind, the relevant registry shall inform the trade registry, and the trade registry shall reject the request for the registration of the capital, due to such transfer or restriction.

After the registration of the company and/or the capital, the relevant trade registry is *ex officio* required to inform the registry of the subject intellectual property right immediately to provide its registra-

---

7 European Commission Final Report from the Expert Group on Intellectual Property Valuation dated 29 November 2013, p. 5, https://ec.europa.eu/research/innovation-union/pdf/Expert_Group_Report_on_Intellectual_Property_Valuation_IP_web_2.pdf (accessed on 19 October 2015).

This report reviews intellectual property valuation approaches, methods and standards and includes recommendations for possible policy actions.

8 Communiqué on the Cooperation between Registries for Structure Changes in Companies and Contribution of Capital in Kind was published in the Official Gazette dated October 31, 2012 and numbered 28453, and entered into force on the same date.

tion in the name of the company. Therefore, the intellectual property right is acquired only after its registration in the name of the company by the relevant registry upon being informed. Registration is constitutive[9].

Another procedural step to be completed upon capital in kind contribution is to provide the necessary details in relation thereto in the founders' declaration. In such declaration, the founders are required to provide precise, justified and documented explanations as to the appropriateness of the consideration of the capital in kind, and on the necessity and advantages of capital in kind contribution.

Conclusion

It is possible to contribute any appraisable and transferrable assets that are not subject to encumbrances, attachments or measures as capital in kind, including intellectual property rights and electronic media, provided that they are registered. Registration of the company and/or the capital does not provide the transfer of the right in the name of the company alone; intellectual property right becomes the property of the company only after the registration of the same upon immediate notification of the relevant trade registry. Valuation is the core of contribution of intellectual property rights, as it is complex and unique in respect of each intellectual property.

9 **Hasan Pulaşlı**, Yeni Şirketler Hukuku Genel Esaslar, Ankara 2012, p. 800.

Protection of Trademarks under Unfair Competition Provisions*

Att. Yesim Tokgoz

Competition is a constitutional right. However, to assert the deceptive and dishonest acts among people, competitors, clients and seller, as a right, and to protect these acts, is impossible. Unfortunately, at the present time, trademarks, which are the most important factors in competition, are being used to provide unjust gains. In this article, protection of trademarks under unfair competition provisions and the unfair competition actions will be addressed.

The Protection of Registered and Unregistered Trademarks

As it is emphasized in our previous article[1], trademarks are protected under Decree-Law on the Protection of Trademarks numbered 556 ("Decree-Law") in the Turkish legal system. However, protection is not limited with this. In accordance with the established case law[2], actions that are derived from the Decree- Law, and actions of unfair competition, can be initiated at the same time. However, in this event, the Court shall separately examine whether or not the act that infringes the right of the trademark's holder, constitutes a breach under the unfair competition provisions, as well.

The protection of the Decree-Law begins with registration. This protection is national. However, trademarks are far too universal to be protected only within national borders. Therefore, the protection of

---

* ***Article of December 2015***

1 For more information: http://www.erdem-erdem.com/en/articles/remedies-under-decree-law-on-trademarks/ (accessed on 04.01.2016).

2 Decision of the 11th Chamber of the Court of Cassation, dated 05.07.2001 and numbered 2001/4502 E., 2001/6197 K may be given as example in the relevant matter.

unfair competition reaches beyond national borders[3]. Within this scope, Articles 10*bis* and 10*ter* of the Paris Convention for the Protection of Industrial Property to which Turkey is a party, regulate international protection. As a result, aside from registered trademarks, foreign trademarks cannot benefit from the Decree-Law if they are not registered in Turkey, but are protected with the provisions of unfair competition.

Unfair Competition Actions

Unfair competition encompasses all types of abuse of competition by deceptive and dishonest acts. The action of unfair competition aims to protect the competition environment, not intellectual property. In the event of unfair competition between merchants, provisions of Article 54 et seq. of the Turkish Commercial Law ("TCL") are applicable. Acts of unfair competition are counted analogically under Article 55 of the TCL[4].

In the event that the trademarks are used contrary to unfair competition provisions, the right-holder who suffers may initiate the action of declaration, the actio negatoria, action pleading the cessation of the acts, and/or the action for remedies[5]. Actions of material and moral compensation can be initiated pursuant to the Turkish Law on Obligations, as well.

In the event that a foreign right holder who did not include Turkey in the registration of his/her trademark with the international trademark registry system created by the Madrid Protocol, or who did not register his/her trademark in Turkey, and learns that his/her trademarks is being used in Turkey without his/her knowledge, he/she may prevent this usage by initiating the above-mentioned actions pursuant to the unfair competition provisions. Within the scope of these actions, the right-holder may demand precautionary measures that are also set forth in the Decree-Law. For an actio negatoria, an action pleading the ces-

---

3 **Reha Poroy, Hamdi Yasaman**, Ticari İşletme Hukuku, İstanbul 2012, p. 305.

4 For more information: http://www.erdem-erdem.com/articles/yeni-turk-ticaret-kanununda-haksiz-rekabet-hukumleri/ (accessed on 04.01.2016).

5 For more information: http://www.erdem-erdem.com/articles/yeni-turk-ticaret-kanununda-haksiz-rekabet-hukumleri/ (accessed on 04.01.2016).

sation of the acts, and/or an action for remedies, negligence is not sought, where it is sought for the actions of compensation.

In addition, in the event that both actions as derived from the Decree-Law and unfair competition are initiated at the same time, only one form of compensation can be requested, since the compensation should not be deemed as a vehicle for enrichment[6].

Apart from the other civil actions, the final decisions of these actions are enforceable towards the persons who provided the goods subject to unfair competition, directly or indirectly, excluding the acquirer for personal use.

We would like to underline that the provisions of unfair competition are applicable to company names, business products that are not registered, or trademarks, which are no longer under the protection of the Decree-Law.

Prescription

Unfair competition actions are time-barred within one year after the knowledge of the abuse by the right-holder, and three years under any circumstances. The prescription does not start in the event of an ongoing unfair act. Therefore, the right-holder, whose right was time-barred pursuant to the Decree-Law may request to remove the injustice in accordance with the provisions of unfair competition. However, in the event that the right holder keeps silent for a lengthy period of time, and does not initiate an action of unfair competition, pursuant to the principle of loss of right caused by remaining silent, even though the unfair act continues, the right can be time barred[7].

Penal Liability

Apart from above-mentioned regulations, upon the complaint of the persons who have right to initiate an action of unfair competition, persons who perform one of the acts listed under Article 62 of the TCL will be imposed a fine of imprisonment or monetary fine up to 2 years.

---

6 **Reha Poroy, Hamdi Yasaman**, Ticari İşletme Hukuku, İstanbul 2012, p. 307.

7 Decision of the Assembly of Civil Chambers of the Court of Cassation, dated 04.05.2011 and numbered 2011/11-59 E., 2011/271 K. may be given as example in the relevant matter.

Conclusion

The provisions of unfair competition serve the purpose of providing an honest and fair competition environment for all participants[8]. In order to realize this purpose, the trademarks which are the essential actors of competition, should not be used in bad faith. Within this scope, the provisions of unfair competition of the TCL and the Decree-Law compliment the other. In addition to the protection of the Decree-Law, or the situations/products that are excluded from the Decree-Law, the rights of the right-holders are protected in light of the provisions of unfair competition, and through this, a fair competition environment is provided.

8 **Reha Poroy, Hamdi Yasaman,** Ticari İşletme Hukuku, İstanbul 2012, p. 305.

CONSUMER LAW

Comparative Advertising in Turkish Law*

Att. Leyla Orak Celikboya

Introduction

The Law on Consumer Protection No. 6502[1] ("LCP") entered into force on 28 May 2014 abrogating the former Law on Consumer Protection No. 4077 ("fLCP"). This amendment aiming to ensure coherence with European Union legislation, and at enhancing the protection of the consumer[2], and the secondary legislation enacted under the LCP introduces important novelties.

One of the matters among these novelties that requires assessment is comparative advertising. Art. 61 LCP provides for a general framework governing comparative advertising. The Regulation governing Commercial Advertising and Unfair Commercial Practices[3] ("Regulation") provides detailed regulation on the subject that is generally stipulated in Art. 61 et seq. LCP.

Nevertheless, comparative advertising relates not only to consumer protection and consumer law, but also to unfair competition[4] and the protection of competitors' rights. This months' Newsletter article assesses comparative publication under Turkish Law with a preponderant view to the LCP, and to the Regulation.

---

* ***Article of January 2015***

1 Published in the Official Gazette ("OG") dated 28 November 2013 and No. 28835, and entered into force six months after its publication.

2 Draft Law on Consumer Protection, General Legislative Justification ("Justification"), http://www2.tbmm.gov.tr/d24/1/1-0787.pdf (accessed on 29 January 2015), p. 33 et seq.

3 Published in the OG of 10 January 2015 and No. 29232. Other than Art. 8 which will enter into force one year following its publication, the Regulation entered into force through publication.

4 See Newsletter article on unfair competition **Berna Aşık Zibel**, Unfair Competition Provisions Under New Turkish Commercial Code, November, 2011, http://www.erdem-erdem.com/en/articles/unfair-competition-provisions-under-new-turkish-commercial-code/ (accessed on 29 January 2015).

Comparative Advertising and Unfair Competition

The Turkish Commercial Code No. 6102[5] ("TCC") regulates the acts of unfair competition in Art. 55. Two paragraphs of this provision which read: "*1 To discredit others, their goods, business products, prices, activities and commercial businesses, through false, misleading or unnecessarily injurious declarations,*" and "*5 To compare itself, its goods, business products, activities or prices with others, their goods, business products or prices in a false, misleading, injurious or imitative manner, or to favor one party to the detriment of its competitors,*" related to comparative advertising, specify the acts that would constitute unfair competition.

In order for comparative advertising to be deemed lawful under the TCC, it must not mislead or deceive the consumer, it must be truthful, the goods and services subject to comparison must have the same qualities and features, or meet the same needs, or be intended for the same purpose and, thus, be equivalent or substitutable, the advertising must not be unnecessarily denigrating or demeaning, it must not take unfair advantage of the reputation of another person, and not give rise to confusion[6].

These conditions as foreseen in the TCC regarding unfair competition must be taken into consideration when assessing the LCP and secondary legislation governing comparative advertising.

Comparative Advertising in Consumer Protection Legislation

LCP Provisions

Art. 16 fLCP and Art. 61 LCP regulate comparative advertising. Both provisions enable comparative advertising regarding goods and services that meet the same needs or are intended for the same purpose. Therefore, these statutory provisions do not provide a difference governing the comparative advertising regime. The Justification of LPC (as defined in the footnotes)[7], by making a reference to the *acquis communautaire*, states that comparative advertising must comply with

---

5 OG 14 Februaruy 2012, No. 27846.

6 **Reha Poroy/Hamdi Yasaman**, Ticari İşletme Hukuku, 14. Bası, İstanbul 2012, p.333.

7 Justification, p. 78.

honest and fair competition principles, and must not mislead its audience. Nevertheless, further details regarding comparative advertising have yet to be regulated under secondary legislation.

Art. 4 of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning Misleading and Comparative[8] advertising ("Directive") m. 4 also foresees that comparative advertising shall compare goods or services that meet the same needs or are intended for the same purpose. The Justification refers to the Council Directive of 10 September 1983 covering the same principle. Therefore, the fLCP and the LCP are in line with European legislation in this respect.

Regulation Provisions

Pursuant to Provisional Art. 1/3 LCP, until the entry into force of the regulations foreseen under the LCP, the provisions of the secondary legislation enacted under the fLCP that do not contradict the LCP shall continue to apply. Commercial advertising was regulated under the former Regulation governing Principles and Application of Commercial Advertising and Announcements[9] ("Former Regulation") during the period when the fLCP was in force. This Former Regulation that continued to apply until the entry into force of the Regulation contains provisions regulating comparative advertisements.

Pursuant to Art. 11 of the Former Regulation, (a) the goods, services or brand names that are subject to comparison cannot be mentioned, (b) the goods and services that are subject to comparison must have same qualities and features, or meet the same needs, or be intended for the same purpose, and (c) the advertisements must comply with fair competition principles, and must not deceive the consumer. Thus, the Former Regulation confirms the equivalence or substitution criteria foreseen under the LCP (and in the EU Council Directives), and emphasizes compliance with fair competition principles, as referred to in the Justifications. However, the Former Regulation foresees an addi-

---

8 See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF for the English text of the Directive (accessed on 29 January 2015).

9 RG, 14 June 2013, No. 25138.

tional requirement to not mention the goods, services or trade names that are compared.

Given the express provision of Provisional Art. 1/3 LCP, until the enactment of the Regulation, the Former Regulation's application continued. As the LCP and the fLCP contains the same provision governing comparative advertising, the entry into force of the LCP does not introduce a major amendment on the matter.

On the other hand, the Regulation, which abrogated the Former Regulation by entering into force on 10 January 2015, includes an innovative provision governing comparative advertising. Art. 8 of this Regulation reads as follows:

"*ARTICLE 8 – (1) Comparative advertisements may only be made if;*

a) They do not deceive or mislead,

b) They do not result in unfair competition,

c) The goods and services that are subject to comparison have the same qualities and features, or meet the same needs, or are intended for the same purpose,

ç) A feature that benefits the consumer is compared,

d) One or more material, major, verifiable and typical quality or qualities, which include the price, of the compared goods or services are compared in an objective manner,

e) Objective, quantifiable assertions based on numeric data are proven through scientific tests, reports or documents,

f) They do not denigrate or discredit the intellectual or industrial property, commercial name, trade name, or other distinct marks, goods, services, activities or other aspects of the competitors,

g) Goods and services whose origins are specified are compared with other goods and services from the same geographical location,

ğ) They do not result in confusion regarding the trademark, trade name, commercial name, any other distinct mark, or goods and services of the advertiser and the competitor.

(2) The name, trademark, logo or other distinct shapes or expressions, as well as commercial and trade names may be contained in comparative advertisements, provided that they comply with the conditions specified in the first paragraph of this provision.

(3) Food supplements cannot be subject to comparative advertising."

This article, in line with the TCC provision, but which goes into further detail, sets forth rules governing comparative advertising. The first paragraph specifies conditions for a comparative advertisement to be deemed lawful. Not resulting in unfair competition, comparing an aspect that is beneficial to the consumer, comparing material, major, verifiable and typical qualities, and proving objective assertions are noteworthy conditions.

The opinion of the Competition Authority on the draft Regulation[10] has also been taken into consideration, and the price of the goods and services is provided as an example to the material, major, verifiable, and typical qualities that can be compared.

The second paragraph of this article, for the first time, allows the mention of the name, trademark, logo or other distinct shapes or expressions, as well as commercial and trade names of competitors. This provision requires compliance with the conditions mentioned in the first paragraph, while allowing for this explicit comparison.

Entry into Force

As assessed above, the Regulation provides for novelties that govern comparative advertising. This provision, in comparison with the Former Regulation enacted under the fLCP, and applied until the entry into force of the Regulation, constitutes a highly detailed and innovative framework. Provided that certain requirements are complied with, it is allowed for the first time to refer to the name, trademark, logo or

---

[10] For the Competition Authority's opinion of 29 September 2014 on the draft of the Regulation, see. http://www.rekabet.gov.tr/tr-TR/Kurum-Gorus-Listesi and http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fKurum+G%C3%B6r%C3%BC%C5%9F%C3%BC%2fTicari+Reklam.pdf (accessed on 29 January 2015).

other distinct shapes or expressions, as well as commercial and trade names in comparative advertising.

The Regulation entered into force on its date of publication. Nevertheless, Art. 8 regulating comparative advertising shall be enforced on 10 January 2016, one year after the Regulation's publication. Hence, the novelties emphasized above will not be in effect yet.

Conclusion

Comparative advertisements concern commercial and competition law due to its links to unfair competition, and consumer law, for the sake of protecting consumers. Certain requirements, such as the comparative advertisement not being of a misleading nature, being truthful, the goods and services that are compared being equivalent or substitutable, and which avoid unnecessary disparagement, must be met.

The LCP provision enabling comparative advertising does not differ from the corresponding provision under the fLCP. Both articles, as is the case under the EU directives, render comparison of goods and services that meet the same needs, or are intended for the same purpose, possible.

Notwithstanding the Regulation enacted pursuant to the LCP. Contrary to the Former Regulation, it provides for new and detailed provisions regulating comparative advertisement. Art. 8 of the Regulation introduces additional and detailed conditions that comparative advertisements need to meet, and state in its second paragraph that the name, trademark, logo or other distinct shapes or expressions, as well as commercial and trade names of competitors, may be mentioned. Nevertheless, despite the other provisions entering into force through publication of the Regulation, this Art. 8 will become effective as of 10 January 2016.

New Regulation on Distance Contracts*

Att. Ecem Cetinyilmaz

Introduction

The Regulation on Distance Contracts ("New Regulation") has been recently promulgated in the Official Gazette dated 27 November 2014 and numbered 29188 pursuant to the Law on Protection of Consumers No. 6502 ("Law"). Upon the expiry of the three month period as foreseen under the New Regulation, it entered into force on 27 February 2015 and abolished the former Regulation regarding Distance Contracts which was published in the Official Gazette dated 6 March 2011 and numbered 27866 ("Former Regulation").

A distance contract is defined as "*any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme, wherein the parties make use of means of distance communication up to and including the moment at which the contract is concluded*".

The New Regulation contains newly introduced provisions concerning consumers and distance suppliers including e-commerce companies, as well as companies that make sales or provide services via telephone. In line with the nature of consumer protection legislation, this brings with it further protection for consumers, and imposes further liabilities upon distance suppliers.

Major Provisions of the New Regulation

The New Regulation regulates the performance methods and principles of distance contracts and focuses on delivery processes, prior information of consumers, right of withdrawal and the liabilities of the parties.

---

* ***Article of March 2015***

Prior Information

Whereas the obligation to provide pre-contractual information was also regulated under the Former Regulation, the New Regulation widens the scope and detail of the information to be declared to the consumer. Accordingly, the supplier of the goods or services must inform the consumer prior to the conclusion of the distance contract or to the acceptance of the offer by the consumer in accordance with the respective methods applicable to contracts concluded via internet, telephone, etc.

This information includes the basic qualities of the goods or services, identity and communication details of the supplier, total price of the goods or services, including applicable taxes, transportation and delivery costs, information on payment, delivery and performance and commitments of the supplier in relation thereto, resolution methods for possible complaints, conditions and details of the right of withdrawal, if it exists, details of the deposit or other financial securities, if any, technical protection precautions for the digital content, if any, information on the hardware or software that the digital content can work with, if any, and information on the consumer's rights regarding any disputes.

The supplier is required to provide that the consumer confirms having been informed through applicable methods, the failure of which would render the contract null and void ab initio, as if the contract has never been concluded. The supplier is the party who is under the burden of proof for prior information. Unlike the Former Regulation, the New Regulation also provides sanctions for several specific failures: For example, upon the supplier's failure to inform the consumer of the delivery, transportation and similar additional costs, the consumer will no longer be responsible for the payment of such.

Finally, just prior to the approval of the order by the consumer, the supplier is required to clearly inform the consumer that the approval of the order will mean a payment obligation; otherwise, the consumer will not be bound by the purchase order.

Right of Withdrawal

Time constraints relating to the exercise of the right of withdrawal have been extended by the New Regulation. The consumer is now enti-

tled to withdraw from the distance contract for convenience within fourteen (14) days (formerly seven (7) days) without being subject to any penalty. The fourteen (14) day period starts running as of the date of conclusion of the contract for provision of services, and as of the date of delivery, in case of sale of goods, without prejudice to the exercises until the date of delivery. Such time constraint does not apply where the consumer was not pre-informed of the right of withdrawal, which, in any case, cannot be exercised after the expiry of the one (1) year period following the end of the withdrawal period (formerly three (3) months).

For the ease of the consumers, a withdrawal form is annexed to the New Regulation, which may as well be included on the websites of the suppliers and used by the consumers to exercise the right of withdrawal, as well as an explicit written declaration in this regard. In contrast to the provision on the pre-contractual information, the consumer is the party who is under the burden of proof with respect to the exercise of the right of withdrawal.

The consumer is required to return the goods to the supplier within ten (10) days following its notification to exercise the right of withdrawal; whereas, at the same time, the supplier is required to return the payment within fourteen (14) days following the aforesaid notification. The consumer will not be charged for any return costs so long as he returns the goods through the carrier determined by the supplier.

The consumer is not liable for any changes and deterioration to the goods within the withdrawal term insomuch as he has used the goods in accordance with their function, technical qualities and user manuals.

Examples that are in favor of the suppliers are that the fourteen (14) day return period for the payment had been regulated as ten (10) days under the Former Regulation; the supplier was required to take back the goods within twenty (20) days, instead of the consumer returning it himself; and the types of contracts that were not subject to right of withdrawal were more limited.

Performance of the Contract and Delivery

Whereas the Former Regulation set forth that the supplier was to perform the order within thirty (30) days following the order, which

could be extended with up to ten (10) days upon written notification of the supplier; the New Regulation obliges the supplier to execute the order within the period it is promised, which cannot exceed thirty (30) days. As a novelty, the New Regulation also entitles the consumer to terminate the distance contract in the event of nonfulfillment of the foregoing obligation. In such a case, the supplier is required to return the payment, including the delivery costs and the default interest, to the consumer within fourteen (14) days following receipt of the termination notification, together with the promissory documents obtained from the consumer, if any.

Notification and return periods in the event of impossibility of the performance have also changed, obliging the supplier to notify the consumer within three (3) days following its awareness of the impossibility and to return any payment within fourteen (14) days following its notification. The former Regulation did not contain any specific notification period, and regulated the return period as ten (10) days.

As a newly introduced provision, the New Regulation holds the seller of the goods liable for any damage and loss until the delivery of the goods has been made to the consumer, including the period where the goods are kept by the carrier, unless the consumer requested delivery through a carrier other than determined by the seller.

Additional Payments

In order to request additional payments from the consumer aside from the originally agreed amounts arising from the obligations under the contract, the New Regulation requires the explicit approval of the consumer. If the consumer made an additional payment due to the fact that the options presented to him were already selected without his explicit approval, the supplier is required to return such payment immediately. This provision means that the options must be presented to the consumer, and the choice must be made only by the consumer.

Record Keeping

The New Regulation did not change the obligation to retain all kinds of documents and information relating to the elements of the distance contract for a period of three (3) years, yet burdens intermediary

firms to maintain the same record-keeping in relation to their transactions concluded with the suppliers.

Inertia Selling and Payment by Card

Unlike the Former Regulation, provisions on inertia selling and payment by card have not been included in the New Regulation. Inertia selling is regulated under Article 7 of the Law in a broad scope, and in such a way so as to include all consumer transactions. The said article exempts the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response, or the use of the goods or services not constituting consent for the conclusion of a contract; whereas, under the Former Regulation, use by the consumer was deemed to be consent.

The omission of the provision on payment by card is due to the fact that the Law foresees issuance of a specific regulation for payment by card.

Evaluation

While e-commerce is playing a larger part in consumers' daily lives day by day, the New Regulation aims to ensure that consumers are fully aware of their rights prior to the conclusion of distance contracts, especially in terms of the right of withdrawal. It strengthens consumers' positions by placing the suppliers under the burden of proof with respect to prior information, and setting forth specific sanctions for failure to inform consumers. It extends the time constraints relating to the exercise of the right of withdrawal, and shortens the period for the performance of the contract. It should be also stated that the New Regulation is considerably compatible with the current European Union legislation in terms of consumer protection.

Consumer Loan Agreements Regulation Entered Into Force*

Att. Alper Uzun

Introduction

The Consumer Loan Agreements Regulation ("Regulation") that was prepared to regulate various issues set forth by the Law on Consumer Protection numbered 6502, and which will determine the principles and procedures regarding consumer loan agreements, was published in the Official Gazette dated May 22, 2015 and numbered 29363.

The Regulation abolished the Regulation on the Principles and Procedures on Early Payment Discounts in Consumer Loans and Calculation of the Annual Cost of Loan Ratios, and will enter into force six months following its publication.

Scope and Application

Art. 31/4 of the Law on Consumer Protection and numbered 6502 stipulated that the principles and procedures regarding pre-consumer loan agreement information, mandatory contents of the agreement, out-of-scope agreements, rights and obligations of the consumer and the lender, right of withdrawal, early payment, calculation of the effective annual interest rate, the mandatory content of advertisements of consumer loans, enjoyment of the rights of termination, default, assignment of loans, tied loans, and other issues shall be governed by a regulation. The Regulation sets forth these issues in detail.

The Regulation defines consumer loan agreements as agreements through which lenders loan or undertake to extend credit to consumers by way of financing methods, such as postponement of payments or loans, etc. in return for benefits, such as interest or fees.

---

* ***Article of June 2015***

The scope of the Regulation comprises of all kinds of consumer loan agreements concluded between lenders and consumers, as well as credit card agreements that grant the option to postpone payment for more than three months, or similiar payment methods, in return for interest or similiar benefits.

On the other hand, the Regulation does not apply to housing finance agreements and overdraft account agreements in which the loan is paid back in thirty days, and non-cash loan agreements, such as cheques and letters of guarantee.

Material Provisions

The Second Part of the Regulation concerns Prior Information Obligations. Accordingly, it is mandatory that the prior information forms are prepared in at least twelve fonts, using an understandable language, clear, simple and legible, and are provided to the consumer either in hard copy, or in a permanent data form. Furthermore, in agreements for definite or indefinite periods, lenders or (if any) loan agents, are obliged to inform the consumer in detail about the terms of the agreement within a reasonable time prior to the conclusion of loan agreements with definite periods. For example, this information shall specifically include the type of the loan, the address, and communication information of thes lender and their agents, if any, the period of the loan agreements, the total amounts of the loans, and the fees to be charged from the consumers, the interest rates, the detailed payment plans, whether the parties will assume costs that arise, the legal consequences of defaults, the rights of withdrawal, the early payments, and other issues set forth under the Regulation.

The Third Party regulates the Form and the Mandatory Content of the Agreements. In accordance with Art. 10 of the Regulation, except for distance agreements, consumer loan agreements shall not be valid unless concluded in writing. Lenders who do not conclude a valid agreement shall not claim the invalidity of the agreements afterwards, to the detriment of the consumer. Moreover, it is mandatory that consumer loan agreements be prepared in at least twelve fonts, using understandable language, clear, simple and legible, and a copy be given to the consumer, either in hard copy, or in permanent data storage form.

Art. 11 and Art. 12 of the Regulation both explain the terms that are included in the Mandatory Content of the Agreements. Art. 13 sets forth Amendment of the Agreements. Accordingly, the terms of the definite agreements shall not be amended to the detriment of the consumers. In indefinite agreements, in the event that the contractual interest rate is amended, it is obligatory that the consumers are informed of such amendments thirty days prior to entry into force, in hard copy, or in permanent data storage form. This notification shall comprise the amount to be paid after entry into force of the amended interest rate, the number of payments, and the details in relation thereto. If the interest rate is increased, the new interest rate shall not be applied retroactively. The consumer shall not be affected from the increase in the interest rate, provided that the entire debt is paid, or the loan usage ceases within sixty days after the date of such notification. If the provisions, other than those that govern the interest rate, are amended, it is mandatory that notification be given to the consumer in writing or by a permanent data storage thirty days before their entry into force. The consumer shall decline such amendment and use the termination right set forth under Art. 25.

As per Art. 14 of the Regulation, consumer loan agreements shall contain the effective annual interest rate. Article 15 governs Early Payments. In accordance with the Regulation, the consumer may pay either a single or multiple installments or pre-pay the loan debt fully, or in part. In these cases, the lender is obliged to make the necessary discount. Art. 17 of the Regulation defines Interim Payments. According to this Article, pre-payment by the consumer that covers any amount not less than a single installment amount as stated in the payment plan is called an interim payment. The same Article regulates the consequences of interim payments, as well.

The Regulation defines the Limit Excess as the state of overdraft of a deposit account limit, or the event in which the consumer collects cash that exceeds the amount available in his deposit account, and is implicitly acknowledged by the consumer. As stated in Article 21, if the opening of a deposit account allowing limit excess is concluded with the consumer, such agreement shall comprise the contractual interes rate, and the conditions regarding the application of such rate. In any case, the lendor is obliged to provide the consumer with this

information, on a monthly basis, either in hard copy or in permanent data storage form. In the event of significant limit excess for periods that exceed one month, the lender shall promptly inform the consumer, either in hard copy or in permanent data storage form.

Art. 18 of the Regulation governs the events of Defaults and Late Payments. If the consumer lapses into default of installment payments, the lender may request payment of the entirety of the debt as a whole. However, the lender must reserve this right in the agreement, must fulfil his obligations, if the consumer lapses into default for at least two succesive installments. The lender must notify the consumer regarding the maturity by at least thirty days, in order to enjoy this right. Additionally, in the event of default or late payment, the lender shall not collect default interest, which is 30% higher than the contractual interest amount.

Art. 24, which is one of the most significant Articles of the Regulation, governs the Right of Withdrawal. The Regulation bestows the consumer with the right to withdraw from the consumer loan agreement, within fourteen days, without giving justification, nor paying a penalty. The right of withdrawal can be enjoyed as of the execution date of the agreement. However, in the case where the date upon which a copy of the agreement is delivered to the consumer, either in hard copy, or in permanent data storage form, on a later date than the execution date of the agreement, such right shall be used as of the delivery date of the copy of the agreement. In cases where the consumer enjoys the right of wihdrawal benefits from the loan, the consumer shall refund the principal debt and the amount of the interest accrued as of the usage of the loan until the date of refund. In the case of non-payment within this period, the consumer shall be deemed as having not withdrawn from the consumer loan.

Art. 26 of the Regulation envisages that the consumer shall not have insurance regarding the loan without the written consent of the consumer, or his consent given, through permanent data storage form. Thus, the necessity of having direct insurance for each consumer loan, and the subject matter of the insurance being within the initiative of the lender, have been abolished.

Article 28 sets forth the matter of Suretyship. Personal guarantees for the consumers to perfom, acquired within the scope of the consumer loan agreements, shall be deemed as ordinary suretyships regardless of their titles. Personal guarantees given for consumers receivables consumer shall be deemed as joint suretyships, unless other laws so regulate.

As per Art. 25 of the Regulation, if a termination notice period is not determined under the consumer loan agreement, the consumer may terminate the agreement at any time by notifying the lender, either through hard copy or in permanent data storage form. However, in the event a period for the termination notice is determined under the agreement, this period shall not exceed one month. If the right to terminate the indefinite consumer loan agreement is granted to the lender, the lender shall notify the consumer at least two months prior to such termination, either in hard copy or in permanent data storage form. Termination by the lender, without complying with the notification periods, is only possible when such right is envisaged under the agreement, and when valid grounds exist. The procedure of such information process is also governed under the Regulation.

Conclusion

The Consumer Loan Agreements Regulation that was prepared to regulate various issues set forth by the Law on Consumer Protection and numbered 6502, and which will determine the principles and procedures regarding consumer loan agreements, was published in the Official Gazette dated May 22, 2015 and numbered 29363, and will enter into force six months following its publication. The Regulation stipulates, in detail, the principles and procedures regarding pre-consumer loan agreement information, mandatory contents of the agreement, out-of-scope agreements, the rights and obligations of the consumer and the lender, the rights of withdrawal, early payments, calculation of the effective annual interest rates, the mandatory contents of advertisements of consumer loans, the enjoyment of rights of termination, default, assignment of the loan, tied loans, and other issues.

MISCELLANEOUS

Seizure and Transfer of Limited Liability Company Shares*

Att. Alper Uzun

Limited Liability Companies are regulated under the Turkish Commercial Code ("TCC") numbered 6102 Art. 573 ff. Limited companies have a predetermined capital comprised of the sum of capital shares, established by one or more real persons or legal entities under one trade name. Shareholders of a limited liability company are not responsible for the company's debts; their only liability is towards the payment of the capital shares and fulfillment of the additional payment and auxiliary obligations set forth under the articles of association.

A shareholder's share of a limited liability company is counted among seizable properties and rights since it is also an asset with a financial value. The personal creditors of a shareholder may initiate enforcement by seizure or by foreclosure of the pledged property; if the shareholder is subject to bankruptcy, they may initiate bankruptcy proceedings and request seizure and liquidation of a shareholder's limited liability company share.

Art. 133 titled "Personal Creditors of Shareholders" of the TCC that stipulates seizure of a company share is as follows:

> *(1) Personal creditor of one of the shareholders of a partnership company shall take his payment from the dividends that belong to that shareholder in accordance with the financial statements of that company, or from the liquidation profit, if the company is liquidated. If the financial statements are not yet drawn up, the creditor may seize the dividend or the liquidation profit that would fall to the shareholder's portion after the financial statements have been drawn up.*

---

* ***Article of February 2015***

(2) Along with the opportunity to retrieve their receivables from the dividend or liquidation profit, the creditors of a stock company may request the documented or undocumented shares to be seized and liquidated in accordance with the provisions relating to the movables under the Bankruptcy and Enforcement Law dated 09.06.1932 and numbered 2004. The seizure is registered in the share ledger upon request.

(3) Furthermore, in all commercial companies, the creditors shall have the power to retrieve their receivables from the company's shareholder's receivables and seize the aforesaid.

(4) The provisions above shall not prevent the creditors from taking action on the properties of the debtor shareholders outside of the company.

In the preamble of the provision, by using the phrase "stock company," the provision is regulated to include limited liability companies. Thus, this provision eliminated ambiguities arising from the abolished Turkish Commercial Code numbered 6762, and clearly stipulated the conditions through which the seizure and liquidation shall be carried out.

In respect thereof, the Decision of the Court of Cassation 12th Civil Chamber 2013/7955 E. 2013/17423 K. is as follows:

"*In accordance with Art. 145 of the TCC, a personal creditor of a limited liability company shareholder shall take his payment from the personal property of the shareholder, from the dividends that belong to that shareholder in accordance with the financial statements of that company, or from the liquidation profit, if the company is liquidated. TCC numbered 6762 regulates the enforcement conditions in limited liability companies under Art. 522 and 523. In the face of such regulations, it is clear that the shares are not directly seizable due to the personal debt of a shareholder, only the dividend, and for pecuniary claims if the company is liquidated, the liquidation profit of the shareholder is seizable. Pursuant to Art. 522 of the TCC numbered 6762, the right of the creditor to seize the lim-*

ited liability company share of a shareholder does not include the right to request liquidation, because, as a rule, a share shall not be divided in limited liability companies. However, an exception to this rule is in the transfer of shares and for inheritance, where the share is initially divided and then transferred or inherited. Moreover, the concept of a share represents all of the rights and obligations of a company.

Art. 133 of the Turkish Commercial Code numbered 6102 regulated this differently from Art. 145 of the TCC numbered 6762. In accordance with this provision, along with the opportunity to retrieve their receivables from the dividend or liquidation profit, the creditors of a stock company may request the documented or undocumented shares to be seized and liquidated in accordance with the provisions relating to movables under the Bankruptcy and Enforcement Law dated 09.06.1932 and numbered 2004. The seizure is registered in the share ledger upon request.

Apart from the above, in all commercial companies, the creditors shall have the power to retrieve their receivables from the receivables of the company's shareholder and seize the aforesaid.

After such amendment, contrary to Art. 145 of the TCC numbered 6762, the right to seize and liquidate a shareholder's share in a limited company is granted to the personal creditor of a limited liability company shareholder.

The preamble provision explains the reasoning behind the amendment as "The second paragraph, which is dedicated to companies with share capital and joint stock companies and share certificates includes the phrase "stock companies;" thus, the scope is broadened to include limited liability companies and undocumented shares. Whether the seized or liquidated share belongs to a joint stock, limited liability or commandite company, or whether it is documented or undocumented, makes no difference in terms of the implementation of the provision.

Another reform provided by the article, as set forth in the preamble of the article, is that it clarified the relevant provisions to be applied for seizure and liquidation. Pursuant to Art. 133/2 of the TCC numbered 6102, shares of the limited liability company's debtor shareholder shall be seized in accordance with the provisions on seizure of the movable properties of the Bankruptcy and Enforcement Law. Accordingly, in the event where a creditor requests the seizure of the debtor's shares of the third party limited liability company, the debtor's rights arising from the shares shall be seizure by notifying the company of such seizure, or by notifying the company of the seizure through the physical presence of the enforcement officer at the registered office, recording the seizure in writing in the company's share ledger in order to conclude the bare seizure, and drafting a report.

Another issue to be examined is that:

In accordance with the reforms adopted in Art. 593/2 of the TCC numbered 6102, bills with may be issued for purposes of evidence, or they may be registered as representing the share capital of the limited liability company. The preamble sets forth that issuance of the registered bills representing the share capital shall not be negotiable, and the share of a limited liability company shall not be deemed as a share of a joint stock company. This only provides certain possibilities regarding evidencing issues, and the transfer of the share in accordance with the provision on joint stock companies.

In this instance, share certificates of limited liability companies shall constitute legal proof, the shareholding rights shall not be transferred and assigned through delivery of share certificates and again, by virtue of the same reason, such rights shall not be seized and pledged. The capital share shall not be deemed to be acquired via acquisition of the share certificates. The transfer of the capital share can only be performed in accordance with Art. 595 and Art. 596 of the TCC.

Accordingly, due to the fact that the delivery of the share certificate shall not procure the transfer of shareholding rights,

the seizure of the share certificate shall not result in the seizure of debtor's shares in the limited liability company. As stated above, shares can be seized either by notifying the limited liability company via a notification of seizure, or by execution officer, in person, attending at the company headquarters, notifying the company of the seizure, thereby allowing the company to record this seizure in the share ledger and minutes.

In light of the foregoing and legal provisions thereof;

The creditor requested a warrant of seizure regarding the seizure of the debtor's shares in ____ Ltd. Şti company to be written and delivered to Adana Trade Registry on 25.07.2012. In response, the trade registry informed the creditor that the seizure had been recorded in the registry's records.

Additionally, the warrant of seizure dated 28.08.2012 was sent to the third person company together with the first notice of seizure dated 03.08.2012.

As mentioned above, in accordance with Art. 133/2 of the TCC numbered 6102, which was in force on the date of the mentioned seizure, the seizure of a debtor's shares of a limited liability company may be made, and the court rendered a judgment to approve the complaint, instead of rendering a judgment regarding dismissal of the complaint as being inappropriate."

After the creditors initiated enforcement actions through seizure, and after the finalization of the enforcement, they may request seizure of other pecuniary rights of the shareholder other than its shares. These pecuniary rights may be exemplified as dividends, pecuniary claims, and his/her right to be included in the liquidation profit.

Art. 596 paragraph 1 of the TCC reads "If the capital share has been transferred as a result of enforcement actions, all rights and obligations shall be transferred to the acquiring person without the approval of the general assembly." This legal provision emphasizes that the shares will be transferred not by a legal transaction, but by operation of law or upon judicial decision.

The TCC provision that stipulates share seizures directly refers to the Bankruptcy and Enforcement Law ("BEL"). In this regard, Art. 94 of the BEL must be taken into consideration. The said provision is as follows:

> "*If a usufruct right, or an undivided inheritance, or a company or co-owned property share is seized, the enforcement office shall notify the relevant third parties whose resident addresses are known. In this way, if the debtor's shares in a specific immovable are seized, the enforcement office shall be able to inform the title deeds registry to record the seizure restriction on the title deed. If no share certificate or interim certificate is issued, the share shall be sezied by notification of the seizure to the company by the enforcement office. It is mandatory that this seizure is registered in the share ledger; however, the seizure shall be considered as completed on the notification date to the company even if it is not registered in the share ledger. The seizure shall be notified to the Trade Registry for registration by the enforcement office. In this instance, the transfer of the seized shares shall be null and void insomuch as it violates the rights of the creditors. The liquidation of the seized shares shall be subject to the liquidation of movable property. For other movables, the enforcement office shall take the necessary measures to prevent transfer to third parties.*
>
> …
>
> *The legal costs incurred by creditors for this reason are collected from the debtor by the enforcement office without any enforcement action or judicial decision.*"

The seizure and transfer of the shares are subject to the provisions that govern the liquidation of movables. In this case, when a creditor requests the seizure of a limited liability company share, the enforcement office notifies the company by drawing up a writ of seizure. Moreover, the company's trade registry is also notified through a writ of seizure that the shares are seized. Furthermore, the enforcement officer is entitled to notify the company of the seizure and have the seizure registered in the share ledger in the company headquarters. The seizure officer records these actions by filing an official report.

Together with the request for liquidation, and for the assessment of the real value of the shares, valuation of the shares is concluded by experts. Afterwards, the liquidation is completed in accordance with the liquidation provisions of the BEL.

Establishment of Foundations*

Att. Ecem Susoy Uygun

Introduction

Foundations are defined under Turkish Civil Law No. 4721 ("Civil Law") as a group of properties with legal personalities, established through the allocation of appropriate assets and rights for a certain and constant purpose by real persons or legal entities. Foundations are considered to be legal entities.

The Civil Law, Law on Foundations No. 5737, Regulation on Foundations, Bylaw on the Registration and Announcement of the Foundations that was published in the Official Gazette dated 26.04.2013 and numbered 28269, as well as other relevant legislation, comprises provisions regarding the incorporation of foundations. This article briefly analyzes the establishment steps, management, auditing, purposes and activities, and termination of foundations within the framework of the aforementioned legislation.

Establishment of Foundations

Foundations that are established in accordance with the abrogated Law numbered 743 and Civil Law are considered as new foundations. For new foundations, the will to establish a foundation may be declared either before a notary public through an official deed ("deed") issued in statutory form or by a testamentary disposition.

Real persons or legal entities declare their will to establish a foundation before a notary public through a deed issued in statutory form. Following the issuance of the deed, the founder or the representative of the founder, submits the deed to the authorized civil court of first

---

* ***Article of March 2015***

instance. The foundation to be established by a testamentary disposition may be established by registration following the death of the founder.

The court to which the submission shall be made requests the opinion of the General Directorate of Foundations. Nonetheless, the court may hear the founders, request expert examination, and eventually, decide as to whether or not the foundation shall be registered.

If the court renders a decision regarding refusal of the registration request, the decision of the court may be appealed. On the other hand, if the court renders a decision in favor of registration, the foundation shall be granted legal entity status, and then, it shall be registered with the court that has jurisdiction over the foundation's headquarters, and, as well, with the central registry kept by the General Directorate of Foundations.

The foundation that is registered with the central registry shall be announced in the Official Gazette. The said announcement consists of information, such as the names of the founders, name, headquarters, purpose of the foundation, its managerial bodies, assets and rights devoted thereto, and information regarding the court that will render the registration decision.

Deed of Foundation

The deed is the document that is comprised of information on the assets and conditions of the foundation. The deed includes the name, headquarters and purpose of the foundation, the acts and actions to be performed in order to fulfill the purpose of the foundation, the establishment asset, managerial bodies, management, and termination procedures of the foundation.

Rejection of the submission for registration shall not be necessary, provided that the purpose of the foundation, and the assets and rights allocated to such purpose envisaged in the deed, are adequate to realize the ultimate purposes of the foundation, even if the deed contains other deficiencies. The court may order remedies for such deficiencies prior to its registration decision.

Assets and Rights Allocated to the Foundation

Foundations may acquire assets and may dispose of its property. However, provisions regarding acquisition via possession shall not be applied to the properties of foundations.

The minimum amount of assets to be allocated to new foundations is determined annually by the Council of Foundations. The ownership of the assets and the rights allocated to the foundation shall be transferred to the legal entity, once the foundation gains its legal personality after being registered. Thus, the court shall notify the land registry administration in order for them to register the immovable property with the name of the legal entity foundation.

Management of the New Foundations

The managerial bodies of the new foundations shall be established in accordance with the deed, and the majority of the persons responsible in these managerial bodies shall reside in Turkey. However, persons who have been convicted of thievery, fraud, illegal trafficking, or forgery shall not be appointed as a manager.

Managers of foundations shall act in conformity with the purpose of the foundation, as well as the legislation in force. Managers who do not use the assets and incomes of the foundation in accordance with the purpose of the foundation, thereby damaging the foundation through gross negligence and malicious actions, do not remove or repair defects or errors identified by the auditors, lose his/her capacity to use civil rights. Those persons who acquire an illness or become incapacitated, which constitutes an impediment to the performance of his/her duties, may be dismissed by the civil court of first instance that has jurisdiction over the headquarters of the foundation, upon the auditors' application that is based on the decision of the Council of Foundations.

Nonetheless, on the basis of just cause, the court may alter the organization, management structure and functioning of the foundation, upon request of either one of the managerial bodies of the foundation or the General Directorate of Foundations, along with the written opinion of the other.

In the event of a decrease in the number of members of the bodies due to death, reassignment, or for any other cause, the deficiency shall be remedied in accordance with the procedure envisaged in the deed. If no procedure is envisaged, the deed shall be amended. By virtue of this fact, the amendment procedure can be avoided if the fixing procedure, upon a decrease among members of the bodies, is explicitly specified in the deed.

Activities of Foundations

To give broad examples, foundations may be engaged in areas of health, education, science, and culture, and carries out activities within such areas. To carry out such activities, and to earn income for the use of the foundation, the foundations are permitted and authorized to dispose of and manage movable and immovable properties and cash, to acquire securities, and to sell such securities by utilizing them in line with the purpose of the foundation, cooperate with real persons and legal entities, domestic or foreign foundations with similar purposes, receive aid from persons or entities other that state institutions and authorities, enter into agreements to procure such aid, incorporate commercial enterprises and companies, and other similar activities, within the framework of the Civil Law.

Foundations may become shareholders of current incorporated companies, provided that they inform the General Directorate of Foundations. However, incomes from commercial enterprises shall not be allocated for any purposes other than those of the foundation.

Additionally, the foundations are authorized to cooperate and carry out activities, internationally, open branches abroad, receive donation and aid in cash and kind from persons, institutions and authorities located abroad, financially assist or make donations to foreign or domestic foundations and associations with similar purposes.

Audit of Foundations

All acts and actions of the foundations are within the scope of internal auditing. Foundations may either be audited by its own bodies or by independent auditing firms. An independent auditing firm shall be appointed by the decision-making body of the foundation.

Managers of the foundation present the internal auditing reports that are prepared at least once a year, and these reports are provided to the General Directorate of Foundations within two months as of the date of the report. The audit assessment the compliance of the foundation with its purpose and legislation, along with the audit assessment the compliance of the foundation's commercial enterprises with legislation is performed by the General Directorate of Foundations.

Termination of Foundations

Where the decision-making body of the foundation or the General Directorate of Foundations concluded that the purposes of the foundation were impossible to be fulfilled, they may always request registration of such situation from the civil court of first instance by a petition.

The Court may render a decision regarding the dissolution of the foundation and establishment of a board of liquidators and register the decision of dissolution, if necessary. The termination of the foundation shall be registered into the central registry and announced in the Official Gazette by the General Directorate of Foundations.

The remaining assets and rights of the new foundation shall be transferred to a foundation or an institution with similar purposes that are set out in its deed. If there are no specific provisions in the deed regarding the said matter, the assets and rights of the foundation shall be transferred to a foundation with similar purposes that will be determined by the court, provided that the opinion of the General Directorate of Foundations and the transferee foundation is taken.

Conclusion

The establishment, management, purposes and activities and termination of foundations are subject to legislation regarding foundations and notably the Civil Law. The establishment and termination procedures of foundations require an attentive and careful assessment due to the fact that such procedures necessitate an opinion of General Directorate of Foundations and a court decision.

New Brokerage Regulation*

Att. Ecem Cetinyilmaz

Introduction

The new Insurance and Reinsurance Brokerage Regulation ("New Regulation") entered into force through publication in the Official Gazette dated 27 May 2015 and numbered 29368. The New Regulation abrogated the former Insurance and Reinsurance Brokerage Regulation ("Former Regulation") which entered into force on 21 June 2008[1]. According to the 1st provisional article of the New Regulation, brokers shall be obliged to comply with the new provisions within one year as of the publication date of such regulation. The Undersecretariat of Treasury ("Treasury") is authorized to extend this period of compliance up to three months.

Shareholders and Directors

The New Regulation does not require any information or conditions pertaining to the directors, real person shareholders and directors of legal entity shareholders of legal entity brokers. Therefore, information in this regard is not required to be submitted to the Treasury.

Nevertheless, the New Regulation mostly keeps the requirements that real person and legal entity brokers must have as the same, except for the condition of not being bankrupt. Accordingly, not being bankrupt is no longer a condition for conducting brokerage activities.

Prior Approval of the Treasury

The New Regulation does not require brokerage companies to obtain prior approval of the Treasury for share transfers. As per the

---

* ***Article of June 2015***

1 Published in the Official Gazette dated 21 June 2008 and numbered 26913 and entered into force on the same date.

Former Regulation, acquisition of the shares that represented more than 10% of the share capital of a legal entity broker or share acquisitions that caused the shares of a shareholder to exceed or fall below 10% of the share capital were subject to the approval of the Treasury. Additionally, legal entity brokers were obliged to inform the Treasury of any changes of managers and technical personnel within two business days, and other changes within fifteen days. This requirement is also not included in the New Regulation.

Minimum Share Capital Requirement

The minimum capital requirement has been increased to TRL 250,000; whereas, it was TRL 100,000 under the Former Regulation. An additional TRL 50,000 is required for each license (this amount had been TRL 25,000). The New Regulations also introduces the obligation of TRL 25,000 paid-in capital for each out-of-center organization of the broker.

In addition, whereas the Former Regulation stated that the equity of the brokers cannot be less than 10% of the annual activity revenues, the New Regulation includes a different calculation. The equity capital of the brokers shall not be less than the sum of (i) 10% of the annual activities revenue and (ii) due debts of the company multiplied by a coefficient depending on the due date of the debt as specified below;

a) debts of which the due dates have passed for 1 to 30 days multiplied by (0.25),

b) debts of which the due dates have passed for 31 to 60 days multiplied by (0.5),

c) debts of which the due dates have passed for 61 days to 1 year multiplied by (0.8),

d) debts of which the due dates have passed for more than 1 year multiplied by (1).

The Treasury is authorized to increase or decrease these amounts by up to 50%.

This calculation shall be made at the end of each year. In the case of a deficiency in the equity capital amounts, the deficient amount shall

be paid until the end of the year following the relevant fiscal period. Brokers shall not be allowed to make dividend distributions so as to cause a decrease in the equity, below the amounts specified above.

General Managers and Deputy General Managers

The New Regulation requires brokers to employ deputy-general managers who are accountable for matters related to insurance or insurance techniques, and introduces several mandatory features for such, together with the general managers. According to the relevant article, general managers and deputy general managers shall be resident in Turkey, as was required before. The requirements as to the educational background and professional experience of such persons are set forth below:

General managers who are university graduates and have a major in insurance related areas are required to have 5 years of professional experience; whereas other graduate general managers having a major in other areas are required to have 7 years of professional experience. For deputy general managers, these terms are 2 years and 5 years, respectively.

Technical Personnel

Brokers are required to employ a sufficient number of technical personnel in relation to the branches in which such broker is engaged. A novelty brought by the New Regulation for technical personnel is being subject to an examination that shall be arranged by the Insurance Training Center. In addition, brokers are obliged to notify the Treasury of the hiring of technical personnel within fifteen business days as of the start date of the employment in order to designate a registration number, and identification card, which shall be then registered in the Insurance and Reinsurance Brokers Information System.

Physical, Technical and Administrative Infrastructure

The Former Regulation set forth that legal entity brokers were required to be adequate in terms of physical, technical and administrative infrastructure and human resources, yet did not regulate any specific conditions. With the New Regulation, in order for the brokerage

companies to be deemed technically sufficient, they are required to have an information system that is sufficient to be used in brokerage activities, an adequate archiving system, an electronic data network, and an electronic mail address. The features of the location where brokerage activities are conducted shall be further determined by the Treasury.

Brokerage Information System

The New Regulation envisages a secure and supplementary information system called the Insurance and Reinsurance Brokers Information System, in order to achieve and procure information regarding brokers. Brokers shall contribute to the expenses arising from this system. The procedures and principles of this system shall be determined by the Treasury. In connection with this requirement, the New Regulation does not mention the requirement of keeping a brokerage book.

Granting of Brokerage Authority

As per the New Regulation, the brokerage authority shall be granted to the broker via a certificate of authority. However, if the broker and the authorizing party are not able to convene, such authority may be given orally or electronically. The scope, limits and the duration of the authority shall be indicated in the certificate, and such authority cannot be transferred to third persons. Brokers shall be obliged to provide the certificate of authority in submitting offers, and informing the authorizing party regarding such offers and comparative prices.

The requirement of brokers to receive offers from at least three different insurance or reinsurance companies is not included in the New Regulation. In addition, the New Regulation also removes the requirement of brokers to take necessary measures so as to allocate their portfolio to several companies, and to notify the Treasury upon the concentration of their portfolio in one company.

Collection of Premiums

The provisions in the Former Regulation are mainly preserved with regard to the collection of insurance premiums. Notwithstanding

this fact, the New Regulation sets forth that, in principle, premiums shall be collected directly from the insurant. However, the procedures and principles regarding the authorization of the broker by the company for premium transfers may be further determined by the Treasury.

Professional Liability Insurance

The New Regulation does not regulate the minimum coverage amounts of professional liability insurance that the brokers are obliged to hold, and sets forth that the relevant procedures and principles shall be determined by the Treasury at a later stage.

Revocation of Brokerage License

The New Regulation sets forth a slightly different procedure for the revocation of brokerage licenses. Accordingly, brokers who are not in compliance with the legislation provisions shall be first warned by the Treasury. As a result of the evaluation of the Treasury following the warning, a broker's activities may be suspended up to six months, or its licenses may be revoked. In the event that the broker continues the incompliant activities within one year as of the warning or re-operation (after the suspension), its license shall be revoked.

Evaluation

Considering the above-mentioned novelties brought by the New Regulation, it would be reasonable to conclude that the brokerage market is now much less regulated. Most of the transactions that formerly required the Treasury's consent, or obliged the brokers to follow more detailed procedures and provide the Treasury with comprehensive documentation, are no longer subject to the Treasury's consideration. Removal of the requirement to receive offers from at least three different insurance or reinsurance companies shortens the brokerage process, as well.

General Terms of Compulsory Traffic Insurance and Liability of Social Security Institution*

Att. Yesim Tokgoz

In Turkey, every year, hundreds of people lose their lives or are rendered handicapped due to traffic accidents. Unfortunately, because of the Ramadan festival and summer season, we will be faced with these tragedies more frequently. Losses suffered in traffic accidents are covered by Compulsory Third Party Liability Insurance ("Compulsory Traffic Insurance" or "CTP"), Assurance Account in the absence of CTP, Optional Traffic Insurance, Green Card Insurance and the Social Security Institution ("SSI") pursuant to the Law of Road Traffic numbered 2918 ("Law"). In this article, we discuss the SSI's liability for health costs that arise stemming from these traffic accidents within the scope of the General Terms of the CTP, which entered into force on 01.06.2015 ("General Terms"), and which is synchronized with the relevant legislations regulated in 2011.

Scope of the Coverage

According to the CTP, the insurer fulfills the legal liability of the insured as a result of an act which causes death, or damages suffered by third parties, or damages objects. The liability of the insurer is limited by the legal limit of compulsory insurance at the time of the accident, and the coverage types that are determined under the General Terms.

Coverage limits of compulsory insurance are regulated under the Regulation on Tariff Implementation Principles for Compulsory Third Party Liability Insurance of Motor Vehicles ("Tariff"). The types of insurance coverage counted under the General Terms are material damages, health expenditures, permanent disability and loss of support.

---

* ***Article of June 2015***

Among these types, the most problematic coverage is health expenditures. The victims remain uncertain from whom they will collect their losses. This issue is regulated under i) Article 98 of the Law, which was amended by Article 59 of Law numbered 6111, ii) the Regulation on Principles and Procedures for Collection of Charges for Health Services Provided to Those Involved in Traffıc Accidents ("Regulation"), iii) and General Terms.

The Coverage of Health Expenditures

Pursuant to Article A.5/b of the General Terms ("A.5/b"), health expenditures are a variety of charges for all health services required for treatment of the third party/victim due to a traffic accident, including costs for artificial organs. According to this Article, this contains all of the expenditures, such as caretaking, or loss of work that arises from a traffic accident, will be made from the beginning of the treatment, until the victim provides a permanent disability report.

As it is seen from this regulation, all types of expenses incurred until a permanent disability report is obtained are deemed as health expenditures. We would like to state that, in this context, apart from the Law and Regulation, expenses incurred regarding the inability to work until the disability report is prepared, are regulated as health expenditures.

The health expenses of the insured party (Operator of the Vehicle, the "Operator") are not covered by CTP.

Liability of SSI

Pursuant to Article 98/1 of the Law, "*Charges for all health services required for treatment provided by university hospitals, and all other official and private health institutions and entities ("Hospitals"), due to traffic accidents shall be covered by the SSI as per the principles and procedures for the repayment determined for the general health insurance ("GHI") insurers regardless of whether or not the victim has a social insurance*".

Through this Regulation, in the event of a traffic accident that occurs in Turkey, all of the health expenditures of the victims are covered by the SSI. In this case, the fact of whether or not the victim is

Turkish or a foreigner, whether s/he has GHI or not, whether the party liable for the damages has CTP or not, whether the accident occurred before or after the application of the relevant legislation, or the qualifications of the hospital, do not influence the liability of the SSI.

The SSI also covers the health expenditures of foreigners. However, in the event the foreigner continues his/her treatment abroad, the SSI shall not be liable for these expenses. The expenses of Turkish citizens incurred abroad are covered within the provisions of the relevant legislation.

The liability of the SSI is limited with the legal coverage limits determined under the Tariff. Within the framework of the established opinion of the Court of Cassation, "*losses suffered within the legal limits are covered by the SSI, whereas losses that exceed the legal coverage limit should be demanded from the Operator and the insurer*".

The SSI is not liable for indirect losses, such as moral compensation, loss of revenue, loss of profit, and loss of rent that are also extended within the scope of General Terms. These losses shall be required directly from the party liable for damages. We would like to emphasize that since the extra costs required by private hospitals are not deemed as health expenditures, the CTP and persons who caused the damage are liable for these expenses.

Right of Recourse of SSI

The liability of the person who has CTP starts when the health expenditures of the victims exceed the coverage limit of the CTP. The SSI compensates only the exceeded amount of expenditures. Persons who do not have CTP may not benefit from this right, and the SSI reimburses all of the health expenditures.

In addition, the SSI compensates health expenditures from persons who have harmed willfully, the persons who have the GHI or right holders, pursuant to Articles 21/4 and 76/6 of Social Security and General Health Insurance Law numbered 5510.

In the event that the fault of victim is detected from liability research, SSI recourses the relevant health expenditures to them.

Liability of the Insurer Regarding the Coverage of Health Expenditures

The liability of insurance companies and the Assurance Account regarding the coverage of the health expenditures of the CTP policies towards insured parties and right holders ends by transferring the amount of premium determined as per the principles set forth in Article 5/2 of the Regulation to the SSI.

The Collection of Health Expenditures

The Hospitals treat victims of traffic accidents at no cost. It is sufficient to provide a license plate number of one of the vehicles that has been involved in the accident for the GHI owners, whereas it is sufficient to provide any kind of proof regarding the accident for those victims who do not have GSI.

Health services rendered by the Hospitals who have contracts/protocols with the SSI shall be covered as per the provisions set forth in the Health Application Notice ("HAN"). A system called "MEDULA" is created for the collection of the charges of the Hospitals' services. With this system, all health service charges that are incurred, or are continuing to be incurred due to traffic accidents, are recorded and continued to be updated so that the history of costs follows the relevant traffic accident. Through this system, the Hospitals collect the relevant fees from the SSI. In addition, in accordance with the Circular of SSI numbered 2015/5, the medicine expenses of the victims are covered by SSI as well.

This data shall be forwarded to the Insurance Information and Observation Centre ("TRAMER") via electronic medium so that repeating payments are avoided.

With regard to health service charges arising due to traffic accidents that occur in Turkey in which vehicles bearing foreign license plates are involved, the portion corresponding to the liability of the Operator that bears a foreign license plate within the framework of the Green Card Insurance shall be claimed by the Institution, from the Bureau.

Benefit for Temporary Incapacity

Regarding the jurisprudence of the Court of Cassation[1] dated before the General Terms entered into force; the SSI is deemed not liable with the benefit for temporary incapacity. In accordance with the above-mentioned jurisprudence, the SSI shall reimburse payments for temporary incapacity to the insurer within the insurance limits, and to the Operator.

However, pursuant to A.5/b, as it is clearly regulated, health expenditures cover loss of work arising from the traffic accident. This regulation may lead to an amendment of jurisdiction since the loss of work until the victim provides a permanent disability report are deemed as health expenditures and are added to the liability of the SSI, and the liability of the insurance companies and Assurance Account is over.

Conclusion

The above-mentioned regulations are the necessity, and result of the social state principle. Through these regulations, each person's initial care can be realized with equal treatment at any Hospital. Nevertheless, to compensate the damages from the SSI regarding benefit for temporary incapacity, causes and will continue to cause problems since the liable person remains uncertain. It should also be emphasized that the difficulty of obtaining a right from the SSI which requires many frustrating procedures aggrandizes these problems. Hopefully, in time, this system will work more justly and efficiently so that the right holders will be compensated for their losses without suffering from any other losses.

---

1 Decisions of the 10th Chambers of the Court of Cassation, dated 17.10.201, numbered 2014/15707 E., 2014/19889 K.; dated 18.3.2014, numbered 2014/5225 E., 2014/6200 K. and dated 21.6.2013, numbered 2013/613 E., 2013/14151 K. may be given as example in the relevant matter.

Overriding Mandatory Rules in Private International Law*

Att. Naciye Yilmaz

In general

There are certain limitations to freedom of contract. Under national laws, these limitations appear as mandatory rules based on public policy. Similarly, under international law, even if the parties have made a choice of law, in case there are overriding mandatory rules, these rules shall apply despite the choice of law. In this Newsletter article, overriding mandatory rules shall be assessed especially within the framework of Article 31 of Act No. 5718 on Private International and Procedure Law ("MOHUK").

Definition and Scope

Overriding mandatory rules can be defined as mandatory rules that are crucial for the countries' economic, social and political purposes, and their applications are required for the disputes within their scope in order to implement the above-mentioned purposes[1].

There are three categories of overriding mandatory rules: overriding mandatory rules pertaining to lex fori; overriding mandatory rules pertaining to lex causae; and finally, overriding mandatory rules of a third country.

Overriding mandatory rules are regulated under Article 6 and Article 31 of MOHUK under Turkish law. Article 6 of MOHUK regulates overriding mandatory rules of Turkish law, while Article 31 of

---

* ***Article of July 2015***

1 **Francescakis Ph.,** Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles de conflits des lois, Rev.Cr.DIP, 1966/I(p. 1-18), p. 13 in **Hatice ÖZDEMİR KOCASAKAL,** Sözleşmelere Uygulanacak Hukukun MÖHUK m. 24 Çerçevesinde Tespiti ve Üçüncü Devletin Doğrudan Uygulanan Kuralları, MHB Yıl 30, No. 1-2, 2010, p. 71.

MOHUK sets forth giving effect to the overriding mandatory rules of another country's law, under the condition that this law is closely related to the contract.

Difference between Overriding Mandatory Rule and Public Policy

Overriding mandatory rules are related to social and economic politics of the relevant country, serving the general public interest, without regard to private law norms. These rules usually serve the related external commerce, economic, defense, environmental, and social politics of the country. These provisions are of such material importance to the country that they require strict implementation thereof. Therefore, even if a foreign law governs a given *inter partes* relation, these overriding mandatory rules shall apply. Similarly, when public policy is concerned, a local provision may be preferably applied based on the positive effect of public policy, even when a foreign law is applicable[2]. However, when an overriding mandatory rule is concerned, such rule shall absolutely be applied, regardless of the results; whereas, the results are taken into consideration for the implementation of public policy. In other words, when a foreign law is applicable in a given case, public policy shall only intervene if a result arises that would be unacceptable within the framework of the national laws[3].

Overriding Mandatory Rules of a Third Country

Pursuant to Article 31 of MOHUK, "*While applying the law that the contractual relationship is subject to, the effect of the overriding mandatory rules of another country's law may be recognized on the condition that they are closely related to the contract. The intent, nature, content and effects of these provisions are respected in deciding whether to recognize and whether to apply them.*"

The first condition to give effect to another country's overriding mandatory rules is that this rule should be applied, irrespective of the applicable law, to the contract[4].

---

2 **Ergin NOMER,** Devletler Hususi Hukuku, Beta, Edition 19, 2011, p. 163.

3 **NOMER,** p. 183.

4 **ÖZDEMİR KOCASAKAL,** p. 77.

The second condition within this framework is the concept of the close connection between the third country's law and the given case. Since there is no clarity for the cases of close connection, the court's discretion shall be applied[5].

Rome Convention and Rome I Regulation

The source of Article 31 of MOHUK is Article 7/1 of the Rome Convention. The related article of the Rome Convention is as follows: "*When applying the law of a country under this Convention, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied, whatever the law may be that is applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose, and to the consequences of their application or non-application.*"

The Rome Convention was replaced by the Rome I Regulation a short while after the entry into force of MOHUK. The Rome I Regulation contains in its Article 9 the definition of the overriding mandatory provisions since there were doubts between scholars during the application of Rome Convention that related to the difference between the mandatory rules and overriding mandatory rules[6]. As per Article 9/1 of the Rome I Regulation, overriding mandatory rules are "*provisions, the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.*"

Conclusion

As stated above, mandatory rules are the general provisions that limit the freedom of contract. Their appearing in international law is due to national laws. Within this framework, it should be noted that

---

5 **ÖZDEMİR KOCASAKAL,** p. 77.

6 **ÖZDEMİR KOCASAKAL,** p. 79.

there are several opinions on the differences between the mandatory rule notion and their applications amongst scholars. This Newsletter article brings attention to the overriding mandatory rules within the framework of Article 31 of MOHUK.

Direct Bankruptcy for Collection of Receivables under Turkish Law*

Att. Suleyman Sevinc

Introduction

Bankruptcy cases may be filed by the creditors following an enforcement proceeding against the debtor, without any need for a prior enforcement proceeding, in the presence of certain grounds. The grounds for the initiation of a direct bankruptcy cases are, in general, set out under Articles 177 and 178 of the Enforcement and Bankruptcy Law ("EBL"). In addition to these Articles, there are various provisions in other legislation that permit the creditor to file a direct bankruptcy case against the debtor.

Grounds for Direct Bankruptcy Case

Article 177/1 of the EBL provides four grounds for filing a direct bankruptcy case against a debtor. The first ground is when the residence of the debtor cannot be determined. The notion of "residence" is interpreted wider than its meaning in civil law, and therefore, it comprises the domicile of the debtor. As a result, in the event where the debtor has a *de facto*, or temporary, domicile, the condition shall not be fulfilled. In addition, in the event where the debtor has a domicile abroad, the condition shall not be deemed fulfilled, as the provision does not make any distinction between a domicile within the country, or abroad. The presumptive evidence for these conditions is sufficient. This ground is only applicable for real persons, since the residence of the legal persons are stated in their articles of association and are, therefore, determinate.

---

* ***Article of September 2015***

Another ground is established when the creditor may file a direct bankruptcy case if the debtor has fled for purposes of avoiding creditors[1]. This means the debtor has left his/her residence in order to avoid his/her due or undue obligations, thereby damaging his/her creditors. In some cases, the new address of the debtor may be known, but it may be inconvenient for the debtor to initiate an enforcement proceeding. In such cases, certain scholars state that presumptive evidences would be sufficient to prove the intention of the creditor. However, some others defend that the burden of proof is on the debtor; thus, the creditor shall prove the change of residence of the debtor, and the debtor shall prove that the purpose of this change was not to avoid his/her debts, and not to damage his/her creditors[2].

Another ground for a direct bankruptcy case is the occurrence or attempt by the debtor of fraudulent transactions which threaten the rights of the creditors. This act does not have to qualify as a crime in terms of criminal law, nor does the debtor have to be subject to any criminal investigation. Occurrence or attempting to conduct fraudulent transactions that have a direct or indirect negative effects on the assets of the debtor is deemed to be sufficient. The creditor may initiate a direct bankruptcy in the presence of the cases set forth under Articles 278-280 of the EBL regarding the initiation of a lawsuit on the annulment of a disposal transaction[3]. Similarly, the grounds of fraudulent bankruptcy set forth under Article 311 of the EBL may also be evaluated as grounds for a direct bankruptcy case[4].

The last of the ground provided by Article 177/1 of the EBL is hiding the assets by the debtor during an attachment proceeding. This ground is only applicable once the obligation to declare its assets arises for the debtor[5]. After the enforcement proceeding for purposes of

---

1 Court of Cassation 23rd Civil Chamber, Date 31.05.2012, No E. 2012/1431, K. 2012/3846 (www.kazanci.com).

2 **Sümer Altay**, Türk İflas Hukuku, Book I, Ocak 2004, p. 468.

3 **Baki Kuru/Ramazan Arslan/ Ejder Yılmaz**, İcra ve İflas Hukuku Ders Kitabı, Ankara 2012, 2nd Edition, p. 493.

4 Altay, p. 469.

5 **Hakan Pekcanıtez/ Oğuz Atalay/Meral Sungurtekin Özkan/Muhammet Özekes**, İcra ve İflas Hukuku, Ankara 2013, 11th Edition, p. 649.

attachment becomes definite, this condition is deemed fulfilled in the event the debtor avoids to declare its assets, or does not declare its assets in their entirety, and the declared assets do not cover the total amount of the receivable, interest, and expenses. If the declared assets cover the total amount of the receivable, interests and enforcement expenses, this condition is not fulfilled even if the debtor did not declare its assets in their entirety.

Pursuant to Article 177/2 of the EBL, suspension of the payments is another ground for a direct bankruptcy case. Suspension of the payments means the permanent and general non-payment of the debts by the debtor. Although it is similar to insolvency, suspension of payment is different than insolvency; in the case of suspension of the payments, the debtor does not have enough cash to pay its debts, regardless of its assets. The debtor may explicitly declare that it has suspended its payments. Additionally, there are several indicators of suspension of payments, such as existence of numerous pending enforcement proceedings against the debtor and non-payment of due debts. However, if the debtor requests arrangement of debts with the creditors does not mean that the debtor has suspended its payments. Accordingly, if the enforcement court grants an arrangement period to the debtor, the enforcement proceedings shall be suspended during this period, but such suspension shall not be deemed as "suspension of payments" in terms of a direct bankruptcy case. The Court of Cassation also considers the suspension of payments as a reason for the direct bankruptcy case[6]: "*In accordance with the documents in the file, the evidences that the decision is based on and in particular art. 177/2 of the EBL, it is concluded that the suspension of the payments is a reason for direct bankruptcy case; that the debtor, as the defendant, did not make any payments as it is understood from the enforcement files; that the trustee appointed to the company has declared before the court that they will make the payment, and that the suspension of payments has been determined by the expert report; thus, it is decided that (…) the decision that is in compliance with the procedure and law is APPROVED.*"

---

6 Court of Cassation 19th Civil Chamber, Date 11.03.2004, No E. 2003/7969, K. 2004/2562 (www.kazanci.com).

In accordance with Article 177/3 of the EBL, refusal of the offered arrangement with creditors, removal of the arrangement period and dissolution of the arrangement are grounds for the direct bankruptcy; however, refusal of its request for arrangement period would not constitute a ground for direct bankruptcy as per art. 177/3 and 301 of the EBL[7]. Nevertheless, the refusal of request for arrangement period by the enforcement court might be interpreted that the debtor has suspended its payments. In addition, in the case of restructuring by way of reconciliation, the courts declare the bankruptcy of the debtor if the debtor does not comply with its obligations arising from the project or the rights of the financing creditor is not satisfied[8].

The last ground provided by Article 177 of the EBL is non-payment of a debt approved by a court decision although it has been requested by a statutory demand, and which is also accepted by the Court of Cassation's decisions[9]: "*According to the fact that (…) the statutory demand is notified, that it is adequate to accept that bankruptcy request and court decision was due pursuant to art. 166 of the EBL; and that no additional payment order was required as Art. 177/4 of the EBL provides grounds for direct bankruptcy case (…).*" The prior court decision does not have to become definitive in order to initiate the direct bankruptcy case. However, in practice, the courts suspend the direct bankruptcy case until the decision of the Court of Cassation is granted if the debtor obtains a decision for suspension of execution proceedings[10]. It is controversial among the scholars whether a direct bankruptcy case may be initiated if the enforcement proceeding is based on a document that substitutes a court decision, and the Court of Cassation has rendered different decisions with this regard[11].

In addition to the above, various other grounds for direct bankruptcy are provided regarding the general partnership and limited part-

---

7 Court of Cassation 19th Civil Chamber, Date 24.04.2003, No E. 2002/10298, K. 2003/4431 (www.kazanci.com).

8 **Kuru/Arslan/Yılmaz,** p. 495.

9 Court of Cassation 19th Civil Chamber, Date 03.03.2005, No E. 2004/12356, K. 2005/2159 (www.kazanci.com)

10 **Altay**, p. 473.

11 **Altay**, p. 474.

nership (*société en commandite*) companies, as well as the share capital companies. Pursuant to Article 238/2 of the Turkish Commercial Code, a creditor may initiate a direct bankruptcy case against a general partnership and its partners if the creditor has initiated an enforcement proceeding with a prior court decision, and the debtor has not repaid the debt despite the payment order. This provision applies for the shareholders of imited partnerships, as well. For the share capital companies, over-indebtedness constitutes a reason for a direct bankruptcy case. The state of over-indebtedness is determined by the experts appointed by the court.

Procedure

In the presence of the above-stated grounds, the creditors may file a direct bankruptcy case before the commercial court of first instance where the debtor is situated, without any need to conduct a prior enforcement proceeding for the purposes of bankruptcy.

The bankruptcy case is subject to a simple procedure and fixed fee regardless of the amount of the receivable since the subject of the case is the bankruptcy of the debtor and not the payment of the debt. Nonetheless, the creditor shall pay advance costs to be determined by the court. The court will spend the advance for the liquidation transactions during and after the bankruptcy case.

The claimant shall specify the ground for the direct bankruptcy in its petition. As the grounds for direct bankruptcy are different from each other, amendment of this ground shall be subject to the prohibition of extension of the claims[12]. Claimant shall prove its receivable and ground for the direct bankruptcy. However, in some cases, definitive evidence is not required and presumptive evidence is deemed sufficient; any type of proof may be submitted to the court.

After receiving the petition, the commercial court announces the bankruptcy request in the trade registry gazette and in daily newspapers. In accordance with Article 178/2 of the EBL, other creditors may demand the refusal of the request before the court within fifteen days as of the date of announcement by claiming that the debtor has arranged

---

12 **Pekcanıtez/Atalay/ Özkan/ Özekes**, p. 654.

the bankruptcy in order to postpone the enforcement proceedings due against him and the payment of its debts. The court will examine whether bankruptcy is appropriate; if there is a need for a further examination, it will examine the merits of the case. Otherwise, the request will be rejected at the very beginning of the case.

With respect to the provisions applicable to the direct bankruptcy case upon the request of the creditor, Article 181 of the EBL makes reference to the provisions on the general bankruptcy procedures. However, the provisions on the last order for payment shall not apply, and the court declares the bankruptcy once the presence of the receivables and the ground for direct bankruptcy is proven.

Conclusion

The creditors are entitled to file an enforcement proceeding for the purposes of bankruptcy in order to request the bankruptcy of the debtor, as well as to file a direct bankruptcy case where the legislator considers that the creditor is under the risk of non-fulfillment, or that the debtor's financial situation is fragile. In this respect, the EBL provides certain general grounds for the direct bankruptcy case, and the Turkish Commercial Code specifies certain grounds for the partnerships. In the presence of these grounds, the creditor may file a lawsuit before the commercial court and prove its receivable and the ground allowing the initiation of the direct bankruptcy case.

An Overview of Tax Crimes and Penalties*

Att. Alper Uzun

Introduction

Tax crimes may be defined, in short, as economic crimes perpetrated against the "public treasury." Through the commission of a criminal act, the interest of the public treasury, in a wider sense, the interest of the general public is violated. The aim of the penalty is, therefore, the timely payment of taxes due. The principles pertaining to tax crimes and penalties are regulated under the Tax Procedure Code ("TPC"). Some of the crimes and penalties stipulated under the TPC solely concern the tax law, and tax offices can directly apply these penalties without further need of a judicial decision. The acts within this scope are evaluated as "financial crimes and penalties." On the other hand, other crimes and penalties regulated under the TPC are crimes according to criminal law, and are punishable by restricting freedom. These are determined as "criminal crimes and penalties"[1].

Types of Tax Crimes and Penalties

Financial Crimes and Penalties

As exemplified with loss of tax revenue and non-compliance, these types of tax crimes, which are punishable by monetary fines and detected and applied by tax offices, are crimes within the sense of "tax law." These crimes may be committed without deliberate intent.

Loss of tax revenue is defined in Art. 341 of the TPC as "*Loss of tax revenue means late or incomplete accrual of tax due to the non-performance or ill-performance of a taxpayer of a liable person of*

---

* ***Article of October 2015***

1 **Prof. Dr. Mualla Öncel - Prof. Dr. Ahmet Kumrulu - Prof. Dr. Nami Çağan**, Vergi Hukuku, Ankara 2015, p. 209 and following.

their obligations regarding taxation. Incomplete accrual of tax or unlawful return of tax because of misleading declarations of personal, marital status of familial situation, or other reasons shall also be deemed as loss of tax revenue."

Art. 344 defines a criminal act of the loss of tax revenue: "*Given that the tax revenue is lost due to the reasons listed under Art. 341, the taxpayer or the liable person shall be fined with the amount of tax revenue lost. If the loss of tax revenue occurs as a result of an act stipulated under Art. 359, a triple fine shall be applied, and to those who are complicit in the act, a single fine is applied.*"

Non-compliance is stipulated under Art. 351 et seq. of the TPC. Accordingly, "non-compliance" means the failure to comply with the material and procedural rules of tax laws. As a result of the loss of tax revenue, some tax is evaded; whereas, in the event of non-compliance, the tax is not yet lost. Instead, through their non-compliance with formal or procedural tax rules, taxpayers, or the liable persons are trying to create a feasible environment for such loss. Art. 352 et seq. of the TPC lists the relevant acts of non-compliance and their respective penalties. These crimes are categorized as 1st Tier, 2nd Tier, and are acts that garner a special penalty. The non-compliant acts are penalized in accordance with the tiers specified in the code and with the table provided therein. Given that the described act of non-compliance requires ex officio discretion, the relevant fines shall be doubled. 1st Tier non-compliances are as follows: Failure to make tax payments and fee declarations in a timely fashion; Failure to keep the books deemed necessary in accordance with the TPC; Incomplete, non-compliant, and unorderly keeping of the books to the extent that they renders a clean tax audit impossible; Non-acceptance of the invitation made by village councilmen and community council pursuant to Art. 245, by farmers; Non-compliance with the rules of bookkeeping set out in the TPC; Not declaring the commencement of work on time; Failure to certify one of the books that is required to be certified (Certification that is made 1 month after the legal period has expired shall be deemed non-existent); Failure to levy a tax, even though the levy period has passed; Declaring inheritance and transfer tax within the time periods specified under Art. 342/2.

2nd Tier non-compliances are as follows: Declaring the inheritance and transfer tax within the time periods specified under Art. 342/1 after the expiry of their declaration periods; Failure to provide the seeding and counting declarations in time, or wholly; Failure to make the necessary written declarations specified in tax laws (except the commencement of work declaration); Failure to obtain the tax card although the period within which to obtain the same has expired for 15 days; Certifying the books that are required to be certified within 1 month after the expiry of their certification period; Failure to comply with the rules regulating the form and content of tax declarations, notifications, documents and copies and their annexes; Non-existence or non-declaration of some documents and copies, provided that this does not disturb the correctness and clarity of the account or transactions.

"Special Non-Compliances" can be exemplified as the failure to give or receive receipts, non-compliance with other formal or procedural rules, non-compliances pertaining to Stamp Taxes, and the failure to furnish information and non-compliance with Art(s). 256, 257 and 257 bis.

Criminal Crimes and Penalties

As stated above, the TPC stipulates that some tax crimes shall be adjudicated by the criminal courts, and these shall be penalized by restricting of freedoms.

The first of these is the "Tax Evasion" stipulated under Art. 359 et seq. In tax evasion, taxpayers, liable persons, and those who are complicit in the act, engage in deceitful activities that result in the loss of tax revenue. These acts are listed in the same provision: To engage in accounting and financial fraud in books and records, distorting, hiding, destroying books and records; Forging documents and copies, and using forged documents and copies; and Unauthorized printing of documents and using such documents, each of which may incur a prison sentence of 18 months to 5 years. It is clearly stated that these acts shall be punishable with punishments restricting freedom, and "fault" is necessary for the commitment of these crimes. In other words, material and subjective elements of criminal law are taken into consideration in determining acts that constitute tax evasion in accordance with the TPC.

Another tax crime in a criminal sense is the "Violation of the Secrecy of Taxes." Pursuant to Art. 362 of the TPC, among persons who shall abide by the secrecy of taxes as listed under Art. 5 of TPC, and those who violate this provision, are punishable in accordance with Art. 239 of the Turkish Criminal Code ("TCC"). These persons are as follows: Public officers who conclude tax transactions and audits, the officials of tax courts, regional administrative courts and Council of State, members of the commissions formed in accordance with tax laws, as well as experts of tax transactions. These persons, as a result of the work they do, cannot declare or use for their own benefit, or for the benefit of third parties, the information they are privy to, pertaining to the identities, transactions and account statuses, works, businesses, wealth and professions of the taxpayers and persons in relation to taxpayers. This prohibition continues even though the said persons leave their work. As per Art. 239 of the TCC, a person who commits this crime shall be sentenced with imprisonment for one to three years, and with a monetary fine of up to five thousand days. A person who forces another to declare such information and documents by coercion and threat shall be punished with imprisonment for three to seven years.

The last paragraph of Art. 6 of the TPC regulates the crime of "Conducting Personal Work of Taxpayers." Accordingly, public officers who conclude tax transactions and audits, and the officials of tax courts, regional administrative courts and Council of State, shall be prohibited from conducting accounting, communications, and other personal work of taxpayers regarding the application of tax rules, even for free. Violation of this provision shall result in imprisonment for a period of 6 months to 2 years, as per Art. 257/1 of the TCC entitled "Professional Misconduct."

General Provisions Regarding Tax Crimes and Penalties

When considered from the perspective of "Complicity," as a general principle of criminal law, tax crimes and penalties, it is necessary to identify persons who commit acts of tax evasion as shall be punished as per the provisions of the TCC regarding complicity. Every person who jointly commits the act shall be liable as proprietor, and those people who influence these persons shall be punished with the same penalty.

Provided that those persons who are complicit in tax evasion do not financially benefit from the crime, the punishment shall be reduced by half as per the provisions regarding secondary complicity.

In criminal law, "Repetition" means a person charged with committing a crime commits another crime in a specified time period. As per Art. 339 of the TPC, this applies also to tax crimes, and the penalties are increased by half if the loss of tax revenue is repeated within 5 years, and by one-quarter if non-compliance is repeated within 2 years.

The principle of "Unification" in criminal law means the commitment of more than one crime through one act, and is also applicable to tax crimes and penalties.

Personal Data Protection under Turkish and European Legislation*

Att. Eda Uludere

Introduction and General Legislative Framework

Protection of personal data has become increasingly important in the second half of the 20th century onwards, and more strikingly so in the last decade. In European context, such protection is realized through a twofold system; namely, the Council of Europe ("CoE") protection of personal data scheme, and the protection enshrined in the European Union's ("EU") *acquis communautaire*. The CoE's system is comprised of Art. 8 of the European Convention on Human Rights ("ECHR") on one hand, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention No. 108") on the other. Although all 47 of the CoE Member States, including Turkey, are parties to the ECHR, Turkey is not a State Party to Convention No. 108 as of the date of this article, although Turkey signed it on 28.01.1981. As for the EU framework, adopted in 1985, Directive 95/46/EC ("Directive") is the primary piece of legislation that governs the protection of personal data[1]. However, a new regulation referred to as the General Data Protection Regulation ("GDPR") is on its way to include the impacts of technological innovations such as social media and cloud computing[2].

---

* ***Article of December 2015***

1 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, for the full text please see: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN (date of access: 30.12.2015).

2 The New European General Data Protection Regulation, http://www.mondaq.com/x/452870/Data+Protection+Privacy/The+New+European+General+Data+Protection+Regulation (date of access: 30.12.2015).

Personal data protection in the Turkish system finds its roots in the last paragraph of Art. 20 of the Constitution, which was added to the provision on 12.09.2010. This paragraph reads: "*Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law.*" The law foreseen by the law-maker in the last sentence has been on the Turkish legislative agenda for many years. Aligned very closely with the Directive, the fourth version of the Draft Law on the Protection of Personal Data ("Draft Law") was issued in 2014, and is expected to become law in 2016[3].

The protection regarding electronic commercial communication is enshrined in the Law on the Regulation of Electronic Commerce numbered 6563 ("E-Commerce Law"), published in the Official Gazette dated 05.11.2014 and numbered 29166 and entered into force on 01.05.2015. This article addresses the personal data protection that falls outside the scope of the E-Commerce Law and, where applicable and necessary, adopt a comparative approach with the corresponding EU legislation[4].

The Definition

The definition of personal data is provided in Art. 2(a) of the Directive as "… *any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.*" As is

---

[3] In a more recent note, the draft has been submitted to the Presidency of Turkish Grand National Assembly on December 2015.

[4] For an evaluation of personal data protection in e-commerce under Turkish law, please see: http://www.erdem-erdem.com/en/articles/provisions-introduced-by-the-law-on-the-regulation-of-electronic-commerce/ (date of access: 30.12.2015).

observed, the term is widely defined, ensuring a wider scope for protection.

Art. 3 of the Draft Law defines personal data almost identically, and the justification of this provision clarifies this definition by listing, *inter alia*, the name, surname, date and place of birth, information regarding a person's physical appearance, his/her familial, economic, social and psychological properties, his/her social security number, curriculum vitae, his/her image and sound recordings, and his/her genetic data, IP address, e-mail address, hobbies, preferences, and memberships. The medical data and religious and political beliefs of a person can also be listed among those above-mentioned.

The Directive introduces a sub-category of personal data under Art. 8 which is adapted into the Draft Law as Art. 6. Accordingly, ethnicity, origin, political, religious and philosophic views, union memberships, information on health and sexual life are deemed as special categories of personal data. The distinction is fortified by the fact that such data are prohibited from being processed in both the Directive and the Draft Law. Exceptions to this rule are indicated in their respective provisions. Convention No. 108 also lists data pertaining to criminal convictions as personal[5].

The Scope of Protection

Although Turkey has yet to enact a law on the protection of personal data as foreseen by its Constitution, with the exception of E-Commerce Law, the current protection relies on the Turkish Constitution, Turkish Civil Code numbered 4721 and Turkish Criminal Code numbered 5237. Art. 23 et seq. of the Turkish Civil Code regulates the protection of the personal rights and the lawsuits to be filed to this end. Moreover, Turkish Criminal Code Art. 135 criminalizes the unlawful recording of any personal data, Art. 136 the illicit sharing or obtainment of such data, and Art. 138, the failure to dispose of such data.

The protective measures included in the Draft Law and the Directive are very similar. Firstly, Draft Law Art. 4 sets forth some

---

5 Handbook on European Data Protection Law, European Union Agency for Fundamental Rights, Council of Europe, 2014, p. 44.

General Principles with regard to personal data processing, among which are lawfulness and compliance with the principle of good faith; correctness and actuality; being specific, explicit and legitimate in purpose, and connectedness with the purpose for which the data is being processed, being limited and proportional while doing so; and finally, retaining the data no longer than necessary. In comparison, Art. 5 of the Directive stipulates very similar principles for data protection, except that such principles are explained somewhat more in detail.

In accordance with Art. 6 of the Draft Law, the special kind of personal data, in other words, sensitive data, shall only be processed under exceptional circumstances. In this vein, Art. 7 of the Draft Law presupposes that although processed lawfully, provided that the reasons which led to the processing of any given data has disappeared, such data shall be erased, destroyed or made to be anonymous, either *ex officio*, or upon the data subject's request. Furthermore, Art. 8 introduces limitations as to the transfer of personal data, and makes it conditional to the fulfillment of certain criteria also set forth by the same provision. Art. 10 fills an important gap in the personal data protection scheme by regulating the rights of the data subject, including the right to request information on whether his/her personal data exists, has been subject to processing, transferred, or correction requested of any personal data, etc. In addition, the same article also bestows the right to claim damages arising from the unlawful processing of personal data.

Part VI of the Draft Law provides for the establishment of a Personal Data Protection Board ("Board") that will oversee the implementation of the Draft Law. Moreover, a registry of data responsibilities shall be established under Art. 15 of the Draft Law, to which the parties who are responsible for processing any personal data shall be registered. The personal data protection is supervised by the European Data Protection Supervisor ("EDPS"), which is an independent supervisory authority at the EU level[6].

Art. 16 of the Draft Law makes reference to the provisions of the Turkish Criminal Code; whereas, Art. 17 sets forth certain misde-

6 For more information on EDPS, please see: https://secure.edps.europa.eu/EDPSWEB/edps/EDPS (date of access: 30.12.2015).

meanors and monetary sanctions pertaining thereto. Art. 24 of the Directive provides for Member States to lay down the sanctions to be imposed in the event of an infringement of the Directive.

Conclusion

Personal data protection is at the verge of being enhanced in both Turkish and EU systems. Although the EU provides greater protection via adapting its current legislation to another legal instrument (namely, a regulation) and introducing provisions to ensure personal data protection in recent forms of communication and data storage, Turkey is historically far from catching up to EU standards, as the Draft Law has not yet been enacted. When enacted, influenced very closely by the Directive, the Turkish personal data protection system will very much resemble its EU counterpart.

LEGAL DEVELOPMENTS

Important International Agreements

- The Resolution of the Council of Ministers dated 12.12.2014, regarding the ratification of the "Agreement Concerning the Participation of Republic of Turkey to the Union's 'Creative Europe' Program for Cultural and Creative Sectors and the Cooperation of European Union and Republic of Turkey within the scope of the Media Subprogram of 'Creative Europe," signed by and between the Government of Republic of Turkey and the European Union on 31.12.2014, was published in the Official Gazette dated 26.12.2014 and numbered 29217.
- The Resolution of the Council of Ministers dated 01.12.2014, regarding the ratification of the "Protocol of the International Road Transport Joint Committee Meeting between Turkey and Austria" that was signed in Vienna on 21.05.2014, was published in the Reiterated Official Gazette dated 30.12.2014 and numbered 29221.
- The Law No. 6587 on the Approval of the Ratification of the Convention on Granting Associate Membership Status to Turkey in the European Organization for Nuclear Research (CERN) concluded by and between Republic of Turkey and CERN entered into force by publication in the Official Gazette dated 03.02.2015 and numbered 29256.
- The Council of Ministers Resolution on the Ratification of the Social Security Agreement between the Republic of Turkey and the Republic of Korea was published in the Official Gazette dated 06.02.2015 and numbered 29259.
- The Council of Ministers Resolution on the Ratification of the Convention on Safety and Health in Mining Workplaces numbered 176 that was approved by Law numbered 6580 and dated 04.12.2014 was published in the Official Gazette dated 09.02.2015 and numbered 29262.

- The Council of Ministers Resolution on the Ratification of the Appendix No. 5 to the Financing Agreement with relation to the National Program of Turkey, 2008 within the framework of Pre Accession Assistance – Transition Assistance and Institutional Structuring Component between the Republic of Turkey and the European Commission was published in the Official Gazette dated 11.02.2015 and numbered 29264.
- The Council of Ministers Resolution dated 15.12.2014 and numbered 2014/7086 on the Ratification of the Protocol concerning the Turkey – Azerbaijan Land Transportation Joint Commission Meeting was published in the Official Gazette dated 12.02.2015 and numbered 29265.
- The Law on the Approval of the Ratification of the Free Trade Agreement between the Republic of Turkey and the Government of Malaysia entered into force through publication in the Official Gazette dated 20.02.2015 and numbered 29273.
- The Law on Approval of the "Ratification of the Memorandum of Understanding Concerning Development of the Electricity Interconnections of the Turkey-Georgia between the Turkish Republic Ministry of Energy and Natural Resources and Georgia Ministry of Energy" entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.
- The Law on Approval of the "Ratification of the Memorandum of Understanding Concerning Cooperation on Energy between the Turkish Republic Ministry of Energy and Natural Resources and the Greek Republic Ministry of Environment, Energy and Climate Change" entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.
- The Law on Approval of the Adherence to the Protocol Amending Article 1 (a), Article 14 (1) and Article 14 (3) (b) of the European Agreement Concerning the International Carriage of Dangerous Goods by Road Dated 30 September 1957 (ADR) entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.

- The Law on Approval of the Ratification of the Agreement on the Organization of the International Railway-Ferry Line between the Harbors Having a Railway Connection of the Turkish Republic and the Republic of Bulgaria entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.
- The Law on Approval of the Ratification of the Agreement on Cooperation and Aid on Tariff between the Government of the Turkish Republic and the Republic of India entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.
- The Law on Approval of the Ratification of Schedules of Concession Annexed to the Preferential Trade Agreement Among D-8 Member States entered into force through publication in the Official Gazette dated 26.02.2015 and numbered 29279.
- The Law on the Ratification of Cooperation and Reciprocal Aid Agreement pertaining to Custom Matters between the Government of the Republic of Turkey and the Government of the Kingdom of Saudi Arabia that was signed in Istanbul on 15.05.2012 entered into force through publication in the Official Gazette dated 28.03.2015 and numbered 29309.
- The Protocol on the Enhancement of Registered Mail, On-Line Transfer and Collection Services between the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus that was signed in Lefkoşa (Nicosia) on 27.04.2007 and ratified by the Law dated 03.12.2014 and No. 6578 was published in the Official Gazette dated 06.04.2015 and numbered 29318.
- The Law on the Endorsement of Ratification of the Agreement pertaining to Third Party Cost Sharing between the Government of the Republic of Turkey and the United Nations Development Program entered into force through publication in the Official Gazette dated 11.04.2015 and numbered 29323.

- The Law on Approval of the Ratification of the Free Trade Agreement between the Republic of Turkey and the Republic of Kosovo entered into force through publication in the Official Gazette dated 22.04.2015 and numbered 29334.
- The Council of Ministers Resolution dated 08.04.2015 and numbered 2015/7533 on the Ratification of the Convention on the Physical Protection of Nuclear Materials through Declaration was published in the Official Gazette dated 24.04.2015 and numbered 29336.
- The Council of Ministers Resolution dated 23.03.2015 and numbered 2015/7459 on the Ratification of the Diplomatic Notes and Protocol on the Cooperation in the Field of Nuclear Power Engineering, signed between the Republic of Turkey, Ministry of Energy and Natural Resources, and the Russian Federation Ministry of Energy was published in the Official Gazette dated 26.04.2015 and numbered 29338.
- The Law on the Approval of the Ratification of the Framework Agreement regarding the Regulations for the Implementation of the Financial Aid to the Republic of Turkey by the European Union within the Pre-Accession Assistance between the Republic of Turkey and the European Commission (IPA II) entered into force through publication in the Official Gazette dated 28.04.2015 and numbered 29340.
- The Law on the Approval of the Ratification of the Cooperation Agreement between the Republic of Turkey and the Republic of Bulgaria in the field of Emergency Situations entered into force through publication in the Official Gazette dated 28.04.2015 and numbered 29340.
- The Council of Ministers Resolution on the Ratification of Convention on Granting Associate Membership Status to Turkey in the European Organization for Nuclear Research (“CERN”) and the Letter Bearing our Statement thereon, concluded between the Republic of Turkey and CERN, was published in the Official Gazette dated 28.04.2015 and numbered 29340.

- The Council of Ministers Resolution on the Ratification of the Amendment of Various Provisions of the Financial Statements Annexed to Development of Human Resources Operational Program in Accordance with the Fund Loss in 2013 within the scope of the Pre-Accession Assistance ("IPA") Period I – Component IV and Financing Agreement, concluded through Exchange of Letters between the Republic of Turkey and the European Commission, was published in the Official Gazette dated 30.04.2015 and numbered 29342.
- The Council of Ministers Resolution on the Ratification of the Cooperation and Mutual Assistance Agreement in the Field of Customs between the Republic of Turkey and the Republic of Chile was published in the Official Gazette dated 08.05.2015 and numbered 29349.
- The Resolution of the Council of Ministers dated 20.04.2015 and numbered 2015/7596 regarding the ratification of the Agreement on the Participation of Turkey in the European Union Program for Employment and Social Innovation between the Republic of Turkey and the European Union that was signed in Brussels on 02.02.2015, was published in the Official Gazette dated 21.05.2015 and numbered 29362.
- The Resolution of the Council of Ministers dated 06.05.2015 and numbered 2015/7697 regarding the ratification of Memorandum of Understanding on Co-operation for Development of Nuclear Power Plants and the Nuclear Industry in the Republic of Turkey between the Government of the Republic of Turkey and the Government of Japan that was approved by the Law dated 01.04.2015 and No. 6642, was published in the Official Gazette dated 23.05.2015 and numbered 29364.
- The Resolution of the Council of Ministers dated 08.04.2015 and numbered 2015/7543 regarding the ratification of the Framework Agreement on the Cooperation for the Transportation of Natural Gas from Turkmenistan to the Republic of Turkey between the Government of the Turkish Republic and the Government of Turkmenistan that was signed in Ashkhabad on 30.05.2013, and

approved by the Law dated 10.02.2015 and No. 6624, was published in the Official Gazette dated 31.05.2015 and numbered 29372.

- The Resolution of the Council of Ministers dated 08.04.2015 and numbered 2015/7552 regarding the ratification of Memorandum of Understanding on Cooperation in the Field of Energy between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Environment, Energy, and Climate Change of the Hellenic Republic that was signed in Athens on 04.05.2010 and approved by the Law dated 10.02.2015 and No. 6613, was published in the Official Gazette dated 31.05.2015 and numbered 29372.
- The Resolution of the Council of Ministers dated 08.04.2015 and numbered 2015/7549 regarding the ratification of the Memorandum of Understanding on Developing the Turkey-Georgia Electricity Interconnections between the Ministry of Energy and Natural Resources of the Republic of Turkey and the Ministry of Energy of Georgia that was signed in Ankara on 29.07.2009 and approved by the Law dated 10.02.2015 and No. 6612, was published in the Official Gazette dated 02.06.2015 and numbered 29374.
- The Resolution of the Council of Ministers dated 27.04.2015 and numbered 2015/7656 regarding the ratification of the Memorandum of Understanding on Promoting Trade, Investments and Cooperation in the Field of Environmental Technology between the Government of the Turkish Republic and the Government of the Kingdom of Sweden that was signed in Stockholm on 11.03.2013 and approved by the Law dated 10.02.2015 and No. 6604, was published in the Official Gazette dated 05.06.2015 and numbered 29377.
- The Resolution of the Council of Ministers dated 20.04.2015 and numbered 2015/7628 regarding the ratification of the Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes Levied on Income between the Government of the Turkish Republic and the Government of the United Mexican States, and of its

annexed Protocol that was signed in Ankara on 17.12.2013 and approved by the Law dated 04.02.2015 and No. 6594, was published in the Official Gazette dated 06.06.2015 and numbered 29378.

- The Resolution of the Council of Ministers, regarding the ratification of Cooperation and Mutual Aid Agreement pertaining to Custom Matters between the Government of the Turkish Republic and the Government of the Kingdom of Saudi Arabia that was signed in Istanbul on 15.05.2012, was published in the Official Gazette dated 11.07.2015, and numbered 29413.
- The Resolution of the Council of Ministers, regarding the ratification of Agreement on the Reciprocal Incentive and Protection of the Investments between the Government of the Turkish Republic and the Government of the Republic of Kosovo that was signed in Ankara on 30.05.2012, was published in the Official Gazette dated 12.07.2015, and numbered 29414.
- The Resolution of the Council of Ministers dated 22.07.2015 and numbered 2015/7929 regarding the Ratification of the Cooperation and Mutual Assistance Agreement concerning Customs Matters between the Government of the Republic of Turkey and the Government of the Republic of India was published in the Official Gazette dated 12.08.2015 and numbered 29443.
- The Resolution of the Council of Ministers dated 22.07.2015 and numbered 2015/7946 regarding the Ratification of the Memorandum of Understanding concerning the Cooperation in the Field of Environment between the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus was published in the Official Gazette dated 12.08.2015 and numbered 29443.
- The Resolution of the Council of Ministers numbered 2015/8157 on the Ratification of the Grant Agreement Concluded between The Republic of Turkey and International Bank for Reconstruction and Development Acting as the European Union Instrument for Pre-accession Assistance Fund

Manager was published in the Official Gazette dated 12.11.2015 and numbered 29530.

- The Resolution of the Council of Ministers numbered 2015/8181 on the Ratification of the Accession Certificate along with the Declaration regarding joining of the United Kingdom of Great Britain and Northern Ireland to the Memorandum of Understanding regarding the Establishment, Management and Functioning of the NATO Energy Security Center of Excellence was published in the Official Gazette dated 14.11.2015 and numbered 29532.
- The Resolution of the Council of Ministers numbered 2015/8236 on the Ratification of the Memorandum of Understanding regarding Environment concluded between the Republic of Turkey and the Islamic Republic of Iran was published in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Resolution of the Council of Ministers numbered 2015/8243 on the Ratification of the Grant Agreement concluded between the Republic of Turkey and the Republic of Bulgaria was published in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Resolution of the Council of Ministers numbered 2015/8246 on the Entry into Force of the Sectoral Agreement concluded between the Republic of Turkey and European Commission Setting Forth the Provisions regarding the Management and Implementation of the Union Financial Aid to be Provided within the Scope of European Union Instrument for Pre-accession Assistance Rural Development was published in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Resolution of the Council of Ministers dated 26.10.2015 and numbered 2015/8206 on the Ratification of Addendum No. 1 to the Financing Agreement between the Government of the Republic of Turkey and the European Commission Concerning the National Programme for Turkey under the Instrument for Pre-accession Assistance – Transition Assistance and Institution Building Component for the Year 2012 was published in the Official Gazette dated 22.11.2015 and numbered 29540.

- The Resolution of Council of Ministers dated 09.11.2015 and numbered 2015/8211 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Environment" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Regional Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 22.11.2015 and numbered 29540.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8301 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Commission Related to the Annual Action Plan for Turkey and the Annexed Note Verbale was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8303 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Union, Represented by the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Regional Competitiveness" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Regional Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8304 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Union, Represented by the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Transport" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Regional Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 19.12.2015 and numbered 29567.

- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8311 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Union, Represented by the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Human Development" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Human Resources Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 20.12.2015 and numbered 29568.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8313 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Union, Represented by the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Regional Competitiveness" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Regional Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 20.12.2015 and numbered 29568.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8314 on the Ratification of the Financing Agreement between the Government of the Republic of Turkey and The European Union, Represented by the European Commission, Amending the Financing Agreement Concerning the Multi-Annual Operational Programme "Environment" for Community Assistance from the Instrument for Pre-Accession Assistance under the "Regional Development" Component in Turkey and the Annexed Note Verbale was published in the Official Gazette dated 20.12.2015 and numbered 29568.

Important Council of Ministers Resolutions

- The Resolution of the Council of Ministers dated 24.11.2014, on the Amendment to the Principles of the Tenders Lodged pursuant to Article 3 (b) of Public Tender Act No. 4734, was published in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Resolution of the Council of Ministers dated 31.12.2014 and numbered 2014/7127, on the Determination of the Private Consumption Tax Rates and the Fixed and Minimum Tax Amounts, Applied to Certain Goods, was published in the Official Gazette dated 01.01.2015 and numbered 29223.
- The Council of Ministers Resolution dated 26.01.2015 and numbered 2015/7205 on the Amendment of the Resolution on the Determination of the Value Added Tax Ratio Applied to Goods and Services was published in the Official Gazette dated 31.01.2015 and numbered 29253.
- The Council of Ministers Resolution dated 29.12.2014 and numbered 2014/7149 on the Amendment to the Resolution on the Determination of the Companies Subject to Independent Audit was published in the Official Gazette dated 01.02.2015 and numbered 29254.
- The Council of Ministers Resolution dated 26.01.2015 and numbered 2015/7249 on the Mandatory Personal Accident Insurance for Mining Employees was published in the Official Gazette dated 06.02.2015 and numbered 29259.
- The Council of Ministers Resolution dated 26.01.2015 and numbered 2015/7542 on the Amendment to the Official Statistics Program (2012-2016) was published in the Official Gazette dated 17.02.2015 and numbered 29270.
- The Resolution of the Council of Ministers dated 15.12.2014 and numbered 2014/7273 on the execution of the "Resolution on Amendment of the Resolution on Governmental Subventions for the Investments" was published in the Official Gazette dated 05.03.2015 and numbered 29286.

- The Resolution of the Council of Ministers dated 25.02.2015 and numbered 2015/7331 on the execution of the "Principles and Procedures Regarding Treasury Support Provided to Credit Guarantee Institutions" was published in the Official Gazette dated 05.03.2015 and numbered 29286.
- The Resolution of the Council of Ministers on Extension of the Specific Periods for Applications and Initial Installment Periods Regulated in Social Security and General Health Insurance Law No. 5510 was published in the Official Gazette dated 31.03.2015 and numbered 29312.
- The Council of Ministers Resolution dated 06.03.2015 and numbered 2015/7431 on the Amendment of the Resolution concerning the Undocumented Export Credits, Tax, Duty and Charge Exemptions was published in the Official Gazette dated 24.04.2015 and numbered 29336.
- The Council of Ministers Resolution dated 23.03.2015 and numbered 2015/7467 on the Amendment of the Resolution concerning the Subsidies provided to the Producers that Prefer the Environmental Agricultural Lands Program was published in the Official Gazette dated 24.04.2015 and numbered 29336.
- The Council of Ministers Resolution dated 02.03.2015 and numbered 2015/7358 on the Application of Tariff Quotas in Importations was published in the Official Gazette dated 05.05.2015 and numbered 29346.
- The Annexed Resolution of the Council of Ministers dated 06.05.2015 and numbered 2015/7699 to the Resolution on the Import Regime was published in the Official Gazette dated 23.05.2015 and numbered 29364.
- The Resolution of the Council of Ministers dated 08.05.2015 and numbered 2015/7703 on the Payment of the Price Difference for the Cost Increase in Respect of the Underground Mining Works in the Mining Lease Agreements that are in force within the framework of Provisional Article 29 of Mining Law No. 3213, was published in the Official Gazette dated 23.05.2015 and numbered 29364.

- The Resolution of the Council of Ministers dated 20.04.2015 and numbered 2015/7606 regarding the Amendment on the Annex to the Resolution on the Import Regime, was published in the Official Gazette dated 30.05.2015 and numbered 29371.
- The Resolution of the Council of Ministers dated 08.04.2014 and numbered 2015/7582 on the Amendment to the Resolution on Hazardous Materials Liability Insurance, was published in the Official Gazette dated 01.06.2015 and numbered 29373.
- The Annexed Resolution of the Council of Ministers dated 18.05.2015 and numbered 2015/7712 to the Resolution on the Import Regime, was published in the Official Gazette dated 07.06.2015 and numbered 29379.
- The Annexed Resolution of the Council of Ministers dated 18.05.2015 and numbered 2015/7713 to the Resolution on the Import Regime, was published in the Official Gazette dated 07.06.2015 and numbered 29379.
- The Resolution of the Council of Ministers dated 14.04.2015 and numbered 2015/7603 on the Amendment to the Resolution on the Protection of the Value of the Turkish Currency No. 32, was published in the Official Gazette dated 11.06.2015 and numbered 29383.
- The Resolution of the Council of Ministers on the Amendment to the Resolution regarding Personal Accident Compulsory Insurance of the Miners was published in the Official Gazette dated 24.06.2015, and numbered 29396.
- The Resolution of the Council of Ministers dated 13.05.2015 and numbered 2015/7715 on the Amendment to the Resolution Pertaining to the Principles and Procedures on Treasury Support to be provided to Loan Guarantee Institutions was published in the Official Gazette dated 24.06.2015, and numbered 29396.
- The Resolution of the Council of Ministers on the Amendment to the Resolution pertaining to the payment of the price differences that have occurred due to the increase of costs of underground mining works, in continuing mining lease agreements

within the scope of provisional Article 29 of the Mining Law No. 3213 was published in the Official Gazette dated 09.07.2015, and numbered 29411.

- The Resolution of the Council of Ministers dated 15.06.2015 and numbered 2015/7755 on the Entry into Force of the Principles regarding the Tenders to be Held within the Scope of Art. 3 Subparagraph (b) of Public Tender Law No. 4734, enacted by the Revenue Administration was published in the Official Gazette dated 24.07.2015 and numbered 29424.
- The Resolution of the Council of Ministers dated 06.07.2015 and numbered 2015/7915 on the Entry into Force of the Principles on the Amendment to the Principles regarding the Tenders to be Held within the Scope of Art. 3 Subparagraph (b) of Public Tender Law No. 4734, enacted by the Ministry of National Defense was published in the Official Gazette dated 24.07.2015 and numbered 29424.
- The Resolution of the Council of Ministers dated 06.07.2015 and numbered 2015/7917 on the Entry into Force of the Resolution on the Amendment to the Resolution on the Implementation of Certain Provisions of Customs Law No. 4458 was published in the Official Gazette dated 25.07.2015 and numbered 29425.
- The Resolution of the Council of Ministers dated 13.07.2015 and numbered 2015/7966 on the Entry into Force of the Resolution on the Underground Coalmines with a Possible Explosive Environment Due to Firedamp Gas and/or Inflammable Gases or Dusts, and the Equipment and Protective Systems Found in the Aboveground Facilities of These Types of Mines was published in the Official Gazette dated 04.08.2015 and numbered 29435.
- The Resolution of the Council of Ministers dated 10.08.2015 and numbered 2015/7997 on the Amendment to the Resolution regarding the Implementation of the Tariff Quotas in the Importation of Certain Agricultural Products Originated From the European Union was published in the Official Gazette dated 14.08.2015 and numbered 29445.

- The Resolution of the Council of Ministers dated 03.08.2015 and numbered 2015/7998 on the Amendment to the State Aids for Export was published in the Official Gazette dated 14.08.2015 and numbered 29445.
- The Resolution of the Council of Ministers Annex to Resolution on Import Regime dated 19.08.2015 was published in the Official Gazette dated 26.08.2015 and numbered 29457.
- The Resolution of the Council of Ministers dated 20.08.2015 and on the Execution of the Resolution on the Amendment to the Resolution on the State Subventions for the Investments was published in the Official Gazette dated 27.08.2015 and numbered 29458.
- The Resolution of the Council of Ministers numbered 2015/8113 on Amendment to the Resolution Pertaining to Implementation of Certain Provisions of the Customs Law No. 4458 entered into force through publication in the Official Gazette dated 13.10.2015 and numbered 29501.
- The Resolution of the Council of Ministers dated 12.10.2015 and numbered 2015/8142 regarding the Principles for the Tenders to be Held by the Ministry of Development within the Scope of Public Tender Law numbered 4734 Art. 3 subparagraph (f) was published in the Official Gazette dated 05.11.2015 and numbered 29523.
- The Resolution of the Council of Ministers dated 12.10.2015 and numbered 2015/8157 regarding the Implementation of Protection Measures in Importation was published in the Official Gazette dated 12.11.2015 and numbered 29530.
- The Resolution of the Council of Ministers dated 09.11.2015 and numbered 2015/8216 on the Amendment to the Resolution regarding the State Aid for Investments was published in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Resolution of Council of Ministers dated 14.12.2015 and numbered 2015/8310 on the Amendment to the Resolution Pertaining to the Principles and Procedures on the Treasury Support to be Provided to the Credit Guarantee Corporations

was published in the Official Gazette dated 18.12.2015 and numbered 29566.

- The Resolution of Council of Ministers dated 07.12.2015 and numbered 2015/8284 Pertaining to the Determination of Technology Development Areas was published in the Official Gazette dated 19.12.2015 and numbered 29567.

Important Changes and Developments in Laws

- The Law on the Regulation of Retail Trade No. 6585 entered into force through publication in the Official Gazette dated 29.02.2015 and numbered 29251.
- The Law on the Amendment to the Mining Law and Other Certain Laws entered into force through publication in the Official Gazette dated 18.02.2015 and numbered 29271.
- The Law on the Amendment to the Specific Laws and Decree-Laws was published in the Official Gazette dated 07.04.2015 and numbered 29319. Different dates of entry into force have been determined for the articles of this Law.
- The Law on the Amendment to the Specific Laws and Decree-Laws was published in the Official Gazette dated 15.04.2015 and numbered 29327. Different dates of entry into force have been determined for the articles of the Law.
- The Law on the Amendment to the Work Health and Safety Law and Various Other Laws and Decree-Laws was published in the Official Gazette dated 23.04.2015 and numbered 29335. Article 8 of this Law will enter into force in the beginning of the month following its publication, whereas the rest of the provisions entered into force through publication.

Important Changes and Developments in Regulations

- The Regulation on the Amendment to the Regulation Concerning Control of Industry Related Air Pollution was published in the Official Gazette dated 20.12.2014 and numbered 29211. Different dates of entry into force have been assigned for the articles of this Regulation.
- The Regulation on the Amendment to the Regulation on the Procedures and Principles Implemented in the Determination of the Tariffs of Waste Water, Infrastructure and Domestic Waste Disposal Plants entered into force through publication in the Official Gazette dated 23.12.2014 and numbered 29214.
- The Regulation on the Amendment to the Regulation on Angel Investment Capital entered into force through publication in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Regulation on the Procedures and Principles Regarding External Financing within the Scope of Law No. 4749 entered into force through publication in the Official Gazette dated 25.12.2014 and numbered 29215.
- The Regulation on the Amendment to the Regulation on Industrial Zones entered into force through publication in the Official Gazette dated 27.12.2014 and numbered 29218.
- The Regulation on the Amendment to the Organized Industrial Zone Implementation Regulation entered into force through publication in the Official Gazette dated 27.12.2014 and numbered 29218.
- The Regulation on the Amendment to the Electricity Market Import and Export Regulation entered into force through publication in the Official Gazette dated 28.12.2014 and numbered 29219.
- The Regulation on the Amendment to the Regulation Regarding Authorizations within the Electronic Communications Sector entered into force through publication in the Official Gazette dated 30.12.2014 and numbered 29221.

- The Regulation on the Amendment to the Insurance Agencies Regulation entered into force through publication in the Reiterated Official Gazette dated 30.12.2014 and numbered 29221.
- The Regulation on the Amendment to the Central Bank of the Republic of Turkey Auditing Regulation was published in the Reiterated Official Gazette dated 30.12.2014 and numbered 29221. This Regulation entered into force on 01.01.2015.
- The Regulation on the Procedures and Principles Regarding the Implementation of Risk Accounts entered into force through publication in the Official Gazette dated 31.12.2014 and numbered 29222.
- The Regulation on the Amendment to the Regulation Pertaining to the Determination and Registration of the Immovable Cultural Assets that are Required to be Protected entered into force through publication in the Official Gazette dated 09.01.2015 and numbered 29231.
- The Regulation on Commercial Advertisement and Unjust Commercial Practice was published in the Official Gazette dated 10.01.2015 and numbered 29232. Different dates of entry into force have been determined for the articles of this Regulation.
- The Regulation on Agreements Concluded Outside of the Workplace was published in the Official Gazette dated 14.01.2015 and numbered 29236. This Regulation will enter into force three months after its publication date.
- The Regulation on the Installment Sale Agreements entered into force though publication in the Official Gazette dated 14.01.2015 and numbered 29236.
- The Regulation on the Amendment to the Regulation on the Implementation of Statutory Decree No. 556 on the Protection of Trademarks entered into force through publication in the Official Gazette dated 18.01.2015 and numbered 29240.

- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Principles under the Statutory Decree on the Protection of Industrial Designs entered into force through publication in the Official Gazette dated 18.01.2015 and numbered 29240.
- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Principles under Statutory Decree on the Protection of Patent Rights entered into force through publication in the Official Gazette dated 18.01.2015 and numbered 29240.
- The Regulation on the Amendment to the Regulation on Foundation Cultural Properties Tender entered into force through publication in the Official Gazette dated 21.01.2015 and numbered 29243.
- The Regulation on the Amendment to the Implementation Regulation of the Law on Foreigners' Work Permits entered into force through publication in the Official Gazette dated 22.01.2015 and numbered 29244.
- The Regulation concerning the Payment of Price Difference arising from the Collective Labor Agreement in Service Procurements related to Personnel Employment entered into force effective as of 11.09.2014 through publication in the Official Gazette dated 22.01.2015 and numbered 29244.
- The Subscription Agreements Regulation was published in the Official Gazette dated 24.01.2015 and numbered 29246. This Regulation will enter into force 3 months after its publication.
- The Regulation on the Amendment to the Regulation on the Working Procedures and Principles of Internal Auditors entered into force by publication in the Official Gazette dated 30.01.2015 and numbered 29252.
- The Regulation on the Distance Contracts on Financial Services was published in the Official Gazette dated 31.02.2015 and numbered 29253. The Regulation entered into force 3 months after its publication.

- The Regulation on the Amendment of the Customs Regulation entered into force through publication in the Official Gazette dated 31.01.2015 and numbered 29253.
- The Regulation on the Procedures and Principles to be Applied in Factoring Transactions entered into force through publication in the Official Gazette dated 04.02.2015 and numbered 29260, effective as of 01.01.2015.
- The Regulation on the Amendment to the Regulation on the Procedures and Principles concerning the Determination of the Features of Credits and Other Receivables by Banks and the Provisions to be Made was published in the Official Gazette dated 14.02.2015 and numbered 29267. Art. 3 of this Regulation entered into force effective as of 01.01.2015, other provisions entered into force through publication.
- The Regulation on the Procedures and Principles of Industrial Cooperation Program on the Goods and Service Procurements made in accordance with Art. 3 (u) of the Public Tender Law No. 4734 entered into force trough publication in the Official Gazette dated 15.02.2015 and numbered 29268.
- The Regulation on the Amendment to the Customs Regulation entered into force through publication in the Official Gazette dated 18.02.2015 and numbered 29271.
- The Regulation on Amendment to the Regulation on Mandatory Insurance Surveillance entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Regulation on Support of Research and Development Projects entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Regulation on Amendment to the Regulation on the Financial Situation of the Insurance, Reinsurance and Retirement Companies entered into force through publication in the Official Gazette dated 28.02.2015 and numbered 29281.
- The Regulation on Amendment to the Regulation on the Principals and Procedures of the Determination, Notification

and Registration of Incorrect Insurance Practices and Their Prevention entered into force through publication in the Official Gazette dated 28.02.2015 and numbered 29281.

- The Regulation on Amendment to the Regulation on the Websites to be Opened by the Corporations entered into force through publication in the Official Gazette dated 28.02.2015 and numbered 29281.
- The Regulation on the Amendment to the Regulation (SHY – YDK) on Authorized Civil Auditing Entities Regarding Civil Aviation Entities entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Regulation on Amendment to the Regulation of Marine Transport of Dangerous Goods was published in the Official Gazette dated 03.03.2015 and numbered 29284. Various provisions of the Regulation will enter into force on different dates.
- The Regulation on Amendment to the Regulation on Security Accounts entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288.
- The Regulation on Amendment to the Regulation on Insurance Information and Surveillance Center entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288.
- The Regulation on Amendment to the Regulations on Duties, Competences and Liabilities of the Technical Auditors of the Civil Aviation General Directorate and Working Principals and Procedures entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288 to be valid as of 06.03.2015.
- The Regulation on Amendment to the Regulation on Labor Health and Security in Mines entered into force through publication in the Official Gazette dated 10.03.2015 and numbered 29291.
- The Regulation on Amendment to the Regulation on Measurement and Evaluation of the Capital Sufficiency of

Banks entered into force through publication in the Official Gazette dated 18.03.2015 and numbered 29299.

- The Disciplinary Regulation of Turkish Capital Markets Association entered into force through publication in the Official Gazette dated 27.03.2015 and numbered 29308.
- The Regulation on the Principles and Procedures related to Electronic Notification Systems of the Head of Financial Crimes Investigation Board entered into force through publication in the Official Gazette dated 30.03.2015 and numbered 29311.
- The Regulation on the Amendment to the Group Life Insurances Regulation was published in the Official Gazette dated 01.04.2015 and numbered 29313. This Regulation enters into force after six months as of its publication.
- The Annuity Insurances Regulation was published in the Official Gazette dated 01.04.2015 and numbered 29313. This Regulation enters into force six months as of its publication date.
- The Regulation on the Independent Audit of Banks entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on the Amendment to the Regulation on Bank Cards and Credit Cards entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on the Amendment to the Regulation on the Principles of Authorization and Activities of Rating Agencies entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on Amendment to the Regulation on Financial Holding Companies entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on the Amendment to the Regulation on Incorporation and Activity Principles for Financial Leasing, Factoring and Financing Companies entered into force through

publication in the Official Gazette dated 02.04.2015 and numbered 29314.

- The Regulation on the Amendment to the Regulation on Payment Services and Issuance of Electronic Fund and Payment Institutions and Electronic Money Institutions entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on the Amendment to the Regulation on Incorporation and Activity Principles of Asset Management Companies entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation of Waste Management was published in the Official Gazette dated 02.04.2015 and numbered 29314. Different dates of entry into force have been determined for the articles of the Regulation.
- The Regulation on the Amendment to the Regulation on Highway Transportation of Hazardous Substances entered into force through publication in the Official Gazette dated 02.04.2015 and numbered 29314.
- The Regulation on the Amendment to the Regulation of Electronic Product Deeds entered into force through publication in the Official Gazette dated 04.04.2015 and numbered 29316.
- The Regulation on the Amendment to the Reconciliation Regulation entered into force through publication in the Official Gazette dated 04.04.2015 and numbered 29316.
- The Regulation on the Amendment to the Regulation on Surface Wastewater Quality Management entered into force through publication in the Official Gazette dated 15.04.2015 and numbered 29327.
- The Regulation on the Amendment to the Highway Traffic Regulation was published in the Official Gazette dated 17.04.2015 and numbered 29329. Different dates of entry into force have been determined for the articles of the Regulation.

- The Regulation on the Amendment to the Regulation on the Procedures and Principles regarding the Production Methods, Labeling and Supervision of Tobacco Products for the Prevention of Damages caused thereby entered into force through publication in the Official Gazette dated 23.04.2015 and numbered 29335.
- The Regulation on the Amendment to the Regulation regarding the Duties, Authorities, Responsibilities and Training of Occupational Safety Specialists was published in the Official Gazette dated 30.04.2015 and numbered 29342. The provisions in this Regulation regarding the working hours and full-time employment of the occupational safety specialists will enter into force on 01.01.2016, the second and third paragraphs of Art. 35/A will enter into force after three months following its publication and the rest of the provisions entered into force through publication.
- The Regulation on the Allocation of the Railway Infrastructure Access and Capacity entered into force through publication in the Official Gazette dated 02.05.2015 and numbered 29343.
- The Regulation on the Administration of the Immovable Properties of the General Directorate of Forestry entered into force through publication in the Official Gazette dated 02.05.2015 and numbered 29343.
- The Regulation on the Amendment to the Electric Network Regulation entered into force through publication in the Official Gazette dated 07.05.2015 and numbered 29348.
- The Water Structures Inspection Regulation entered into force through publication in the Official Gazette dated 12.05.2015 and numbered 29353.
- The Regulation on the Amendment to the Customs Regulation entered into force through publication in the Official Gazette dated 13.05.2015 and numbered 29354.
- The Regulation on the Amendment to the Highway Traffic Regulation entered into force through publication in the Official Gazette dated 15.05.2015 and numbered 29356.

- The Regulation on the Amendment to the Regulation on the Supervision and Inspection of the Ministry of Science, Industry and Technology Market entered into force through publication in the Official Gazette dated 16.05.2015 and numbered 29357.
- The Regulation on the EUR.1 Circulation Certificate to be issued concerning Exports within the Scope of Generalized Preferences System as Recognized by Turkey and Receipt Declaration entered into force through publication in the Official Gazette dated 20.05.2015 and numbered 29361.
- The Regulation on the Amendment to the Regulation on the Implementation of Articles 17/3 and 18 of the Forestry Law entered into force through publication in the Official Gazette dated 20.05.2015 and numbered 29361.
- The Regulation on the Consumer Loan Agreements was published in the Official Gazette dated 22.05.2015 and numbered 29363. The Regulation entered into force 6 months after its date of publication.
- The Regulation on Insurance and Reinsurance Brokering entered into force through publication in the Official Gazette dated 27.05.2015 and numbered 29368.
- The Regulation on Housing Financing Agreements was published in the Official Gazette dated 28.05.2015 and numbered 29369. The Regulation entered into force 6 months as of its date of publication.
- The Regulation on the Approval of the Manufacturers and the Process on Supply of Equipment for the Nuclear Facilities entered into force through publication in the Official Gazette dated 28.05.2015 and numbered 29369.
- The Regulation on the Amendment to the Implementation Regulation regarding Framework Agreement Tenders was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Implementation Regulation regarding Tenders for Purchase of Consultancy

Services was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.

- The Regulation on the Amendment to the Implementation Regulation on Electronic Tenders was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Implementation Regulation regarding Tenders for the Purchase of Services was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Implementation Regulation regarding Tenders for the Purchase of Product was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Implementation Regulation on Construction Work Tenders was entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Regulation on the Incorporation and Operation Principles of Financial Leasing, Factoring and Financing Companies entered into force through publication in the Official Gazette dated 26.06.2015, and numbered 29398.
- The Regulation on the Amendment to the Regulation on the Accounting Practices and Financial Statements of Financial Leasing, Factoring and Financing Companies entered into force through publication in the Official Gazette dated 26.06.2015, and numbered 29398.
- The Regulation on the Amendment to the Regulation on the Implementation of Tenders on the Procurement of Consultancy Services entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Regulation on the Amendment to the Regulation on the Implementation of Tenders on the Procurement of Services

entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.

- The Regulation on the Amendment to the Regulation on the Implementation of Tenders on the Purchase of Products entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Regulation on the Amendment to the Regulation on the Implementation of Construction Works Tenders entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Regulation on the Amendment to the Principle Regulation of Union of Chambers of Turkish Engineers and Architects - Chamber of Civil Engineers entered into force through publication in the Official Gazette dated 27.06.2015 and numbered 29399.
- The Regulation on Shipyards, Boat Building Plants and Boat Yards entered into force through publication in the Official Gazette dated 28.06.2015, and numbered 29400.
- The Regulation on the Amendment to the Customs Regulation was published in the Official Gazette dated 30.06.2015, and numbered 29402. Different dates of entry into force were determined for the Articles of this Regulation.
- The Regulation on the Electronic Performance of Notary Transactions was published in the Official Gazette dated 11.07.2015, and numbered 29413. This Regulation enters into force on 01.03.2016.
- The Regulation on the Registry of Railroad Vehicles entered into force through publication in the Official Gazette dated 16.07.2015, and numbered 29418.
- The Regulation on Transportation of Hazardous Substances via Railroad was published in the Official Gazette dated 16.07.2015, and numbered 29418. Different dates of entry into force were determined for the Articles of this Regulation.

- The Regulation on the Amendment to the Implementation Regulation of the Service Procurement Tenders entered into force through publication in the Official Gazette dated 28.07.2015 and numbered 29428.
- The Regulation on the Amendment to the Regulation on the Measurement of Liquidity Coverage Ratios of Banks was published in the Official Gazette dated 20.08.2015 and numbered 29451. The Regulation entered into force on 28.09.2015.
- The Regulation on the Amendment to the Customs Regulation entered into force through publication in the Official Gazette dated 20.08.2015 and numbered 29451.
- The Regulation on Amendment to the Regulation on the Financial Situation of the Insurance, Reinsurance and Retirement Companies was published in the Official Gazette dated 23.08.2015 and numbered 29454. Article 2 of the Regulation entered into force on 01.01.2016, and the other provisions entered into force on the date of publication.
- The Regulation on the Measurement and Evaluation of the Capital Adequacy of the Insurance, Reinsurance and Retirement Companies was published in the Official Gazette dated 23.08.2015 and numbered 29454. Article 8 of the Regulation entered into force on 01.01.2016, and the other provisions entered into force on the date of publication.
- The Regulation on the Amendment to the Communiqué on the Technical Reserves of the Insurance, Reinsurance and Retirement Companies and on the Assets that these Reserves shall be Invested In entered into force through publication on the Official Gazette dated 23.08.2015 and numbered 29454.
- The Regulation on the Insurance Support Services was published in the Official Gazette dated 28.08.2015 and numbered 29459. The Regulation enters into force 3 months as of its date of publication.
- The Regulation on the Amendment to the Regulation Pertaining to the Principles of Exchange Market Operations of Borsa Istanbul A.Ş. entered into force through publication in the Official Gazette dated 28.08.2015 and numbered 29459.

- The Regulation on the Amendment to the Industrial Zone Regulation entered into force through publication in the Official Gazette dated 16.10.2015 and numbered 29504.
- The Regulation on the Amendment to the Regulation Regarding Support of Marketing and Promotion of Technologic Products entered into force through publication in the Official Gazette dated 16.10.2015 and numbered 29504.
- The Regulation on the Turkish Patent Institute Re-Examination and Evaluation Board entered into force through publication in the Official Gazette dated 16.10.2015 and numbered 29504.
- The Regulation on the Amendment to the Ports Regulation entered into force through publication in the Official Gazette dated 20.10.2015 and numbered 29508.
- The Regulation on the Amendment to the Ports Regulation was published in the Official Gazette dated 20.10.2015 and numbered 29508. The 7th Article of this Regulation entered into force on 01.01.2016, and the remaining provisions entered into force upon publication.
- The Regulation on the Amendment to the Regulation on the Principles and Procedures of the Audits by the Banking Regulation of Supervision Agency entered into force through publication in the Official Gazette dated 23.10.2015 and numbered 29511.
- The Regulation on the Amendment to the Regulation on the Principles and Procedures of the Preparation and Publication of the Annual Activity Report by Banks was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.
- The Regulation on the Amendment to the Regulation on the Banks' Internal Systems and Internal Capital Sufficiency Evaluation Process was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.

- The Regulation on the Amendment to the Regulation on the Principles and Procedures of the Accounting Practices of Banks and Document Keeping was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.
- The Regulation on the Amendment to the Regulation on the Banks' Equity Capital was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.
- The Regulation on the Amendment to the Regulation on the Measuring and Evaluation of the Capital Sufficiency of Banks was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.
- The Regulation on the Amendment to the Regulation on Financial Holding Companies was published in the Official Gazette dated 23.10.2015 and numbered 29511 to be entered into force on 31.03.2016.
- The Regulation on the Amendment to the Regulation pertaining to the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Representatives of the Ministry of Customs and Trade entered into force through publication in the Official Gazette dated 27.10.2015 and numbered 29515.
- The Regulation on the Amendment to the Regulation pertaining to the Procedures and Principles to be Followed in Tax Audits entered into force through publication in the Official Gazette dated 06.11.2015 and numbered 29524.
- The Regulation pertaining to the Procedures and Principles regarding the Obligations of Airline Transporters entered into force through publication in the Official Gazette dated 07.11.2015 and numbered 29525.
- The Regulation on the Building, Repair and Maintenance of Ships and Waterway Vehicles was published in the Official Gazette dated 07.11.2015 and numbered 29525 will enter into force 3 months after its publication.

- The Regulation on the Amendment to the Technology Development Zones Implementation Regulation entered into force through publication in the Official Gazette dated 17.11.2015 and numbered 29535.
- The Regulation on the Amendment to the Organized Industrial Zones Implementation Regulation entered into force through publication in the Official Gazette dated 18.11.2015 and numbered 29536.
- The Organized Industrial Zones Site Selection Regulation entered into force through publication in the Official Gazette dated 18.11.2015 and numbered 29536.
- The Regulation on the Amendment to the Regulation pertaining to the Evaluation and Management of Environmental Noise entered into force through publication in the Official Gazette dated 18.11.2015 and numbered 29536.
- The Regulation pertaining to Principles and Procedures on the Implementation of Turkey Framework of Qualifications entered into force through publication in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Regulation on the Amendment to the Foundation Higher Education Institutions Regulation entered into force through publication in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Retraction Regulation entered into force through publication in the Official Gazette dated 19.11.2015 and numbered 29537.
- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Principles of the Statutory Decree on the Protection of Industrial Designs entered into force through publication in the Official Gazette dated 24.11.2015 and numbered 29542.
- The Regulation on the Amendment to the Regulation on Bank Cards and Credit Cards entered into force through publication in the Official Gazette dated 25.11.2015 and numbered 29543.

- The Regulation on the Amendment to the Regulation on Loan Transactions of the Banks entered into force through publication in the Official Gazette dated 25.11.2015 and numbered 29543.
- The Regulation on the Amendment to the Regulation on Incorporation and Operation Principles of Financial Leasing, Factoring and Financing Institutions entered into force through publication in the Official Gazette dated 25.11.2015 and numbered 29543.
- The Regulation on the Amendment to the Regulation on the Implementation of Statutory Decree No. 556 on the Protection of Trademarks entered into force through publication in the Official Gazette dated 26.11.2015 and numbered 29544.
- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Principles of European Patent Convention on the Grant of European Patent entered into force through publication in the Official Gazette dated 26.11.2015 and numbered 29544.
- The Regulation on the Amendment to the Regulation Demonstrating the Implementation Principles of the Statutory Decree on the Protection of the Patent Rights entered into force through publication in the Official Gazette dated 26.11.2015 and numbered 29544.
- The Regulation on the Amendment to the Regulation on the Procedures and Principles Pertaining to the Production, Processing, Domestic and International Trade of Tobacco entered into force through publication in the Official Gazette dated 29.11.2015 and numbered 29547.
- The Regulation on the Principles Pertaining to the Repo and Reverse Repo Transactions of Banks entered into force through publication in the Official Gazette dated 06.12.2015 and numbered 29554.
- The Regulation on the Abrogation of the Regulation on the Quotation of Borsa İstanbul A.Ş. entered into force through publication in the Official Gazette dated 17.12.2015 and numbered 29565.

- The Regulation on the Abrogation of the Regulation on the Istanbul Stock Exchange Emerging Enterprises Market entered into force through publication in the Official Gazette dated 17.12.2015 and numbered 29565.
- The Regulation on the Abrogation of the Regulation on the Istanbul Stock Exchange Equity Market entered into force through publication in the Official Gazette dated 17.12.2015 and numbered 29565.

Important Changes and Developments in Communiqués

- The Communiqué (Communiqué No: 2014/4) on the Amendment to the Communiqué on Design Sponsorship (Communiqué No: 2008/2) entered into force through publication in the Official Gazette dated 21.12.2014 and numbered 29212.
- The Communiqué on the Amendment to the Communiqué on Fuel Reproduced from Waste, Additional Fuel and Alternative Raw Material entered into force through publication in the Official Gazette dated 23.12.2014 and numbered 29214.
- The Communiqué on the Amendment to the Communiqué pertaining to the Uniform Chart of Accounts and Offering Circular Applied by Participation Banks was published in the Official Gazette dated 23.12.2014 and numbered 29214. This Communiqué entered into force on 01.01.2015.
- The Communiqué on the Amendment to the Communiqué pertaining to the Uniform Chart of Accounts and Offering Circular was published in the Official Gazette dated 23.12.2014 and numbered 29214. This Communiqué entered into force on 01.01.2015.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2014/40) entered into force through publication in the Official Gazette dated 26.12.2014 and numbered 29217.
- The Communiqué on the Principles and Procedures to be Complied with in the Claims For Foreign Notification and Rogatory was published in the Official Gazette dated 27.12.2014 and numbered 29218. This Communiqué entered into force on 01.01.2015.
- The Communiqué on the Amendment to the Communiqué Numbered 2010/1 Pertaining to the Implementation of Supervision of Imports was published in the Official Gazette dated 27.12.2014 and numbered 29218. This Communiqué entered into force on the thirtieth day following its publication.

- The Communiqué Pertaining to the Administrative Fines that will be Enforced in 2015 according to Article 77 of Law No. 6502 on the Protection of Consumers (Communiqué No: TGM-2014/1) was published in the Official Gazette dated 27.12.2014 and numbered 29218. This Communiqué entered into force on 01.01.2015.
- The Communiqué Pertaining to the Increase of the Monetary Limits in Article 68 of Law No. 6502 on the Protection of Consumers, and in Article 6 of the Regulation on the Arbitration Boards for Consumer Problems (Communiqué No: TGM-2014/2) was published in the Official Gazette dated 27.12.2014 and numbered 29218. This Communiqué entered into force on 01.01.2015.
- The Communiqué Pertaining to Administrative Monetary Fines under Environmental Law No. 2872 (Communiqué No: 2015/1) was published in the Official Gazette dated 28.12.2014 and numbered 29219. This Communiqué entered into force on 01.01.2015.
- The Communiqué Pertaining to the Monetary Fines Regulated in Article 20 (k) of Environmental Law No. 2872 (No: 2015/1) was published in the Official Gazette dated 30.12.2014 and numbered 29221. This Communiqué entered into force on 01.01.2015.
- The Communiqué on International Supervision Company Status (Product Safety and Audit: 2015/24) was published in the Official Gazette dated 31.12.2014 and numbered 29222. This Communiqué will enter into force six months following the date of its publication.
- The Communiqué (TPI: 2014/3) on the Amendment to the Communiqué on the Classification of the Goods and Services Regarding Trademark Registration Applications (TPI: 2014/2) was published in the Official Gazette dated 31.12.2014 and numbered 29222. This Communiqué entered into force on 01.01.2015.

- The Communiqué on the Fee Tariff of 2015, which will be Applied by the Turkish Patent Institute (BIK/TPI: 2015/1), was published in the Official Gazette dated 31.12.2014 and numbered 29222. This Communiqué entered into force on 01.01.2015.
- The Communiqué on the Determination of the Default Interest Rate with respect to Late Payments Made to the Creditor in the Supply of Goods and Services was published in the Official Gazette dated 01.01.2015 and numbered 29223. The Communiqué entered into force on 01.01.2015.
- The Communiqué (Serial No: 2014/7) on the Amendment to the Communiqué Pertaining to Required Reserves (Serial No: 2013/15) was published in the Official Gazette dated 03.01.2015 and numbered 29225. This Communiqué enters into force on 13.02.2015.
- The Communiqué on the Abrogation of the Communiqué on the Procedures and Principles Pertaining to the Use of Endnotes and Footnotes in Commercial Advertisements and Announcements entered into force through publication in the Official Gazette dated 10.01.2015 and numbered 29232.
- The Communiqué on the Determination of the Principles and Procedures Pertaining to Implementation of the General Investment and Financing Program of 2015 was published in the Official Gazette dated 15.01.2015 and numbered 29237. This Communiqué entered into force on 01.01.2015.
- The Communiqué (No: 2014/6) on the Amendment to the Communiqué Regarding Market Research and Support for Entry into the Market (Communiqué No: 2011/1) entered into force through publication in the Official Gazette dated 17.01.2015 and numbered 29239.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2015/3) entered into force by publication in the Official Gazette dated 21.01.2015 and numbered 29243.
- The Communiqué (No: 2015/1) on the Amendment to the Communiqué on Printed Form of Cheque Books, Notifying and

Announcing the Decisions on the Amounts that the Banks are Obliged to Pay the Bearers, Issuing Cheques and Prohibitions for Opening Cheque Account (No: 2010/2) entered into force by being published in the Official Gazette dated 21.01.2015 and numbered 29243.

- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2015/2) entered into force by publication in the Official Gazette dated 22.01.2015 and numbered 29244.
- The Communiqué (VII-128.4.a) on the Amendment to the Communiqué on Foreign Capital Markets Instruments, Depositary Certificates and Shares of Foreign Investment Funds (VII-128.4) entered into force through publication in the Official Gazette dated 22.01.2015 and numbered 29244.
- The Communiqué on the Security Report to be Prepared with regards to Industrial Disasters entered into force through its publication in the Official Gazette dated 24.01.2015 and numbered 29246.
- The Communiqué on the Amendment to the Communiqué on the National Professional Standards (No: 2015/1) entered into force by publication in the Official Gazette dated 25.01.2015 and numbered 29247.
- The Communiqué on the Prevention of Unfair Competition in Importation (Communiqué No: 2015/1) entered into force by publication in the Official Gazette dated 28.01.2015 and numbered 29250.
- The Communiqué on the Protection Measures in Importation (No: 2015/1) entered into force by publication in the Official Gazette dated 28.01.2015 and numbered 29250.
- The Public Tender Communiqué (No: 2015/1) was published in the Official Gazette dated 29.01.2015 and numbered 29251. This Communiqué entered into force on 01.02.2015.
- The Communiqué on the Amendment to the Communiqué on the Supervision in Imports (Communiqué No: 2009/8) entered into force through publication in the Official Gazette dated 04.02.2015 and numbered 29260.

- The Communiqué on the Temporary Disqualification of the International Inspection Companies (Product Safety and Surveillance: 2015/26) was published in the Official Gazette dated 05.02.2015 and numbered 29261. This Communiqué entered into force 15 days after its publication.
- The Communiqué (II-23.1.a) on Amendment to the Communiqué (II-23.1) on Common Principals Regarding Material Transactions and the Right to Exit entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Communiqué (II-23.2.a) on Amendment to the Communiqué (II-23.2) on Mergers and Spin-Offs entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Communiqué (II-26.1.a) on Amendment to the Communiqué (II-26.1) on Share Purchase Requests entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Communiqué (VII-128.1.a) on Amendment to the Communiqué (VII-128.1) on Shares entered into force through publication in the Official Gazette dated 27.02.2015 and numbered 29280.
- The Communiqué on Compost entered into force through publication in the Official Gazette dated 05.03.2015 and numbered 29286.
- The Communiqué (SGM-2015/16) on Amendment to the Communiqué (Communiqué No: SGM-2012/10) on Assignment of TÜV Teknik Kontrol ve Belgelendirme Anonim Şirketi as an Approved Entity entered into force through publication in the Official Gazette dated 06.03.2015 and numbered 29287.
- The Communiqué on Amendment to the Communiqué on Independent Auditing Official Registry entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288.

- The Communiqué on Amendment to the Communiqué on Practical Professional Independent Auditing Education entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288.
- The Communiqué on Amendment to the Communiqué on Authorization for Independent Auditing entered into force through publication in the Official Gazette dated 07.03.2015 and numbered 29288.
- The Communiqué (No: 2015/2) on Amendment to the Communiqué (No: 2013/15) on Required Reserves was published in the Official Gazette dated 12.03.2015 and numbered 29293. The first article of the Communiqué enters into force on 13.03.2015 and its second article enters into force on 27.02.2015.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/4) entered into force through publication in the Official Gazette dated 21.03.2015 and numbered 29302.
- The Communiqué of Constant Waste Water Monitoring Systems entered into force through publication in the Official Gazette dated 22.03.2015 and numbered 29303.
- The Communiqué Abrogating the Communiqué on the Supervision in Imports (Communiqué No: 2004/2) entered into force through publication in the Official Gazette dated 01.04.2015 and numbered 29313.
- The Communiqué on the Amendment to the Communiqué on the Supervision in Imports (Communiqué No: 2009/8) entered into force through publication in the Official Gazette dated 01.04.2015 and numbered 29313.
- The Communiqué (Customs Transactions) (Serial No: 129) on the Amendment to the General Customs Communiqué (Customs Transactions) (Serial No: 115) entered into force through publication in the Official Gazette dated 01.04.2015 and numbered 29313.

- The Communiqué (Serial No: 50) on the Amendment to the Communiqué (Serial No: 172) Pertaining to Turkish Financial Reporting Standards on Financial Instruments (TFRS 9) entered into force through publication in the Official Gazette dated 07.04.2015 and numbered 29319.
- The Communiqué (Serial No: 51) on the Amendment to the Communiqué (Serial No: 211) Pertaining to Turkish Financial Reporting Standards on Financial Instruments (TFRS 9) entered into force through publication in the Official Gazette dated 07.04.2015 and numbered 29319.
- The Communiqué (Serial No: 47) on the Amendment to the Communiqué (Serial No: 146) Pertaining to Turkish Financial Reporting Standards (TFRS 1) on the Initial Implementation of Turkish Financial Standards was published in the Official Gazette dated 09.04.2015 and numbered 29321. Different dates of entry into force have been determined for the articles of the Communiqué.
- The Communiqué on the Amendment to the Communiqué (Serial No: 215) Pertaining to Turkish Accounting Standards (TMS 28) on Investments in Affiliates and Joint Ventures entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué (Serial No: 43) on the Amendment to the Communiqué (Serial No: 216) Pertaining to Turkish Financial Reporting Standards on Consolidated Financial Tables (TFRS 10) entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué (Serial No: 44) on the Amendment to the Communiqué (Serial No: 218) Pertaining to Turkish Financial Reporting Standards on Shares in Other Businesses (TFRS 12) entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué (Serial No: 42) on the Amendment to the Communiqué (Serial No: 19) Pertaining to Turkish Accounting Standards (TMS 34) on Interim Period Financial Reporting

entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.

- The Communiqué Pertaining to National Occupational Standards (Communiqué No: 2015/6) entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué (Serial No: 40) on the Amendment to the Communiqué (Serial No: 66) Pertaining to Submission of Financial Tables of Turkish Accounting Standard (TMS 1) entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué (Serial No: 41) on the Amendment to the Communiqué (Serial No: 42) Pertaining to TFRS 7 Financial Instruments: Turkish Financial Reporting Standard on Statements (TFRS 7) entered into force through publication in the Official Gazette dated 09.04.2015 and numbered 29321.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/7) entered into force through publication in the Official Gazette dated 10.04.2015 and numbered 29322.
- The Communiqué on the Supervision in Imports (Communiqué No: 2015/1) was published in the Official Gazette dated 11.04.2015 and numbered 29323. This Communiqué entered into force on the thirtieth day as of its publication.
- The Communiqués on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/9 and Communiqué No: 2015/10) entered into force through publication in the Official Gazette dated 12.04.2015 and numbered 29324.
- The Communiqués No: 2015/5, 2015/6 and 2015/8 on the Prevention of Unfair Competition in Imports entered into force through publication in the Official Gazette dated 17.04.2015 and numbered 29329.
- The Communiqué on the Amendment to the Tariffs and Instructions Communiqué on Mandatory Liability Insurance of

the Sea Vessels entered into force through publication in the Official Gazette dated 22.04.2015 and numbered 29334.

- The Communiqué on the Supervision in Imports (Communiqué No: 2015/2) entered into force through publication in the Official Gazette dated 22.04.2015 and numbered 29334.
- The Communiqué on the Amendment to the Communiqué regarding the Sugar Export and the Issuance of the Preliminary Permission Certificate entered into force through publication in the Official Gazette dated 23.04.2015 and numbered 29335.
- The Communiqué on the Amendment to the Communiqué on the Issuance of Certificates of Conformity for the Import of High Density Sweeteners entered into force through publication in the Official Gazette dated 23.04.2015 and numbered 29335.
- The Communiqué on the Protection Measures in Importation (No: 2015/3) entered into force by publication in the Official Gazette dated 25.04.2015 and numbered 29337.
- The Tariffs and Instructions Communiqué on the Mandatory Accident Insurance of Mining Workers entered into force through publication in the Official Gazette dated 06.05.2015 and numbered 29347.
- The Communiqué on the Prevention of Unfair Competition in Importations (No: 2015/11) entered into force through publication in the Official Gazette dated 10.05.2015 and numbered 29351.
- The Communiqué on the Prevention of Unfair Competition in Importations (No: 2015/13) entered into force through publication in the Official Gazette dated 10.05.2015 and numbered 29351.
- The Communiqué on the Prevention of Unfair Competition in Importations (No: 2015/18) entered into force through publication in the Official Gazette dated 15.05.2015 and numbered 29356.
- The Communiqué on the Prevention of Unfair Competition in Importations (No: 2015/19) entered into force through publica-

tion in the Official Gazette dated 15.05.2015 and numbered 29356.

- The Communiqué on the Amendment to the Communiqué on the Procedures and Principles on the Implementation of the General Investment and Financing Program for 2015 entered into force through publication in the Official Gazette dated 16.05.2015 and numbered 29357.
- The Communiqué on Enforcement of Supervision in Importation (No: 2015/3) entered into force through the publication in the Official Gazette dated 22.05.2015 and numbered 29363.
- The Communiqué (No: 2015/9) on the Amendment to Communiqué (No: 2010/1) pertaining to the Principles and Procedures on the Contribution of the Foundation to the Compulsory Financial Liability Insurance with regard to Medical Malpractice entered into force through publication in the Official Gazette dated 23.05.2015 and numbered 29364.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2015/12) entered into force through publication in the Official Gazette dated 23.05.2015 and numbered 29364.
- The Communiqué (No: MHG/2015-10) on the Publication of the Technical Specification to be applied in accordance with the Regulation on Construction Materials (305/2011/AB) entered into force through publication in the Official Gazette dated 24.05.2015 and numbered 29365.
- The Communiqué on the Principles Regarding Security Investment Companies (III-48.5) entered into force through publication in the Official Gazette dated 27.05.2015 and numbered 29368.
- The Communiqué (No: 2015/3) on the Amendment to Communiqué (No: 2013/15) pertaining to required Reserves published in the Official Gazette dated 30.05.2015 and numbered 29371. Different effective dates for various Articles of the Communiqué are envisaged.

- The Communiqué on the Implementation of the Tariff Contingent in Importation (Communiqué No: 2015/1) entered into force through publication in the Official Gazette dated 23.06.2015, and numbered 29395.
- The Communiqué on the Amendment to the Communiqué (No. 2004/20) Pertaining to the Implementation of Supervision in Imports entered into force through publication in the Official Gazette dated 26.06.2015, and numbered 29398.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/23) entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Communiqué on the Amendment to the General Communiqué on Value Added Tax (Serial No: 3) was published in the in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Communiqué on the Amendment to Communiqué No. 2010/1 on the Implementation of Supervision in Imports entered into force through publication in the Official Gazette dated 04.07.2015, and numbered 29406.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/26) entered into force through publication in the Official Gazette dated 04.07.2015, and numbered 29406.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/24) entered into force through publication in the Official Gazette dated 10.07.2015, and numbered 29412.
- The Communiqué (No: VII-128.7a) on the Amendment to the Communiqué (No: VII-128.7) Pertaining to the Principles of the Licensing and Registration for the Operators in Capital Markets entered into force through the publication in the Official Gazette dated 10.07.2015, and numbered 29412.

- The Communiqué on the Fees of Bankruptcy Administration, Expenses for Transcripts and Notification was published in the Official Gazette dated 12.07.2015, and numbered 29414. This Regulation entered into force on 15.07.2015.
- The Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/28) entered into force through publication in the Official Gazette dated 14.07.2015, and numbered 29416.
- The Communiqués on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/29 and No: 2015/30) entered into force through publication in the Official Gazette dated 16.07.2015, and numbered 29418.
- The Communiqué on the Prevention of Unfair Competition in Importation (No: 2015/27) entered into force through publication in the Official Gazette dated 23.07.2015 and numbered 29423.
- The Communiqué (2015/4) on the Amendment of the Communiqué on the Maturity Dates and Types of Deposit and Participation Funds (No: 2007/1) entered into force through publication in the Official Gazette dated 23.07.2015 and numbered 29423.
- The Communiqués on the Prevention of Unfair Trading in Importation (No: 2015/35 and No: 2015/34) entered into force through publication in the Official Gazette dated 24.07.2015 and numbered 29424.
- The Communiqué (Serial No: 52) on the Turkish Financial Reporting Standards Regarding the Postponement Accounts based on Regulatory Principles (TFRS 14) entered into force through publication in the Official Gazette dated 29.07.2015 and numbered 29429, effective as of the accounting period starting after 31.12.2015.
- The Communiqué (Serial No: 53) on the Amendment to the Communiqué Pertaining to Turkish Financial Reporting Standards (TFRS 1) on the Turkish Financial Standards' Initial Implementation (Serial No: 146) was published in the Official

Gazette dated 29.07.2015 and numbered 29429, effective as of the accounting period starting after 31.12.2015.

- The Communiqué on the Documentation and Reporting Layout Regarding the Investment Services and Activities and Auxiliary Services (III-45.1) was published in the Official Gazette dated 01.08.2015 and numbered 29432. The Articles 5, 6, 13, 18, 22 of the Communiqué will enter into force on the date of publication; the remaining Articles will enter into force after 60 days following date of publication.
- The Communiqué on the Implementation of Supervision in Importation (No: 2015/5) was published in the Official Gazette dated 08.08.2015 and numbered 29439. This Communiqué entered into force on 15.08.2015.
- The Communiqué on the Prevention on the Unfair Competition in Importation (No: 2015/36) entered into force through publication in the Official Gazette dated 16.08.2015 and numbered 29447.
- The Communiqué (No: 2015/35) on the Amendment to the Communiqué (Communiqué No: 2015/16) on Supporting the Economic Investments Based on Agriculture within the Scope of the Rural Development Investments entered into force through publication in the Official Gazette dated 18.08.2015 and numbered 29449.
- The Communiqué on the Amendment to the Communiqué on the Financial Statements to be Announced to the Public by Banks, as well as Explanations and Footnotes thereof was published in the Official Gazette dated 19.08.2015 and numbered 29450. The Communiqué will enter into force on 31.12.2015.
- The Communiqué Pertaining to the Implementation of Supervision in Imports (Communiqué No: 2015/7) entered into force through publication in the Official Gazette dated 22.08.2015 and numbered 29453.
- The Communiqué on the Amendment to the Communiqué Pertaining to the Implementation of Supervision in Imports (Communiqué No: 2010/9) entered into force through publica-

tion in the Official Gazette dated 22.08.2015 and numbered 29453.

- The Communiqué on the Amendment to the Communiqué Pertaining to the Implementation of Supervision in Imports (Communiqué No: 2013/6) entered into force through publication in the Official Gazette dated 22.08.2015 and numbered 29453.
- The Communiqué on the Amendment to the Communiqué on the Prevention of Unfair Competition in Imports (Communiqué No: 2015/5) entered into force through publication in the Official Gazette dated 22.08.2015 and numbered 29453.
- The Communiqué on the Quotas and Tariff Quotas in Imports (Communiqué No: 2015/3) entered into force through publication in the Official Gazette dated 28.08.2015 and numbered 29459.
- The Communiqué Pertaining to the Implementation of Supervision in Imports (Communiqué No: 2015/6) was published in the Official Gazette dated 28.08.2015 and numbered 29459. The Communiqué enters into force on the thirtieth day as of its date of publication.
- The Communiqué on the Amendment to the Communiqué Pertaining to the Implementation of Supervision in Imports (Communiqué No: 2010/5) was published in the Official Gazette dated 28.08.2015 and numbered 29459. The Communiqué enters into force on the thirtieth day as of its date of publication.
- The Communiqué (Communiqué No: 2015/5) on the Amendment to the Communiqué Required Reserves (Communiqué No: 2013/15) was published in the Official Gazette dated 29.08.2015 and numbered 29460. The Communiqué entered into force on 09.10.2015.
- The Communiqué (III-59.1b) on the Amendment to the Guaranteed Securities Communiqué (III-59.1) entered into force through publication in the Official Gazette dated 20.10.2015 and numbered 29508.

- The Communiqué (III-59.1b) on the Amendment to the Asset Guaranteed Securities Communiqué (III-59.1) has entered into force through publication in the Official Gazette dated 20.10.2015 and numbered 29508.
- The Communiqué on the Amendment to the Communiqué on the Financial Statements to be Announced to the Public by Banks, as well as Explanations and Footnotes thereof was published in the Official Gazette dated 23.10.2015 and numbered 29511. Article 4 of this Communiqué will enter into force on 31.12.2015, and the remaining provisions will enter into force on 31.03.2016.
- The Communiqué on the Amendment to the Communiqué on the Formation of the Consolidated Financial Statements of Banks was published in the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.
- The Communiqué on the Public Declarations of Banks regarding Risk Management was published in the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.
- The Communiqué on the Amendment to the Communiqué on the Credit Risk Reduction Techniques was published in the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.
- The Communiqué on Amendment to the Communiqué on the Calculation of the Amount Subject to Credit Risk through an Internal Ratings Based Approach was published in the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.
- The Communiqué regarding the Calculation of the Risk Amounts as related to Securitization was published in the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.
- The Communiqué on the Amendment to the Communiqué on the Calculation of the Amount Subject to Operational Risk through an Advanced Measurement Approach was published in

the Official Gazette dated 23.10.2015 and numbered 29511 will enter into force on 31.03.2016.

- The Communiqué (III-45.Ia) on the Amendment to the Communiqué on Documentation and Record Retention for Investment Services and Related Ancillary Services (III-45.I) entered into force through publication in the Official Gazette dated 11.11.2015 and numbered 29529.
- The Communiqué on Principles Pertaining to the Repo and Reverse Repo Transactions of Intermediary Institutions (III-45.2) entered into force through publication in the Official Gazette dated 06.12.2015 and numbered 29554.
- The Communiqué on the Increase of the Monetary Thresholds Provided by the Article 6 of the Regulation on Consumer Arbitral Tribunals and Article 68 of Consumer Protection Law No. 6502 was published in the Official Gazette dated 20.12.2015 and numbered 29568. The Regulation enters into force on 01.01.2016.
- The Communiqué on the Administrative Fines to be Applied for the Year 2016 in Accordance with Article 77 of the Consumer Protection Law No. 6502 was published in the Official Gazette dated 20.12.2015 and numbered 29568. The Communiqué enters into force on 01.01.2016.

Important Changes and Developments in General Communiqués

- The General Customs Communiqué (Tariffs – Classification Decisions) (Serial No: 18) entered into force by publication in the Official Gazette dated 24.01.2015 and numbered 29246.
- The Communiqué (Serial No: 19) Amending the General Customs Communiqué (Tariffs – Classification Decisions) (Serial No: 15) entered into force through publication in the Official Gazette dated 24.01.2015 and numbered 29246.
- The Communiqué (Customs Transaction) (Serial No: 125) Amending the General Customs Communiqué (Customs Transaction) (Serial No: 104) entered into force through publication in the Official Gazette dated 28.01.2015 and numbered 29250.
- The Communiqué (Customs Transactions) (Serial No: 124) Amending the General Customs Communiqué (Customs Transactions) (Serial No: 96) entered into force through publication in the Official Gazette dated 28.01.2015 and numbered 29250.
- The General Customs Communiqué (Lorry Transactions) (Serial No: 3) was published in the Official Gazette dated 29.01.2015 and numbered 29251. This Communiqué will enter into force 6 months after its publication.
- The Income Tax General Communiqué (Serial No: 288) entered into force in the Official Gazette dated 31.01.2015 and numbered 29253.
- The General Communiqué on Procedural Tax Law (Serial No: 445) entered into force through publication in the Official Gazette dated 31.01.2015 and numbered 29253.
- The Communiqué (Customs Transactions) (Serial No: 129) on the Amendment to the General Customs Communiqué (Customs Transactions) (Serial No: 115) entered into force through publication in the Official Gazette dated 01.04.2015 and numbered 29313.

- The Communiqué (Serial No: 2) on the Amendment to the General Customs Communiqué (Obligor Registration and Tracking System) (Serial No: 1) entered into force through publication in the Official Gazette dated 18.04.2015 and numbered 29330.
- The General Communiqué on Tax Procedural Law (Serial No: 452) was published in the Official Gazette dated 03.06.2015 and numbered 29375. The Communiqué entered into force on 01.07.2015.
- The Communiqué (No: 3) on the Amendment to the General Communiqué (No: 1) regarding the Turkey-European Union Framework Agreement on Instrument for Pre-Accession Assistance (IPA) was entered into force through publication in the Official Gazette dated 06.06.2015 and numbered 29378.
- The Communiqué (No: 9) on the Amendment to the General Communiqué (No: 1) on the Labelled Product Surveillance System for the Tobacco Products and Alcoholic Beverages was entered into force through publication in the Official Gazette dated 06.06.2015 and numbered 29378.
- The Communiqué on the Amendment to the General Communiqué on Public Tenders entered into force through publication in the Official Gazette dated 27.06.2015, and numbered 29399.
- The Communiqué on the Amendment to the Public Tenders General Communiqué entered into force through publication in the Official Gazette dated 28.07.2015 and numbered 29428.
- The Communiqué (Lorry Transactions) (Serial No: 4) on the Amendment to the Customs General Communiqué (Lorry Transactions) (Serial No: 3) entered into force through publication in the Official Gazette dated 05.08.2015 and numbered 29436.
- The General Communiqué on the Implementation of Special Consumption Tax List Numbered (III) entered into force through publication on the Official Gazette dated 08.08.2015 and numbered 29439.

- The Communiqué (Serial No: 2) on the Amendment to the Customs General Communiqué (Serial No: 1) regarding the Temporarily Imported Land Vehicles entered into force through publication in the Official Gazette dated 16.08.2015 and numbered 29447.
- The General Communiqué on the Implementation of Special Consumption Tax List Numbered (IV) was published in the Official Gazette dated 20.08.2015 and numbered 29451. This General Communiqué will enter into force on 01.09.2015.
- The Communiqué on the Amendment to the Customs General Communiqué (System of Generalized Preferences) (Serial No: 1) was published in the Official Gazette dated 22.08.2015 and numbered 29453. The Communiqué entered into force on the date of its publication to be applied as of 27.07.2015.
- The General Communiqué on Property Tax (Serial No: 66) was published in the Official Gazette dated 26.08.2015 and numbered 29457. The Communiqué enters into force 45 days as of its date of publication.
- The Communiqué (Serial No: 8) on the Amendment to the General Communiqué on the Banderolled Product Surveillance System Regarding Tobacco Products and Alcoholic Beverages (Serial No: 1) was published in the Official Gazette dated 26.08.2015 and numbered 29457. The Communiqué enters into force 45 days as of its date of publication.
- The General Communiqué on the Tax Procedural Law (Rank No: 456) entered into force through publication in the Official Gazette dated 27.08.2015 and numbered 29458.
- The General Communiqué on Tax Procedural Code (Serial No: 457) entered into force through publication in the Official Gazette dated 10.11.2015 and numbered 29528.
- The Public Treasury General Communiqué entered into force through publication in the Official Gazette dated 18.11.2015 and numbered 29536.

- The Customs General Communiqué (Custom Transactions) (Serial No: 138) was published in the Official Gazette dated 10.12.2015 and numbered 29558. The Communiqué enters into force on 01.01.2016.

Important Changes and Developments

- The Minimum Mediation Fee Tariff of 2015 was published in the Official Gazette dated 26.12.2014 and numbered 29217. This Tariff entered into force on 01.01.2015.
- The Minimum Attorney Fee Tariff entered into force through publication in the Official Gazette dated 31.12.2014 and numbered 29222.
- The By-Law on the Abolishment of the By-Law regarding the Measures to be taken by Local Authorities in Strikes and Lock-Outs entered into force through publication in the Official Gazette dated 05.05.2015 and numbered 29346.
- The General Conditions for the Mandatory Liability Insurance of Highway Motor Vehicles was published in the Official Gazette dated 14.05.2015 and numbered 29355. These General Conditions will enter into force on 01.06.2015.
- The Bylaw Abrogating the Bylaw on the Supervision of the Confederations of Labor and Employer's Unions entered into force through publication in the Official Gazette dated 30.05.2015 and numbered 29371.
- The Turkish Industry Strategy Paper (2015-2018) dated 18.06.2015, and numbered 2015/24, which was published by the Higher Planning Council, was published in the Official Gazette dated 25.06.2015, and numbered 29397.
- The Decision of the Money-Credit and Coordination Council dated 12.08.2015 and numbered 2015/15 on the Decision on the Amendment to the Decision regarding the Support of Foreign Exchange Earning Service Trade entered into force through publication in the Official Gazette dated 19.08.2015 and numbered 29450.
- The Expert Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 30.09.2015 and numbered 29488. This tariff entered into force on 01.10.2015.
- The Advance on Expenses Tariff of the Civil Procedure Code was published in the Official Gazette dated 30.09.2015 and numbered 29488. This tariff entered into force on 01.10.2015.

- The Arbitrator Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 30.09.2015 and numbered 29488. This tariff entered into force on 01.10.2015.
- The Witness Fee Tariff of the Civil Procedure Code was published in the Official Gazette dated 30.09.2015 and numbered 29488. This tariff entered into force on 01.10.2015.
- The Prime Ministry's Circular No. 2015/15 on the Management of Pre-Accession Funds to be Provided by the EU entered into force through publication in the Official Gazette dated 08.12.2015 and numbered 29556.
- The Prime Ministry's Circular No. 2015/17 on Interest-Free Financing Coordination Board entered into force through publication in the Official Gazette dated 15.12.2015 numbered 29564.

Important Legislation and Decisions regarding Competition

- The Competition Board ("Board") granted a certificate of negative clearance to the "Price Proposal and Agreement" pertaining to free distribution of books via sponsor, signed by and between Doğal Jeotermal Enerji Sistemleri Makine İnşaat Elektrik Turizm Sanayi Ticaret Ltd. Şti. and Ege Reklam Basım Sanatları San. Tic. Ltd. Şti. (25.12.2014; 14-54/918-414)
- The Board decided that the "Authorized Service Management Agreement" signed by and between Çelik Motor Ticaret A.Ş., and its authorized services, benefeits from the exemption granted by Communiqué No: 2005/4 on the Block Exemption of Vertical Agreements and Concerted Practices in the Motor Vehicles Market. Additionally, the Board granted a five-year individual exemption to the "KIA Auxiliary Equipment Premium System" that will be applied by Çelik Motor Ticaret A.Ş. to KIA's authorized services. (25.12.2014; 14-54/920-416)
- The Board granted individual exemption to the vertical agreement between OMV Petrol Ofisi A.Ş., Erk Petrol Yatırımları A.Ş. and USCO Gayrimenkul San. ve Tic. A.Ş., up to 10 years, starting from 07.04.2008, due to the fact that it concerns an establishment of a new station to be built on real estate that has never been used in fuel oil distributorship activities before. (25.12.2014; 14-54/924-419)
- The Board granted individual exemption to the "Joint Loyalty Agreement" dated 11.09.2014 signed by and between Migros Ticaret A.Ş. and Petrol Ofisi A.Ş. (08.01.2015; 15-02/7-5)
- The Board granted individual exemption to the "Bonus Credit Card Program Sharing Agreement" signed by and between Türkiye Garanti Bankası A.Ş. and Denizbank A.Ş. (08.01.2015; 15-02/9-7)
- The Board decided that the franchise agreement on the newly established franchise system concerning the sale of guaranteed second hand tractors and equipment, between Türk Traktör ve Ziraat Makineleri A.Ş. and its authorized distributors, benefits from block exemption pursuant to Block Exemption

Communiqué on Vertical Agreements No. 2002/2. (08.01.2015; 15-02/10-8)

- The Board decided that in the event of an amendment to the "Contractor Agreement" signed by and between Say Reklamcılık Yapı Dek. Pro. Taah. San. ve Tic. A.Ş. and Tekyapı İnşaat Taah. Tic. ve San. Ltd. Şti., limiting the non-compete clause to five years, the said agreeement shall benefit from the block exemption within the scope of Block Exemption Communiqué on Vertical Agreements No. 2002/2. (15.01.2015; 15-03/25-11)
- The Board decided that the mineral oil exclusive supply agreement concluded between Petronas Madeni Yağlar A.Ş. and the buyers for marketing and distribution purposes benefits from group exemption in accordance with Communiqué No. 2002/2. (05.02.2015; 15-06/71-29)
- The Board granted negative clearance to the Standard Sales and Purchase Agreement to be signed between Novo Nordisk Sağlık Ürünleri Ticaret Ltd. Şti. and several pharmaceutical warehouses. (05.02.2015; 15-06/71-29)
- The Board granted individual exemption to the "Aliağa Terminal Product Pass and Storage Agreement" and "Marmara Ereğlisi Terminal Product Pass and Storage Agreement" concluded between Total Oil Türkiye A.Ş. and Opet Petrolcülük A.Ş. (26.02.2015; 15-09/123-52)
- The Board granted individual exemption for five years to the Board of Director's decision of Bankalararası Kart Merkezi A.Ş. (BKM) on mutual exchange commissions with respect to bank cards. In addition, the Board ruled that data used for the formula by BKM shall be audited annually by independent auditors in accordance with the independent auditing procedures, and the applicable rate of the bank card exchange commission shall be announced to the public on BKM's website in such a manner that related persons may access it easily, and the link is provided on the home page. (26.02.2015; 15-09/129-58)
- The Board ruled that the Cooperation Agreement on Retail Financing Services and Its Additional Protocol between TEB

Finansman A.Ş. and BPF Pazarlama ve Acentelik Hizmetleri A.Ş. benefits from block exemption pursuant to Communiqué No. 2002/2. (18.03.2015; 15-12/165-77)

- The Board refused to grant individual exemption to the recommended exemplary price list published by the Association of Security Services Organizations as it does not fulfill the conditions for exemption provided by Article 5 of Law No. 4054. (18.03.2015; 15-12/165-77)
- The Board granted individual exemption to Procurement Agreements for a period of two years, despite the fulfillment of the requirements of Article 5 of Law No. 4054, with the intent to track its consequences in "Mo99/Tc99m generator" and "iodine-131 oral capsule and solution" markets, and to intervene in the event of an occurrence of a collaborator outcome. (07.07.2015; 15-28/340-112)
- The Board granted negative clearance as per Article 8 of Law No. 4054 to media performance measurement services ("ExPL" service analyzing media purchasing performances, "PQS Planning Quality Score" service analyzing media planning, "Inventory Control" service analyzing media inventory controls, consultancy services on agency preferences, consultancy activities towards media management competence, and education activities towards media management activities) rendered by Diye Danışmanlık Eğitim ve Medya Hizmetleri Ticaret A.Ş. (07.07.2015; 15-28/327-102)
- The Board decided that various agreements concluded by and between Akpet Akaryakıt Dağıtım A.Ş., Termopet Akaryakıt Nakliyat ve Ticaret Ltd Şti., AVM Petrol Ürünleri Taah. İnş. San. and Tic. Ltd. Şti. ve Malkoçlar Otomotiv Sanayi ve Ticaret A.Ş. benefits from group exemptions in accordance with Article 5 of the Block Exemption Communiqué on Vertical Agreements No. 2002/2. (07.07.2015; 15-28/310-91)
- The Board granted negative clearance to the Automotive Distributors Association's exchange of information regarding equipment properties, prices and promotions. (09.07.2015; 15-29/428-124)

- The Board granted indefinite individual exemption to the operations conducted via regulations with the purpose of inclusion of the formation established under the roof of Protocol of ATM Bank Cards Sharing Platform, and in which each bank, party to such Protocol are being heard via their representatives, to the Interbank Card Center. (13.07.2015; 15-29/425-121)
- The Board granted individual exemption to the manufacturers' agreement to be signed by the manufacturers who are the members of Elektrik ve Elektronik Geri Dönüşüm ve Atık Yönetimi Derneği İktisadi İşletmesi (ELDAY) and ELDAY. (28.07.2015; 15-32/462-144)
- The Board granted individual exemption the Bonus Credit Card Program Sharing Agreement signed between Türkiye Garanti Bankası A.Ş. and Türk Ekonomi Bankası A.Ş. and the additional agreement signed on 18.12.2012. (05.08.2015; 15-33/482-149)
- The Board reassessed the claim on the abuse of the dominant position by Siemens San. ve Tic. A.Ş. in the spare parts market regarding the medical imaging and diagnosing devices with the Siemens brand after the decision of the Counsel of State's 13th Chamber, and launched an investigation concerning Siemens San. ve Tic. A.Ş. on 07.09.2015.
- The Board launched an investigation concerning Luxottica Gözlük End. ve Tic. A.Ş. on 09.09.2015 after its preliminary inquiry that was initiated upon the application claiming that Luxottica Gözlük End. ve Tic. A.Ş. was conducting tying practices by conditioning the purchase of a product to another, regarding the importation of sunglasses and glasses frames.
- The Board decided that the vertical agreement that was comprised of the usufruct agreement dated 07.06.2006 and dealership agreements dated 01.08.2006 and 12.03.2012 concluded between Kurul, OMV Petrol Ofisi A.Ş., Tuzla Petrol İnş. Turizm Ticaret Ltd. Şti., Altacan Petrol Ticaret Ltd. Şti. and Tuzla Municipality, benefits from the block exemption in accordance with the Block Exemption Communiqué on Vertical Agreements No. 2002/2 for 5 years as of the 30.01.2015. (09.09.2015; 15-36/536-170)

- The Board decided that the "Agency Agreement" dated 01.07.2013 and "Additional Protocol" dated 07.01.2015 concluded between HSBC Bank A.Ş. and Euler Hermes Sigorta A.Ş. benefits from the block exemption in accordance with the Block Exemption Communiqué on Vertical Agreements No. 2002/2. (09.09.2015; 15-36/551-179)
- The Board decided that the Trademark Exclusive Distributorship Agreement concluded between BSH Ev Aletleri Sanayi ve Ticaret A.Ş. and the dealers benefits from the block exemption in accordance with the Block Exemption Communiqué on Vertical Agreements No. 2002/2. (06.10.2015; 15-37/573-195)
- The Board granted negative clearance to Mercedes-Benz Turkish Authorized Dealers and Services Association's sharing of monthly vehicle sales amounts as passenger cars, light commercial vehicles, buses and trucks, without sub-categories. (06.10.2015; 15-37/582-202)
- The Board granted negative clearance to the energy efficiency project to be realized by the members of the Eskişehir Bilecik Kütahya Union. (06.10.2015; 15-37/586-205)
- The Board decided not to grant negative clearance to the "Tender Sale Agreement" that was individually concluded by and between Johnson and Johnson Sıhhi Malzeme San. ve Tic. Ltd. Şti., Aksel Ecza Deposu Tic. A.Ş. and Boğaziçi Ecza Deposu Sağlık Hiz. İth. İhr. Ltd. Şti., and such agreements shall not benefit from the block exemption in accordance with the Block Exemption Communiqué on Vertical Agreements No. 2002/2, yet such agreements shall benefit from individual exemption. (16.10.2015; 15-38/615-209)
- The Board decided not to grant negative clearance to the Cooperation Agreement concluded by and between Bayer Türk Kimya Sanayii Ltd. Şti. and Türkiye İş Bankası A.Ş., yet it was decided to grant individual exemption to such agreement. (16.10.2015; 15-38/618-210)
- The Board ruled that the privatization through the "Transfer of Operating Rights" of Fethiye Hydroelectric Plants and the lands

that the plant uses was not subject to authorization. (10.11.2015; 15-40/671-233)

- The Board ruled that the privatization through the "Transfer of Operating Rights" of Manavgat Hydroelectric Plants and the lands that the plant uses was not subject to authorization. (10.11.2015; 15-40/671-234)
- The Board granted negative clearance to the "Jet A-1 Sale Practices" applied as a standard agreement between Türkiye Petrol Rafinerileri A.Ş. and bunker fuel dealing/distributing corporations. (20.11.2015, 15-41/675-237)
- The Board decided that an individual exemption shall be granted to the Media Rights Agreement concluded between the Turkish Basketball Federation and Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. on 14 May 2015, as it fulfills the conditions provided by Article 5 of Law No. 4054. (20.11.2015, 15-41/678-240)
- The Board decided that a negative clearance shall not be granted; however, an individual exemption shall be granted to the "Business Partnership Agreement" concluded between Dimes Gıda San. Ve Tic. A.Ş. and Pınar Süt Mamülleri San. A.Ş. pertaining to the joint participation to the school milk tenders of the Ministry of Food, Agriculture and Livestock, in 81 regions of Turkey. (09.12.2015, 15-43/719-262)

Important Legislation and Decisions regarding Mergers and Acquisitions

- The Competition Board ("Board") The Board authorized the acquisition of full control of Dosu Maya Mayacılık A.Ş., which is controlled by Yıldız Holding A.Ş., by Lesaffre et Compaigne. (15.12.2014; 14-52/903-411)
- The Board authorized the acquisition of all of the current share certificates of Nutreco N.V. by SHV Holdings N.V. via its affiliate, SHV Investments Ltd. (18.12.2014; 4-53/905-412)
- The Board authorized the establishment of joint control over Ficosa International S.A. through the acquisition of certain amounts of its shares by Panasonic Corporation. (25.12.2014; 14-54/919-415)
- The Board authorized the acquisition of all of the shares of Gizem Seramik Frit ve Glazür San. ve Tic. A.Ş. and Gizem Frit Pazarlama ve Dış Ticaret A.Ş. by Ak-Kim Kimya San. ve Tic. A.Ş. (25.12.2015; 14-54/923-418)
- The Board decided that the acquisition of certain amounts of shares of Eston Yapı A.Ş., and all of the shares of Çatı İnşaat A.Ş. by SDF Emlak Enerji İnşaat Turizm San. ve Tic. A.Ş., is not subject to authorization. (25.12.2014; 14-54/926-BD)
- The Board decided that the acquisition of certain amounts of shares of Corpera Turizm Yatırımları A.Ş. by Doğuş Holding A.Ş. from Palazzo Corpi GMBH is not subject to authorization. (25.12.2014; 14-54/927-BD)
- The Board authorized the establishment of joint control on Antalya Balık Turizm Gıda Taşımacılık İnşaat San. ve Tic. A.Ş. through the acquisition of 33.4% of its shares by Ahmet SAGUN and Marines Gıda San. Tic. A.Ş. (08.01.2015; 15-02/6-4)
- The Board authorized the acquisition of the capital and 100% of the voting rights of Oltan Gıda Maddeleri İhr. İth. ve Tic. Ltd. Şti., Oltan Fındık İşl. San. ve Tic. Ltd. Şti., Oltan Fındık San. ve Tic. Ltd. Şti, Oltan Boyer S.A.S. and Oltan Grout Ltd. by Ferrero International S.A. (08.01.2015; 15-02/8-6)

- The Board authorized the acquisition of all of the shares of Marubeni AG Makine Tic. Ltd. Şti. by Kubota Corporation. (08.01.2015; 15-02/4-2)
- The Board concluded its complete examination and decided that it is not necessary to take any further action, due to the fact that the application regarding the acquisition of the cement facility through the acquisition of the shares of Sançim Bilecik Çimento Madencilik Beton San. Tic. A.Ş. by Çimsa Çimento San. ve Tic. A.Ş., has been withdrawn. (08.01.2015)
- The Board authorized the acquisition of 51% of the shares and the control of Sasa Polyester San. A.Ş. by lndorama Netherlands B.V. from Hacı Ömer Sabancı Holding A.Ş. (08.01.2015; 15-02/24-10)
- The Board decided that the acquisition of 30% and 12% of the shares of TANAP Doğalgaz İletim A.Ş. by Boru Hatları ile Petrol Taşıma A.Ş. and British Petroleum Pipelines Limited, respectively, from Southern Gas Corridor Closed Joint Stock Company was beyond the scope of the Board's powers to examine. (08.01.2015; 15-02/3-BD)
- The Board decided that the establishment of a joint venture by CTI Systems S.A. and Vinçsan Vinç San. ve Tic. A.Ş. under the name of CTI Vinçsan İntralojistik Ekipmanları Vinç Tic. ve San. A.Ş. is not subject to authorization. (08.01.2015; 15-02/17-BD)
- The Board authorized the acquisition of all of the shares of Sançim Bilecik Çimento Madencilik Beton San. Tic. A.Ş. by Aşkale Çimento San. T.A.Ş. (15.01.2015; 15-03/26-12)
- The Board authorized the acquisition of the control of Samsung General Chemicals Co. Ltd. by Hanwha Chemical Corporation and Hanwha Energy Corporation. (15.01.2015; 15-03/29-14)
- The Board authorized the acquisition of control of the business units of Termal Enerji, Yenilenebilir Enerji and Grid, which is incorporated within Alstom S.A. by General Electric Company. (15.01.2015; 15-03/30-15)

- The Board authorized the acquisition of 50% of the shares of Eragaz Petrol Ürünleri San. ve Tic. A.Ş., active in Autogas LPG distribution sector, by Balpet Petrol Ürn. Taş. San. ve Tic. A.Ş. (15.01.2015; 15-03/31-16)
- The Board authorized the conversion of Ege-Tav Ege Tarım Hayvancılık Yatırım Tic. ve San. A.Ş. to a joint venture via the acquisition of 60% of its shares by NH Foods Ltd. (15.01.2015; 15-03/34-19)
- The Board decided that the acquisition of 30% of the shares of Deltom Jeotermal Analiz Enerji Üretim İnşaat Sanayi ve Ticaret A.Ş. which are held by Alstom Yenilenebilir Enerji A.Ş. and Alstom Renewable Holding BV by Derin Jeotermal Analiz Enerji Üretim İnşaat Sanayi ve Ticaret Ltd. Şti. and the transition of Deltom Jeotermal Analiz Enerji Üretim İnşaat Sanayi ve Ticaret A.Ş., to sole control from joint control, is out of its scope. (15.01.2015; 15-03/41-BD)
- The Board authorized the transformation to joint venture by the purchase of 8% shares of the Ateş Çelik İnşaat Taahhüt Proje Mühendislik San. ve Tic. A.Ş. by Gedik Girişim Sermayesi Yatırım Ortaklığı A.Ş. (22.01.2015; 15-04/47-21)
- The Board authorized the acquisition of a certain ratio of D-Market Elektronik Hizmetler ve Ticaret A.Ş.'s shares by TurkCommerce B.V. (05.02.2015; 15-06/80-BD)
- The Board found authorization unnecessary for the acquisition of 90% shares of Polsan Portföy Yönetim A.Ş. by Global Yatırım Holding A.Ş. (05.02.2015; 15-06/80-BD)
- The Board authorized the acquisition of the sole control of Merter Turkey B.V. by MRT Investment Holding 6 B.V., one of The Blackstone Group L.P.'s affiliates. (12.02.2015; 15-07/87-32)
- The Board authorized the acquisition of the sole control of Halla Visteon Climate Control Corporation by Hahn & Co. Auto Holdings Co., Ltd. (12.02.2015; 15-07/88-33)
- The Board authorized the formation of a joint venture through merging of the coffee businesses of D.E Master Blenders 1753

B.V., indirectly owned by Acorn Holdings B.V. and Mondelez International Inc. (12.02.2015; 15-07/90-35)

- The Board found authorization unnecessary for the incorporation of a company named Doğuş Zhenfa Kozmetik Tic. A.Ş. by and between Doğuş Holding A.Ş. and Zhenfa Limited. (12.02.2015; 15-07/94-BD)
- The Board authorized the acquisition of 51% of the shares of Sasa Polyester Sanayi A.Ş. by Erdemoğlu Holding A.Ş from Ömer Sabancı Holding A.Ş. (26.02.2015; 15-09/118-49)
- The Board authorized the acquisition of certain amounts of shares of DeFacto Perakende Ticaret A.Ş. by DF Retail Holdco Coöperatief U.A. and the consequent transaction of the acquisition of all of the shares of Ozon Tekstil Konfeksiyon Sanayi Ticaret A.Ş. by DeFacto Perakende Ticaret A.Ş. (26.02.2015; 15-09/119-50)
- The Board authorized the acquisition of control of Aytemiz Akaryakıt Dağıtım A.Ş., Aytemiz Gaz A.Ş., Aksu Doğal Gaz İletim A.Ş., Gaziemir Petrol Ticaret Ltd. Şti., Hakimiyet Petrol Ticaret Ltd. Şti. and Aytemiz Petrolcülük Ticaret Ltd. Şti. by Doğan Enerji Yatırımları Sanayi ve Ticaret A.Ş. (26.02.2015; 15-09/120-51)
- The Board authorized the acquisition of all of the shares of Wittur International Holding GmbH controlled by Tri Way Hold Co AB ve Way Equity GmbH&Co KG by Paternoster Holding IV GmbH. (26.02.2015; 15-09/126-53)
- The Board authorized the acquisition of the controlling shares of Catlin Group Limited providing non-life insurance and reinsurance services by XL Group operating in the same field. (26.02.2015; 15-09/126-53)
- The Board authorized the acquisition of the control of İnş. Tic. Ltd. Şti., jointly controlled by Meeting Point International GmbH and Mustafa Yadel Oskan, by Meeting Point International GmbH. (26.02.2015; 15-09/127-54)

- The Board authorized the acquisition of control of DMG Mori Seiki AG by DMG Mori Seiki Co. Ltd. (05.03.2015; 15-10/136-59)
- The Board authorized the establishment of joint-venture producing polyurethane materials by SKC Co. Ltd. and Mitsui Chemical Inc. (05.03.2015; 15-10/137-60)
- The Board authorized the acquisition of all of the shares of Olgarlar Spor Malzemeleri Turizm İlan Reklam Ajanslığı Yayıncılık ve Ticaret A.Ş. by SPX Global Holding B.V. (05.03.2015; 15-10/142-64)
- The Board granted negative clearance to the transfer of Bilginoğlu Endüstri Malzemeleri San. ve Tic. A.Ş.'s activities on the sale of cutting tools and fragile tools to Kyocera Bilginoğlu Hassas Takımlar San. ve Tic. A.Ş. founded by Kyocera Unimerco A/S and Bilginoğlu Endüstri Malzemeleri San. ve Tic. A.Ş. (05.03.2015; 15-10/144-BD)
- The Board authorized the acquisition of all of the shares of Batı Ege Kozmetik İthalat İhracat Pazarlama Ticaret Ltd. Şti. by Enucuz Pazarlama Turizm Reklam ve Telekomünikasyon Ticaret A.Ş. (12.03.2015; 15-11/149-66)
- The Board authorized the acquisition of full control of Hogla-Kimberly Limited, jointly controlled by Kimberly Clark Corporation and Hadera Paper Group, by Kimberly Clark Corporation. (12.03.2015; 15-11/151-67)
- The Board authorized the acquisition of the full control of Alfarm Alarko Leröy Su Ürünleri Sanayi ve Ticaret A.Ş., jointly controlled by Lerøy Seafood Group Asa and Alarko Grubu, by Lerøy Seafood Group Asa. (12.03.2015; 15-11/152-68)
- The Board authorized the acquisition of all of the shares of Osmangazi Elektrik Dağıtım A.Ş. and Osmangazi Elektrik Perakende Satış A.Ş., controlled by Dedeli Yatırım İnşaat Taahhüt Elektrik Dağıtım A.Ş. and certain real persons, by China Machinery Engineering Corporation. (12.03.2015; 15-11/157-70)

- The Board authorized the acquisition of all of the shares of Söke Değirmencilik San. ve Tic. A.Ş. by Moms Kitchen International S.a.r.l. (18.03.2015; 15-12/160-73)
- The Board authorized the acquisition of the control of Krone Doğuş Treyler San.veTic. A.Ş. jointly controlled by Doğuş Grubu and Krone Grubu, by Krone Grubu. (18.03.2015; 15-12/162-74)
- The Board authorized the acquisition of the indirect control of ATD Corporation by Ares Corporate Opportunities Fund IV, L.P. with TPG Capital, L.P. (18.03.2015; 15-12/164-76)
- The Board ruled that the acquisition of a certain amount of shares of New Hope Turkey Yem Hayvancılık Gıda İthalat İhracat San. ve Tic..Ltd. Şti. by Marubeni Nisshin Feed Co. Ltd. (%5) ve Marubeni Corporation is not within the scope of application. (18.03.2015; 15-12/171-BD)
- The Board granted negative clearance to the acquisition of ANC Hayvan Sağlığı ve Beslenmesi Hizmetleri A.Ş. by Huvepharma EAD. (18.03.2015; 15-12/172-BD)
- The Board granted negative clearance to the establishment of a joint-venture in Turkey to be operated in the field of international or domestic freight transportation via airway, seaway and road, customs clearance, and logistics by Uluslararası Nakliyat ve Ticaret A.Ş. and Allport Cargo Services Limited. (18.03.2015; 15-12/173-BD)
- The Board authorized the acquisition of Baker Hughes Incorporated by Halliburton Company. (30.06.2015; 15-27/295-80)
- The Board authorized the acquisition of the control of GrafTech International Ltd, via public tender offer, by BCP IV GrafTech Holdings LP, which is the affiliate of Brookfield Asset Management Inc. (30.06.2015; 15-27/296-81)
- The Board authorized the acquisition of a certain amount of shares of Kiler Alışveriş Hizmetleri Gıda San. ve Tic. A.Ş. by Carrefour Sabancı Tic. Merk. A.Ş. (30.06.2015; 15-27/297-82)

- The Board authorized the acquisition of a certain amount of shares of Komet Turizm ve Denizcilik Ticaret ve San. A.Ş. by Marmedsa Turkey Denizcilik, Liman ve Lojistik Hizmetleri A.Ş. (30.06.2015; 15-27/298-83)
- The Board authorized the acquisition of five ready-mixed concrete facilities controlled by Seyhan Hazır Beton Sanayi Madencilik Nakliyat Taşımacılık Pazarlama Ticaret Ltd. Şti. by Medcem Beton Üretim Pazarlama San. ve Tic. A.Ş. (30.06.2015; 15-27/299-84)
- The Board authorized the acquisition of a certain amount of capital of Eaststarch C.V. by lmez B.V. from Nederlandse Glucose lndustrie B.V. (07.07.2015; 15-28/332-104)
- The Board authorized the acquisition of full control of Dorma Holding GmbH+Co.KGaA by Kaba Holding AG. (07.07.2015; 15-28/316-94)
- The Board authorized the acquisition of a certain amount of shares of Gonvarri Eolica S.L. and its affiliates by Mitsui & Co. Ltd. from Holding Gonvarri S.L. (07.07.2015; 15-28/303-85)
- The Board authorized the establishment of the control over Migros Ticaret A.Ş. via the acquisition of the majority shares of MH Perakendecilik ve Ticaret A.Ş., which is under the control of Moonlight Capital S.A., by Anadolu Endüstri Holding A.Ş., with conditions. (09.07.2015; 15-29/420-117)
- The Board authorized the establishment of a joint venture by Doğuş Zhenfa Kozmetik Ticaret A.Ş. and KIKO International S.R.L. (09.07.2015; 15-28/333-105)
- The Board authorized the acquisition of the full control of Caffe Nerro Gıda Ürünleri A.Ş., which is under the joint control of Caffe Nerro Ventures Limited and Infinity Invest, by Caffe Nero Ventures Limited. (09.07.2015; 15-29/440-130)
- The Board authorized the acquisition of joint control of Multinet Kurumsal Hizmetler A.Ş., which is under full control of CD Holding Internationale, by Şevket BAŞEV. (13.07.2015; 15-29/439-129)

- The Board did not authorize the acquisition of all shares of Beta Marina Liman ve Çekek İşletmesi A.Ş. and Pendik Turizm Marina Yat ve Çekek İşletmesi A.Ş. by Setur Servis Turistik A.Ş. (09.07.2015; 15-29/421-118)
- The Board authorized the acquisition of a certain amount of shares of Zeki Kubilay Akyol, İş Girişim Sermayesi Yatırım Ortaklığı A.Ş and Doğuş SK Girişim Sermayesi Yatırım Ortaklığı A.Ş in Radore Veri Merkezi Hizmetleri A.Ş by Mustafa Selçuk Saraç. (10.07.2015; 15-30/446-133)
- The Board authorized the acquisition of a certain amount of shares of Saf Gayrimenkul Yatırım Ortaklığı A.Ş. by Akiş Gayrimenkul Yatırım Ortaklığı A.Ş. and Ali Raif Dinçkök. (10.07.2015; 15-30/447-134)
- The Board authorized the acquisition of the full control of Morgan Stanley's Global Fuel Oil Trade department indirectly by Castleton Commodities International LLC. (28.07.2015; 15-32/449-135)
- The Board authorized the acquisition of the sole control of Alcatel-Lucent by Nokia Corporation. (28.07.2015; 15-32/453-137)
- The Board authorized the transfer of joint control over Avea İletişim Hizmetleri A.Ş. and its affiliate company Fleksus Ödeme Hizmetleri A.Ş. by Türk Telekomünikasyon A.Ş. and İş Bankası Group to the sole control of Türk Telekomünikasyon A.Ş. through share transfers. (28.07.2015; 15-32/454-138)
- The Board authorized the acquisition of Canada Wheat Board by Bunge Canada and SALIC Canada Ltd. (28.07.2015; 15-32/456-139)
- The Board authorized the transfer of shares in Ekol Gıda Tarım Hayvancılık Pazarlama Sanayi Ticaret A.Ş. by Cargill Holdings B.V. (28.07.2015, 15-32/457-140)
- The Board authorized the acquisition of joint control over Hamlet Protein A/S by Goldman Sachs Group Inc. and Altor Fund IV. (28.07.2015; 15-32/458-141)

- The Board decided that the acquisition of 99.99% shares of Enerya Elektrik Ticaret A.Ş. controlled by STFA Yatırım Holding A.Ş. by Enerji Yatırım A.Ş., which is under the joint control of STFA Yatırım Holding A.Ş. and Energizer Turkey SARL, is not subject to the authorization. (28.07.2015; 15-32/450-BD)
- The Board decided that the acquisition of the certain amount of shares of Trabzon Enerji Üretim ve Ticaret A.Ş. by IC İçtaş Hidroelektrik ve Termik Enerji Üretim ve Ticaret A.Ş., is not subject to the authorization. (28.07.2015; 15-32/470-BD)
- The Board decided that the acquisition of the certain amount of shares of Kılıç Deniz Ürünleri Üretim İthalat ve Ticaret Anonim Şirketi held by Statum Investments S.à r.l. by Kılıç Family through Kılıç Holding A.Ş., is not subject to the authorization. (28.07.2015; 15-32/451-BD)
- The Board authorized the formation of a sole control by Prettl Group over PAS Management Holding GmbH in which it holds a certain amount of shares, through the acquisition of the all remaining shares by the means of Jolaos Verwaltungs GmbH (Affiliate Company of Prettl Group). (05.08.2015; 15-33/475-146)
- The Board authorized the acquisition of Muka Metal Ticaret ve Sanayi A.Ş. by Stryker Funding B.V. which is the affiliate of Stryker Corporation. (05.08.2015; 15-33/479-147)
- The Board authorized the acquisition of the whole shares of LeasePlan Corporation N.V by LP Group B.V., which was founded by the investors and controlled by TDR Capital LLP. (05.08.2015; 15-33/480-148)
- The Board authorized the acquisition of the sole control over Çepaş Galvaniz Demir Çelik Madencilik İnş. Nak. Tic. ve San. A.Ş. by Gonvarri MS Corporate S.L. (05.08.2015; 15-33/484-150)
- The Board authorized the establishment of a joint venture by Aéroports de Paris Management S.A., Vinci Airports S.A.S. and Astaldi Conccessioni S.p.A. on the operation of the Santiago Airport in Chili. (01.09.2015; 15-34/509-157)

- The Board authorized the acquisition of the certain amount of shares of Nissan Otomotiv Anonim Şirketi controlled by Sumitomo Corporation Dış Ticaret A.Ş. and conducting the distribution of passenger cars with Nissan brand, by Nissan Middle East FZE. (01.09.2015; 15-34/510-158)
- The Board authorized the establishment of a joint venture on İnci Akü Sanayi ve Ticaret A.Ş. by İnci Holding A.Ş. and GS Yuasa International Ltd. by way of acquisition of a certain amount of shares of İnci Akü Sanayi ve Ticaret A.Ş. by GS Yuasa International Ltd. (01.09.2015; 15-34/511-159)
- The Board authorized the acquisition of a certain amount of shares of İdea Yapı Kimyasalları San. ve Tic. A.Ş. by Fosroc Holding A.G. (01.09.2015, 15-34/516-163)
- The Board authorized the acquisition of KCM Corporation controlled by, Kawasaki Heavy Industries Ltd., by Hitachi Construction Machinery Co. (09.09.2015; 15-36/531-152)
- The Board authorized the establishment of a joint control over Mitsubishi Agricultural Machinery Co. Ltd. by way of acquisition of the shares of the Mitsubishi Agricultural Machinery Co. Ltd., an affiliate of Mitsubishi Heavy Industries Limited, by Mahindra & Mahindra Limited. (09.09.2015; 15-36/532-167)
- The Board authorized the acquisition of a certain amount of shares of Callpex Çağrı Merkezi ve Müşteri Hizmetleri A.Ş and Bin Çağrı Hizmetleri A.Ş. by Webhelp S.A.S. (09.09.2015; 15-36/539-171)
- The Board authorized the acquisition of all shares and sole control of Pozitron Medya Holding A.Ş. by Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. (09.09.2015; 15-36/540-172)
- The Board authorized the acquisition of the sole control of Enformasyon Reklamcılık ve Filmcilik San. ve Tic. A.Ş. (CNBC-e) by Discovery Medya Hizmetleri Ltd. Şti. (09.09.2015; 15-36/541-173)
- The Board authorized the acquisition of all shares of Assan Bilişim A.Ş., İspak İzmit Sıvı Paketleme San. ve Tic. A.Ş. and Kibar Sigorta Aracılık Hizmetleri A.Ş. in Sicpa Assan Ürün

Güvenliği San. ve Tic. A.Ş. by Sicpa Finance SA. (09.09.2015; 15-36/542-174)

- The Board authorized the establishment of a joint venture by Peninsula İstanbul Holdings AG and Salıpazarı Liman İşletmeciliği ve Yatırımları A.Ş. over Peninsula İstanbul Otel İşletmeciliği A.Ş. with equal shareholding structure. (09.09.2015; 15-36/553-180)
- The Board authorized the acquisition of the sole control of CMC İletişim Bilgisayar Reklam ve Danışmanlık Hizmetleri San. Tic. A.Ş. by Uluslararası Çağrı Merkezi Hizmetleri A.Ş. (09.09.2015; 15-36/563-185)
- The Board authorized the acquisition of a certain number of shares of Unit Investment N.V. via capital increase by International Finance Corporation from European Power Systems SA. (06.10.2015; 15-37/565-187)
- The Board authorized the acquisition of OCI N.V.'s North America, Europe and global distribution operations by CF Industries Holdings Inc. (06.10.2015; 15-37/566-188)
- The Board authorized the establishment of joint control over H. Stoll AG & Co. KG by ShangGong (Europe) Holding Corp. GmbH, via a capital increase of a certain number of shares of H. Stoll AG & Co. KG. (06.10.2015; 15-37/567-189)
- The Board authorized the acquisition of Emzet Akaryakıt Ticari ve İktisadi Bütünlüğü, which was incorporated by Savings Deposit Insurance Fund, by Seyhan Akaryakıt Taşımacılık İnşaat Turizm Sanayi ve Ticaret Ltd. Şti. or Sevpet Grup Akaryakıt Dağıtım Sanayi ve Ticaret A.Ş., by means of a tender. (06.10.2015; 15-37/568-190)
- The Board authorized the acquisition of sole control of Sikorsky Aircraft Corporation by Lockheed Martin Corporation. (06.10.2015; 15-37/570-192)
- The Board authorized the acquisition of a certain number of shares of AFS İstanbul Fleksibıl A.Ş. by Soler&Palau Ventilation Group. (06.10.2015; 15-37/571-193)

- The Board authorized the full acquisition of Imtech Marine Group B.V. and its affiliates by Parcom Buy Out Fund IV B.V. and Pon Holdings B.V. (06.10.2015; 15-37/578-198)
- The Board authorized the acquisition of Fuel Systems Solutions Inc. by Wesport Innovations Inc. via its 100% affiliate Whitehorse Merger Sub Inc. (06.10.2015; 15-37/579-199)
- The Board authorized the acquisition of all shares of Getrag Getriebe und Zahnradfabrik Hermann Hagenmeyer GmbH & Cie KG by Magna International Inc. (06.10.2015; 15-37/580-200)
- The Board authorized the acquisition of the distribution and service rights over Suzuki-branded four-wheelers, motorcycles and motorboats, along with present equipment by Suzuki Motorlu Araçlar Pazarlama A.Ş. from Suzuki Otomobil Pazarlama ve Ticaret A.Ş. (06.10.2015; 15-37/581-201)
- The Board decided that the acquisition of a certain number of shares of MAN Finansman A.Ş. by Volkswagen Doğuş Finansman A.Ş. is not subject to authorization. (06.10.2015; 15-37/595-BD)
- The Board authorized the acquisition of a certain number of shares of Parkoteks Kimya Sanayi ve Ticaret A.Ş. by Brenntag CEE GmbH. (16.10.2015; 15-38/609-206)
- The Board authorized the acquisition of a certain number of shares of Bilgitaş Büro Makinaları Sanayi ve Ticaret A.Ş. by Kyocera Document Solutions Europe B.V. (16.10.2015; 15-38/611-207)
- The Board authorized the acquisition of Stemcor Holdings 2 Limited, Stemcor Limited and Stemcor MEIP Limited, along with their direct and indirect subsidiaries (excluding Stemcor Trade Finance Limited and its subsidiaries and Stemcor Trade Development Limited) by the investment funds managed by Apollo Capital Management L.P. (16.10.2015; 15-38/619-211)
- The Board authorized the acquisition of a certain number of shares of Linkplus Bilgisayar Sistemleri Sanayi ve Ticaret A.Ş. by Redington Gulf Fze. (16.10.2015; 15-38/634-217)

- The Board authorized establishment of a joint venture over Muğla Yapı Malzemeleri Sanayi ve Ticaret A.Ş. via acquisition of all of the shares of Muğla Yapı Malzemeleri Sanayi ve Ticaret A.Ş. by Limak Batı Çimento Sanayi ve Ticaret A.Ş. and lC İçtaş Mühendislik ve Yapı A.Ş. (16.10.2015; 15-38/635-218)
- The Board decided that the acquisition of a certain number of shares of Beken Otomotiv San. ve Tic. A.Ş. by General Otomotive Services B.V. via share transfer is not subject to authorization. (16.10.2015; 15-38/626-BD)
- The Board authorized the acquisition of the sole control over Cytec Industries Inc. by Solvay SA. (03.11.2015; 15-39/638-220)
- The Board authorized the acquisition of all of the shares of DP Acquisitions B.V. by beIN Media Group LLC. (03.11.2015; 15-39/639-221)
- The Board authorized the acquisition of certain amount of shares of Della Gıda San. ve Tic. A.Ş., Bahar Su San. ve Tic. A.Ş. and İlk Mevsim Meyve Suları Paz. A.Ş. by DyDO DRINCO, Inc. (03.11.2015; 15-39/642-222)
- The Board authorized the acquisition of certain amount of the shares of Fina Liman Hizmetleri Lojistik Denizcilik Tic. ve San. A.Ş. by Euro-Asia Oceangate S.a.r.l. (03.11.2015; 15-39/646-225)
- The Board authorized joint venture formed on Global Liman İşletmeleri A.Ş. through the acquisition of a certain amount of the shares of Global Liman İşletmeleri A.Ş. by the European Bank for Reconstruction and Development. (03.11.2015; 15-39/647-226)
- The Board authorized the establishment of a full-functioning joint venture, under the joint control of Spike SAS, which is a Michelin Group company, and Fives SA, which is the holding company of the Fives Group, to be active in the area of development, and the sale of layered manufacturing machines and related services. (20.11.2015, 15-41/673-235)

- The Board authorized the acquisition of all of the shares and sole control of Millenicom Telekomünikasyon Hizmetleri A.Ş. by EWE Telekomünikasyon Hizmetleri A.Ş., which is an affiliate of EWE Turkey Holding A.Ş. (20.11.2015, 15-41/676-238)
- The Board authorized the acquisition of Allergan Jenerik Business of Allergan Plc by Teva Pharmaceutical Industries Ltd. (20.11.2015, 15-41/679-241)
- The Board authorized the establishment of a joint venture by way of incorporation of one or more joint stock companies to which Tekfen Holding A.Ş. and Amstar Global Partners Ltd. will participate with equal shareholdings. (20.11.2015, 15-41/681-242)
- The Board authorized the acquisition of the certain amount of shares of Promak Enerji Sanayi ve Ticaret A.Ş. held by Prima Energy Trading LLC. And, therefore, the control of the shares of the relevant company at Enerco Enerji Sanayi and Ticaret A.Ş. ve Avrasya Gaz A.Ş. by Akpol İnşaat Mühendislik Proje ve Ticaret A.Ş. (02.12.2015, 15-42/687-244)
- The Board authorized the acquisition of the "Biotechnological Product Assets" of Eczacıbaşı-Baxter Hastane Ürünleri San. ve Tic. A.Ş., jointly controlled by Eczacıbaşı Group and Baxter Group, by Eczacıbaşı Baxalta Hastane Ürünleri San. ve Tic. A.Ş. (02.12.2015, 15-42/695-249)
- The Board authorized the acquisition of the sole control of the "Hospital Product Assets" of Eczacıbaşı-Baxter Hastane Ürünleri San. ve Tic. A.Ş., jointly controlled by Eczacıbaşı Group and Baxter Group, by EİP Eczacıbaşı İlaç Pazarlama A.Ş. (02.12.2015, 15-42/696-250)
- The Board authorized the establishment of a joint venture by Aventis Inc. and Google Life Sciences LLC. (02.12.2015, 15-42/697-251)
- The Board authorized the acquisition of a certain amount of shares of Selkasan Kağıt ve Paketleme Malzemeleri İmalat San. ve Tic. A.Ş., Kaplamin Ambalaj San. ve Tic. A.Ş., Yalova Ambalaj San. ve Tic. A.Ş., Atkasan Atık Değerlendirme San. ve

Tic. A.Ş. and Ova Oluklu Mukavva Ambalaj San. ve Tic. A.Ş by Cukurova Investments N.V. (02.12.2015, 15-42/698-252)

- The Board authorized the acquisition of the sole control of Montupet S.A. by Linamar Corporation. (02.12.2015, 15-42/699-253)
- The Board authorized the acquisition of the entire control of Amlin plc. by Mitsui Sumitomo Insurance Company Limited, whose shares are fully held by MS&AD Insurance Group Holdings, Inc. (02.12.2015, 15-42/700-254)
- The Board authorized the acquisition of the sole control of UTI Worldwide, Inc. by DSV A/S. (02.12.2015, 15-42/701-255)
- The Board authorized the establishment of two joint ventures, a company for production, and a company for sales and distribution, to be active in the iron and steel casting sector, by Titan Barrato NV and Componenta Corporation, through the use of their companies and assets, and transfer of contractual rights, assets, shares, contracts and relationship with the customers, as well as know-how. (02.12.2015, 15-42/702-256)
- The Board authorized the acquisition of a certain amount of shares of Özbal Çelik Boru Sanayi Ticaret ve Taahhüt A.Ş. by Erciyas Holding A.Ş. (02.12.2015, 15-42/703-257)
- The Board authorized the acquisition of 100% of the shares of TNT Express N.V. by FedEx Acquisition B.V. through a public offering to be conducted in accordance with Dutch law. (02.12.2015, 15-42/713-259)
- The Board decided that the acquisition of all of the issued capital of Kuwait Petroleum Europoort B.V by Sandcape B.V. is not subject to authorization. (02.12.2015, 15-42/708-BD)
- The Board authorized the acquisition of the certain amount of shares of Demirören Axpo Enerji Toptan Ticaret Anonim Şirketi, jointly controlled by Axpo International SA and Demirören Enerji Madencilik Sanayi ve Ticaret A.Ş., by Axpo International SA. (09.12.2015, 15-43/717-261)

- The Board authorized the acquisition of all of the shares of Oruçoğlu Yağ Sanayi ve Ticaret A.Ş. by Trans-Atlantic Group DMCC. (09.12.2015, 15-43/726-263)
- The Board authorized the acquisition of the certain part of the assets related to the LPG tube distribution activities and auto gas LPG distribution activities, as well as the transfer of related dealership agreements by İpragaz A.Ş. (16.12.2015, 15-44/727-264)
- The Board authorized the acquisition of the joint control of Mektebim Eğitim Kurumları Ticaret A.Ş. which is already controlled by Gelişim ve Başarı Eğitim Yatırım ve Hizmetleri Ticaret A.Ş., Ümit KALKO and Yusuf KALKO, by HS Mali Yatırım ve Danışmanlık A.Ş., through the acquisition of shares. (16.12.2015, 15-44/741-268)
- The Board decided that the acquisition of all of the shares of Sekiz Medya Holding A.Ş. that are held by Ali Acun Ilıcalı, by Doğuş Yayın Grubu A.Ş. are not subject to authorization. (16.12.2015, 15-44/744-BD)

Important Publications and Decisions regarding Privatization

- The Competition Board ("Board") the Board decided that there is no obstacle to authorizing the transfer of the Orhaneli and Tunçbilek Thermal Power Plants, the movable properties used by Bursa Linyit İşletmesi, various immovable properties used by said enterprises and related mining licenses along with mining fields, within the scope of privatization of these assets as a whole to Çelikler Taah. İnş. ve San. A.Ş. or Konya Şeker San. ve Tic. A.Ş. (08.01.2015; 15-02/2-1)
- The Board authorized the transfer of Soma B Thermal Power Plant and the immovable used by Soma B Thermal Power Plant as a whole through privatization by "asset sales" to Konya Şeker Sanayi ve Ticaret A.Ş. or Kalyon İnşaat Sanayi ve Ticaret A.Ş. (15-07/98-38, 12.02.2015)
- The Board decided that the privatization of Karacaören 1 and Karacaören 2 Hydroelectric Power Plants of Elektrik Üretim A.Ş. and land allocated for the use of these power plants by way of "Granting Operational Rights" shall not be subject to authorization. (02.12.2015, 15-42/689-246)

Important Changes and Development regarding Energy Law

- The Energy Market Regulatory Authority ("EMRA") announced the Minimum Capitalization in the Natural Gas Market for the year 2015 on 18.12.2014.
- EMRA announced the Liquidated Petroleum Gas ("LPG") Market Sector Report of October 2014 on 19.12.2014.
- The Regulation on the Amendment to the Natural Gas Market Certificate Regulation entered into force through publication in the Official Gazette dated 23.12.2014 and numbered 29214.
- EMRA announced the Amendment to the Natural Gas Certificate Regulation on 23.12.2014.
- The Regulation on the Amendment to the Regulation on Natural Gas Market Distribution and Customer Services entered into force through publication in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Regulation on the Amendment to the LPG Market License Regulation entered into force through publication in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Energy Market Regulatory Board's ("Board") Decision dated 20.11.2014 and numbered 5313/1 regarding the ratification of the Energy Market Notification System Instruction Manual was published in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Board Decision dated 20.11.2014 and numbered 5313/2-b regarding the abrogation of Article 11 of the Board Resolution dated 08.03.2012 and numbered 3727 on License Applications and Notification Explanations in the LPG Market was published in the Official Gazette dated 24.12.2014 and numbered 29215.
- The Board Decision dated 20.11.2014 and numbered 5313-1 on the adaption of Energy Market Notification System Instruction Manual was published in Official Gazette dated 24.12.2014 and numbered 29215.
- The Regulation on the Amendment to the Natural Gas Market License Regulation entered into force through publication in the Official Gazette dated 26.12.2014 and numbered 29217.

- The Regulation on the Amendment to the Petroleum Market License Regulation entered into force through publication in the Official Gazette dated 26.12.2014 and numbered 29217.
- The Regulation on the Amendment to the Electricity Market License Regulation entered into force through publication in the Official Gazette dated 26.12.2014 and numbered 29217.
- The Communiqué on the Amendment to 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 28.12.2014 and numbered 29219. This Communiqué entered into force on 01.01.2015.
- EMRA announced the Petroleum Market Sector Report of October 2014, on 29.12.2014.
- The Electricity Facilities Project Regulation entered into force through publication in the Reiterated Official Gazette dated 30.12.2014 and numbered 29221.
- The Regulation on the LPG Market Pricing System entered into force through publication in the Reiterated Official Gazette dated 30.12.2014 and numbered 29221.
- The Board Decision dated 30.12.2014 and numbered 5398-3 on the Determination of the Application Fee of Unlicensed Production Price and Annual Operating Fee of 2015 was published in the Official Gazette dated 01.01.2015 and numbered 29223.
- EMRA announced the Petroleum Market Pricing Report of December 2014 on 16.01.2015.
- The Board Decision dated 15.01.2015 and numbered 5418 on eligible consumer limits pursuant to Art. 5 (6) subparagraph b of the Law on the Duties and Organization of the Energy Markets Regulation and Art. 25 of the Electric Market Consumer Services Regulation was published in the Official Gazette dated 21.01.2015 and numbered 29243.
- The Protocol on the Cooperation between the EMRA and Competition Authority prepared for the realization of effective communication and cooperation between EMRA and the Competition Authority was signed by the President of EMRA

Mustafa Yılmaz and the President of the Competition Authority Prof. Dr. Nurettin Kaldırımcı on 28.01.2015.

- The Regulation on the Amendment to the Petroleum Market License Regulation entered into force through publication in the Official Gazette dated 01.02.2015 and numbered 29254.
- The Regulation on the Amendment to the Electricity Market License Regulation entered into force through publication in the Official Gazette dated 04.02.2015 and numbered 29260.
- The Communiqué on the Administrative Pecuniary Fines to be implemented in 2015 in accordance with Art. 10 of the Energy Efficiency Law No. 5627 (Serial Number: 2015/2) entered into force through publication in the Official Gazette dated 07.02.2015 and numbered 29260.
- The Regulation on the Amendment to the Petroleum Market License Regulation entered into force through publication in the Official Gazette dated 19.02.2015 and numbered 29272.
- The Regulation on the Principals and Procedures on the Conclusion of the Right of Water Usage in Order to Operate in the Electricity Market entered into force through publication in the Official Gazette dated 21.02.2015 and numbered 29274.
- The Board Decision dated 12.02.2015 and numbered 5468-1 on the Amendment to the Board Decision dated 27.06.2007 and numbered 1243 on Principals and Procedures Regarding the Dealer Control System on Entities having a Distribution License in the Petroleum Market was published in the Official Gazette dated 21.02.2015 and numbered 29274.
- The Board Decision dated 12.02.2015 and numbered 5468-3 on the Amendment to the Board Decision on the Announcement of Applications for a License in the Petroleum Market was published in Official Gazette dated 21.02.2015 and numbered 29274.
- The Board Decision dated 12.02.2015 and numbered 5468-4 on the Amendment to the Board Decision on the Required Information and Documents for the Renewal of Licenses Regarding the Petroleum Market was published in the Official Gazette dated 21.02.2015 and dated 29274.

- The Regulation on Connection of the Wind Energy Centrals to the Wind Power Surveillance and Estimation Center entered into force through publication in the Official Gazette dated 25.02.2015 and numbered 29278.
- The Board Decision dated 12.02.2015 and numbered 5466-32 providing that the maximum rate of sale of the annual production of electricity registered to the license shall be 40% for the year 2015 regarding the licensed legal entities in accordance with the temporary 7th article of Law on Electricity Market No. 6446, was published in the Official Gazette dated 28.02.2015 and numbered 29281.
- The Regulation on Amendment to the Regulation on Licenses Regarding Natural Gas Market entered into force through publication in the Official Gazette dated 19.03.2015 and numbered 29300.
- The Communiqué on Amendment to the Communiqué on Principals and Procedures Regarding Supply of Oil Products from Domestic or Foreign Sources with the Exception of Fuel entered into force through publication in the Official Gazette dated 18.03.2015 and numbered 29299.
- The Communiqué Abrogating the Communiqué (Serial No: 6) Pertaining to Auditing of Real and Legal Persons Active in the Energy Market by Independent Auditing Institutions entered into force through publication in the Official Gazette dated 25.03.2015 and numbered 29306.
- The Regulation on the Amendment to the Electricity Market Stabilization and Reconciliation Regulation was published in the Official Gazette dated 28.03.2015 and numbered 29309. This Regulation entered into force on 01.07.2015.
- EMRA announced the Natural Gas Market Sector Report of 2015 January on 26.03.2015.
- EMRA announced the tariff tables to be in force as of 01.04.2015 on 31.03.2015.
- EMRA announced the LPG Market Sector Report of 2015 January on 02.04.2015.

- EMRA announced the Petroleum and LPG Market Pricing Tables of 2015 March on 15.04.2015.
- EMRA published the Memorandum regarding the price cap applied within the scope of Petrol Market Law No. 5015 on 20.04.2015.
- 13th Chamber of the Council of State adopted a stay of execution decision dated 18.02.2015 and numbered 2014/2924 E. for the Temporary 7th article of the Electric Network Regulation. The EMRA declared the above-mentioned decision on 20.04.2015.
- The Board Decision dated 16.04.2015 and numbered 5560-9 regarding the Mineral Oil License Period was published in the Official Gazette dated 29.04.2015 and numbered 29341.
- EMRA published a draft for the Amendment to the Electricity Market Unlicensed Electricity Generation Regulation and the Communiqué on the Implementation of the Electricity Market Unlicensed Electricity Generation Regulation on 15.05.2015.
- The Board Decision dated 21.05.2015 and numbered 5605-2 on the Principles and Procedures on National Marker Implementation Activities and Delivery of National Marker was published in the Official Gazette dated 12.06.2015 and numbered 29384.
- The Regulation on the Amendment to the Petroleum Market Licenses Regulation entered into force through publication in the Official Gazette dated 23.05.2015 and dated 29364.
- The Regulation on the Amendment to the Regulation on Electricity Market Ancillary Services was published in the Official Gazette dated 04.06.2015 and numbered 29376 to be valid as of 01.06.2015.
- The Regulation on the Amendment to the Regulation on Implementation of National Marker in the Petroleum Market entered into force through publication in the Official Gazette dated 12.06.2015 and numbered 29384.
- EMRA published the Petroleum Market Sector Report of April, 2015.

- EMRA published the Natural Gas Market Sector Report of April, 2015.
- The Board Decision numbered 5665 regarding the active electric energy wholesale tariff to be applied, as of 01.07.2015, by Türkiye Elektrik Ticaret Taahhüt Anonim Şirketi (TETAŞ).
- EMRA published the Natural Gas Market Sector Report of May, 2015.
- EMRA published the Pricing Report of Petroleum and LPG Markets of June, 2015.
- EMRA published the Sector Report of LPG Market of May, 2015.
- The Communiqué (No: MSG – MS – 2015/5) on the Transportation Standards of the TS 1445 LPG was published in the Official Gazette dated 24.07.2015 and numbered 29424. The Germaniqué enters into force three months ofter its publication.
- EMRA published the Petroleum Market Sector Report of May, 2015.
- The Board Decision dated 30.07.2015 and numbered 5709 on the Electricity Market License Regulation was published in the Official Gazette dated 08.08.2015 and numbered 29439.
- EMRA published the Petroleum Market Sector Report of June, 2015.
- EMRA published the Petroleum and LPG Market Pricing Report of July, 2015.
- EMRA published the Natural Gas Market Sector Report of June, 2015.
- The Regulation on Electricity Market Tariffs was published in the Official Gazette dated 22.08.2015 and numbered 29453. The Regulation enters into force on 01.01.2016.
- The Communiqué on the Abrogation of the Communiqué on Drawing Up of Retail Sale Agreements in the Electricity Market entered into force through publication in the Official Gazette dated 25.08.2015 and numbered 29456.

- The Board Decision dated 06.08.2015 and numbered 5716-1 on Retail Sale Agreements was published in the Official Gazette dated 25.08.2015 and numbered 29456.
- The Board Decision dated 10.09.2015 and numbered 5781-3 on determination of the income cap for the dates of 01.09.2015-31.12.2015 regarding the market operation activities to be conducted by Energy Market Operation Joint Stock Company (EPİAŞ) as of 01.09.2015, was published in the Official Gazette dated 14.09.2015 and numbered 29475.
- The Board Decision dated 03.09.2015 and numbered 5762 on the approval of the investment program on national transmission network, including transit transmission of natural gas, by way of Petroleum Pipeline Corporation (BOTAŞ) was published on 10.09.2015.
- The Regulation on Amendment to the Regulation on Electricity Market Customer Services was published in the Official Gazette dated 16.09.2015 and numbered 29477. Articles 5 and 6 of the Regulation enter into force on 01.03.2016, and the others enter into force on the date of their publication.
- The Regulation on Abrogation of the Regulation on the Issuance of New Production Licenses to the Facilities Which are Commenced to be Constructed in Electricity Market entered into force through publication on the Official Gazette dated 19.09.2015 and numbered 29800.
- EMRA published the Petroleum and LPG Market Pricing Report of August 2015 on 29.09.2015.
- EMRA published the LPG Market Sector Report of July 2015 on 30.09.2015.
- EMRA published the Retail Electricity Tariff Tables to be Valid as of 01.10.2015, on 30.09.2015.
- The Board Decision dated 30.09.2015 and and numbered 5801 regarding the wholesale electric energy tariff to be applied as of 01.10.2015, by Türkiye Elektrik Ticaret Taahhüt Anonim Şirketi (TETAŞ), was published in the Official Gazette dated 01.10.2015 and numbered 29489.

- EMRA published the Petroleum Market Sector Report of July 2015 on 02.10.2015.
- EMRA published the LPG Market Sector Report of September 2015 on 16.10.2015.
- The Regulation Pertaining to Technical Evaluation of Wind Based Electricity Generation entered into force through publication in the Official Gazette dated 20.10.2015 and numbered 29508.
- The Regulation on the Technical Evaluation of the Wind Powered Electricity Generation Applications entered into force through publication in the Official Gazette dated 20.10.2015 and numbered 29508.
- The Electricity Generation Facilities Acceptance Regulation entered into force through publication in the Official Gazette dated 06.11.2015 and numbered 29524.
- The Regulation on the Amendment to the Electricity Facilities Project Regulation entered into force through publication in the Official Gazette dated 07.11.2015 and numbered 29525.
- The EMRA published the Natural Gas Market September 2015 Sector Report.
- The Board Decision dated 24.11.2015 and numbered 5885-1 on the Procedures and Principles to Determine the Efficiency Parameters to be Based upon for the Tariffs of Electricity Distribution Companies was published in the Official Gazette dated 28.11.2015 and numbered 29546.
- The Board Decision dated 24.11.2015 and numbered 5885-7 on the Procedures and Principles for the Electricity Market Distribution System Investments was published in the Official Gazette dated 28.11.2015 and numbered 29546.
- The Board Decision dated 10.12.2015 and numbered 5910-4 on the Amendment to the Provisional Article 2 of the Procedures and Principles Pertaining to the Supervision of the Determination and Realization of the Electricity Market Distribution System Investment Expanses Subject to

Regulation was published in the Official Gazette dated 15.12.2015 and numbered 29563.

- The Board Decision dated 26.11.2015 and numbered 5890 on the Procedures and Principles to Determine the Target Loss Ratios of the Electricity Distribution Companies was published in the Official Gazette dated 15.12.2015 and numbered 29563.
- The Communiqué on Distribution System Revenues was published in the Official Gazette dated 19.12.2015 and numbered 29567. The Communiqué enters into force on 01.01.2016.
- The Board Decision dated 17.12.2015 and numbered 5922 on Crude Oil, Fuel, Bunker Fuel, Mineral Oil, Base Oil and Petroleum Related Materials was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5921-3 on the Permission for Fuel Commerce between the Distributors Holding Distribution Licenses was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5932 on participation fee for the year 2016 to be paid by the real person or legal person-license holders who will operate in the petroleum market was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5931 on the fees for application, amendment, extension of time (visa) and any request of copies of the license, and fees for tariff approval, and fuel oil trading permission to be applied in the year 2016, in accordance with Article 27 of the Petroleum Market Law and Article 13 of the Petroleum Market Regulation was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5933 on the participation fee for the year 2016 to be paid by the license holders who will operate in the LPG Market was published in the Official Gazette dated 19.12.2015 and numbered 29567.

- The Board Decision dated 17.12.2015 and numbered 5934 on the fees for application, amendment, extension of time (visa) and any request of copies of the license to be applied in the LPG Market for the year 2016 was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5920 on the eligible consumer threshold to be applied in the Natural Gas Market for the year 2016 was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5928 on the participation fee to be applied in the Natural Gas Market for the year 2016 was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5929 on the fees for application, amendment, extension of time (visa) and any request of copies of the license to be applied in the Natural Gas Market for the year 2016 was published in the Official Gazette dated 19.12.2015 and numbered 29567.
- The Board Decision dated 17.12.2015 and numbered 5930 on the fees for application, renewal, amendment and any request of copies of the certificate and fees for certificate visa to be applied in the Natural Gas Market for the year 2016 was published in the Official Gazette dated 19.12.2015 and numbered 29567.

Important Case Law and Other Important Decisions

- The Constitutional Court Decision dated 13.05.2015 and numbered 2015/49 E., 2015/46 K. was published in the Official Gazette dated 15.05.2015 and numbered 29356. This Decision annulled Art. 16 (5) of Decree-Law No. 556 on the Protection of Trademarks ("Decree-Law") on the grounds that Decree-Laws shall not include regulations pertaining to the rights of property.
- The Constitutional Court's Decision dated 27.05.2015 and numbered E. 2015/33, K. 2015/50 pertaining to the annulment of paragraph (1) of Article 7/1 of Decree Law No. 556 on the Protection of Trademarks was published in the Official Gazette dated 02.06.2015 and numbered 29374.
- Coordination and Money-Credit Council's Decision dated 26.05.2015 and numbered 2015/8 on Promoting Trade of Services that Earn Foreign Currency was published in the Official Gazette dated 02.06.2015 and numbered 29374.
- The decision of the Constitutional Court dated 22.05.2014, and numbered E: 2013/65, K: 2014/93 regarding the annulment of Temporary Article 8 and Temporary Article 14 of the Electricity Market Law was published in the Official Gazette dated 24.06.2015, and numbered 29296.
- The decision of the Ministry of Justice regarding the Establishment of Six New Regional Courts of Justice was published in the Official Gazette dated 07.11.2015 and numbered 29525.
- The decision of the Ministry of Justice regarding the Establishment of Regional Courts of Justice and Determination of their Jurisdiction was published in the Official Gazette dated 07.11.2015 and numbered 29525.
- The decision of the Ministry of Justice regarding the Date on Which the Regional Courts of Shall Begin Active Duty was published in the Official Gazette dated 07.11.2015 and numbered 29525.

- Constitutional Court Decision numbered E. 2015/29 K. 2015/95 and dated 22.10.2015 which cancelled a portion of the third sentence of Art. 13(4) of the Capital Markets Law numbered 6362, and its fourth and fifth sentences on the grounds that the public welfare and individual's property rights were not justly and reasonably balanced, was published in the Official Gazette dated 12.11.2015 and numbered 29530.
- The decision of the Central Bank of Turkey dated 05.11.2015 and numbered 10208/19807 was published in the Official Gazette dated 18.11.2015 and numbered 29536.

INDEX

D

P