

# TABOGLU & DEMİRHAN

## Quarterly Report

### DRAFT COMMUNIQUÉ ON VOLUNTARY AND MANDATORY TENDER OFFERS IN PUBLIC COMPANIES

By: *Enver Sezer Çalışkan*

A tender offer is generally defined as the solicitation of the shareholders in a public company for the purchase of their shares through public announcements made under the scrutiny of a regulatory body. Tender offers may be classified as a mandatory tender offer and a voluntary tender offer as to whether or not it is required to be exercised under the rule of the law.

Pursuant to Turkish capital markets legislation, tender offer procedures are regulated under the Communiqué on Principles Regarding Proxy Voting, Proxy Solicitation and Tender Offer, published by the Turkish Capital Markets Board (the “CMB”) on 9 March 1994 (the “Communiqué”). The Communiqué principally regulates the concept under mandatory and voluntary offer headings. The presence of ambiguities in many sections has led the CMB to issue principle decisions with a view to make clarifications for remedying thereof. Finally, with the belief that the first generation Communiqué has completed its tenure, the CMB has started works for the second generation communiqué and prepared the Draft Communiqué on Tender Offers (the “Draft Communiqué”) and submitted it to the opinion of the capital markets community.

The Draft Communiqué is prepared to regulate solely the tender offer procedures, *i.e.* the rules with respect to proxy solicitation are not touched upon. The Draft Communiqué focuses on the concept on the basis of voluntary and mandatory tender offers. It is noteworthy to mention that no material amendment to the process of voluntary offers has been made. However, the Draft Communiqué has introduced many amendments with respect to mandatory offers. The most important amendment is related to the conditions which lead to a mandatory offer.

According to the Communiqué, in the event that any person or persons acting together acquire, directly or indirectly, 25% or more of the capital and voting rights or take over management control of a public company, such party or parties are required to make a mandatory offer to the other shareholders. Furthermore, if any person or persons acting together having stake between 25% - 50% in a public company increases its shareholding directly or indirectly by 10% or more in any given 12-month period, such shareholder(s) would have to launch a mandatory offer as well. However, in the Draft Communiqué, a mandatory offer arises when, directly or indirectly, more than 50% of a shareholding of a public company is acquired or when management control of a public company is taken over through acquiring the necessary number of shares granting the right to elect or allowing the appointment of the majority of the board of directors. Veto powers without having control in the management do not suffice to trigger a mandatory offer. Given the rule, the Draft Communiqué also points out that share transfers providing equal management at the board level shall not qualify for a mandatory offer.

Another significant amendment is related to the tender price. According to the Communiqué, the mandatory offer price shall be the highest price in case of block acquisitions or acquisitions upon a voluntary offer. In other cases, it shall be the highest price paid by the acquirers to shareholders for any transaction realized within 3-month period prior to the acquisition leading to the mandatory offer. However, in the Draft Communiqué, the mandatory offer price shall be the highest price paid by the acquirers to shareholders for any offer (transaction including the one leading to mandatory offer) realized within 6-month period prior to the acquisition leading to the mandatory offer. The Draft Communiqué also rules that any additional adjusted payment mechanisms, earn out payments and further allowances shall be taken into consideration.

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#### Headlines

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If the mandatory offer has arisen due to indirect share acquisitions in parent companies, then the price shall be the highest of the aggregated stock market price within a 6-month period prior to the first announcement on acquisition leading to mandatory offer and the actual acquisition leading to mandatory offer.

The Draft Communiqué has also set forth tender price adjustment rules and thus, regulated its adjustment mechanisms that have been so far determined on a case by case basis. Accordingly, weekly TRLIBOR shall be applicable when mandatory offer procedures have not been initiated within 30 business days from the date of acquisition leading to a mandatory offer. TRLIBOR shall be replaced with EURIBOR and LIBOR in cases where the acquisition price is denominated in Euro or USD, respectively.

Finally, the Draft Communiqué also amends the exemptions from mandatory offer. According to the Communiqué, an exemption may be granted by the CMB in case (i) acquisition of shares or voting rights is necessary to strengthen the company's financial structure; or (ii) acquisition is approved by the general assembly of the target company with a 2/3 meeting quorum; or (iii) such acquisition does not result in the change in the management of the target company; or (iv) acquisition results from legal requirements; or (v) acquiring party undertakes to dispose of the excess portion within a period of time to be determined by the CMB. In the Draft Communiqué, items (i) and (v) remain untouched. However, items (ii) and (iv) are deleted. The Draft Communiqué has amended the exception in item (iii) by giving explicit exception to acquisitions in group companies and exemption to management control changes in the parent companies where no new management control structure is aimed.

It should also be noted that the CMB's discretion on granting the exemption is still maintained in the Draft Communiqué.

The Draft Communiqué is considered to compile all the rules in the Communiqué and those later issued by the CMB on a case by case basis in order to better determine the rights of the investors as well as the procedures to be applicable to the acquirers subject to tender offer. The Draft Communiqué may well remedy certain ambiguities which have been long debated by the practitioners in capital markets.

### **MERGER RULES OF PUBLIC COMPANIES ARE ABOUT TO CHANGE**

*By: Esin Taboğlu*

Under Turkish capital markets legislation, merger of public companies is subject to the prior approval of the Turkish Capital Markets Board (the "CMB"). From a capital markets point of view, the main legislation governing mergers, in which at least one of the parties is a publicly held company, is the Communiqué Serial I No. 31 on Principles of Merger Transactions (the "**Communiqué I/31**"), promulgated by the CMB. The Communiqué I/31 sets forth the procedures for **merger through acquisition of a company** (*ortaklık devralma yoluyla birleşme*), which enables one of the companies to survive, where the other transfers all its assets and liabilities as a whole to the surviving company and loses its legal entity and the shareholders of the dissolving company receive shares of the surviving one, and for **merger through incorporation of a new company** (*yeni ortaklık kurulması yoluyla birleşme*), in which two or more companies transfer all their assets and liabilities to a new company, in the meantime, lose their legal entities through dissolution and the shareholders of the dissolving companies receive shares in the new company.

During the last couple of years, there have been a quite number of mergers and acquisitions involving at least one public company. As needs have arisen, the CMB has prepared an amendment to the Communiqué I/31 to meet the expectations of the investors and eliminate the loopholes and published it in its website to collect comments from market participants.

Below is a comparison of the current merger rules and the proposed merger rules.

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In order to start procedures for two or more companies, the Communiqué I/31 requires adoption of a decision by the boards of directors of respective companies to initiate merger or acquisition proceedings. Alternatively, there is an option to start the process through a shareholders decision.

Once the permission to start the merger procedures is granted, the merging companies are required to prepare numerous documents for the application to the CMB. The principal documents to be prepared are the merger financials of the merging companies. These financials should be prepared in accordance with the principles laid down by the CMB and be audited. As per the amendments, public companies, which are required to prepare consolidated financial statements, are required to prepare the merger financials on consolidated basis.

Although there is no specific date prescribed by the CMB for the merger financials, time period between date of such merger financials and date of the general assembly, in which the merger agreement shall be conclusively approved, should not exceed six months in any case. As per the amendments, if the time is longer than six months, the merging companies are required to prepare interim financials.

With respect to the determination of merger ratio and exchange ratio, the Communiqué I/31 provides for an examination to be conducted by experts to be appointed by the competent court. It is emphasized in the Communiqué I/31 that merger ratio, which will be calculated according to the merger method adopted by the parties, should be indicated within the court-appointed expert's report. Moreover, the Communiqué I/31 obliges the parties to receive a report from an expert firm, which is defined as one of the independent audit firms acceptable to the CMB, or the brokerage houses holding both public offering and investment consultancy licenses or one of the banks which do not accept deposits.

As per the Communiqué I/31, if between the merger financial dates and the completion of the merger transaction there are any transactions which are not within the ordinary course of merging companies' businesses affecting the merger ratio, then the merging entities are required to prepare new merger financials. As per the amendments, if there are any developments materially affecting the merger ratio and the net assets of the company which are taken into account when preparing the merger financials *(i)* the audit firm is required to prepare a report detailing the effects of such transactions on the merger financials; *(ii)* expert report, which is required under the Communiqué I/31, shall be updated; and *(iii)* the board of directors of the merging companies are required to submit such reports to the CMB and the general assembly of shareholders.

As per the Communiqué I/31, dividends shall be distributed either before the date of the merger financials or after the completion of the merger, provided that dividends are distributed within the legally required time period. The amendments lift such restrictions and provide that if the dividend distribution decision is taken after the dates of the merger financials, the merging entities are required to take into account the effects of such distribution on merger ratios.

The amendments introduce an exemption to the expert reports to be prepared in connection with each merger. As per the proposal, there is no need to prepare an expert report, if there is no capital increase in the surviving merging entity as a result of merger and the merger ratio is determined as per equity method.

Finally, the amendments require that if one of the merging entities is listed on the Istanbul Stock Exchange, all merger documents, namely merger announcement approved by the CMB and the merger agreement shall be published both in the Exchange Bulletin and the website of the merging entities, if any. In case none of the merging entities are listed on the Istanbul Stock Exchange, all merger documents are published in the CMB Bulletin and the website of the merging entities, if any. Such publications must be made within 30 days in advance of the relevant general assemblies of shareholders of the merging entities and shall continue until the completion of the merger process, i.e. registration of merger documents with the relevant trade registry following the general assemblies of shareholders of the merging entities.

**AMENDMENTS RE BOOK-ENTRY RECORDING OF DEMATERIALIZED SECURITIES**

*By: Onur Ergün*

In an effort to monitor the domestic government bonds, which are mostly used in transactions with a considerable amounts and liquid bonds through client accounts kept at the Central Registry Agency (the “**Agency**”), the Turkish Capital Markets Board (the “**CMB**”) has issued two communiqués amending the Communiqué IV/28 on Terms and Conditions Regarding Book-Entry Recording of Dematerialized Capital Markets Instruments which are published in the Official Gazette on 29 April 2009 and 21 May 2009, respectively (the “**Amending Communiqués**”). The Amending Communiqués set forth the principles governing the transactions related to government bonds and liquid bonds and the new account type of the Central Bank of the Republic of Turkey (the “**Central Bank**”).

Under the Amending Communiqués, accounts to be maintained with the Agency shall be opened by the Central Bank, issuers, intermediary institutions, authorized clearing and custody institutions and other institutions determined by the CMB. Merely, the Central Bank and authorized clearing and custody institutions are allowed to open accounts directly with the Agency and the Central Bank without making a connection with any member of the Agency.

The Amending Communiqués have also determined the principles on Central Bank account, government bond deposit accounts and general deposit accounts under a new section named “Central Bank Account”. Accordingly, a Central Bank account is comprised of a domestic government bond deposit account, intermediary institution pooling account and investor account and in case of a need, other accounts may be opened by the Agency by obtaining the Central Bank’s opinion thereon. Domestic government bond deposit account shall be exclusively used for the transfers between the Central Bank Electronic Security Transfer System (the “**Transfer System**”) and investor accounts kept under the Agency and transfers concerning the sale and purchase transactions. General deposit account shall be used for monitoring the securities kept under the deposit accounts of the banks under the Transfer System on beneficial owner basis.

The Agency transmits the balance details of the accounts kept by the Agency with respect to domestic government bonds’ principal and interest payments to the Central Bank. Funds in such accounts shall be transferred by the Central Bank to the related accounts of the members. Funds of Agency’s members who are not members of the Central Bank Electronic Fund Transfer System shall be transferred by the Central Bank to the correspondent bank of the Agency. One day before such payment, following the receipt of the orders sent by the Central Bank, domestic government bonds to which payment will be made, will be frozen. With effect as of freezing, no transaction concerning the related securities shall be allowed within the Agency.

Transfer of securities to the accounts of the members under the Agency system can be realized by using the Transfer System. Such transfers shall be reflected in the system of the Agency. Transfer of the securities from the account at the Agency to another account under the Transfer System shall be completed by security transferring from the account of the Agency under the Transfer System to the account of the related member under the Transfer System.

Recording procedure on guaranty, pledge and usufruct rights has also been amended by the Amending Communiqués. Accordingly, pledges on the securities shall be monitored with the identification information of the pledgee by opening a sub-account under the account of the owner (this provision will be effective as of 1 December 2009). The CMB may establish additional restrictions on the records of such rights.

Finally, it has been determined that liquid bonds shall be subject to the same provisions on domestic government bonds under the Amending Communiqués whilst the provisions with respect to (i) recording and blockage regarding guaranty, pledge and usufruct rights; (ii) recording transfers through succession; (iii) attachment and injunction of dematerialized capital markets instruments; and (iv) asserting rights to third parties, shall apply to the transactions in relation with domestic government bonds.

## NEW PATH FOR DISCLOSURES

*By: Tolga Tulgar*

By means of the developments on technology and international trade, the importance of disclosures of the companies has gained significance. In this sense, the Turkish Capital Markets Board (the “**CMB**”) has issued the Communiqué on the Delivery of the Information, Documents and Disclosures to the Public Disclosure Platform (the “**PDP**”) on 30 May 2009 (the “**Communiqué**”).

According to the Communiqué, being in effect as of 30 May 2009, all public companies are required to disclose their financial statements, explanatory notes, material events and all other disclosures via the PDP on the Internet by using electronic signature. The PDP, which was developed collectively by the CMB, the Istanbul Stock Exchange and the Scientific and Technological Research Council of Turkey and managed by the Istanbul Stock Exchange, allows users to have access to current and past notifications, current announcements and up-to-date general information about all listed companies on an equal and a timely basis.

As per the provisional article of the Communiqué, in order to prevent problems during the transition period, the past procedures regarding the public disclosures shall be maintained until the date which will later be determined by the CMB. Before the Communiqué was issued, the Istanbul Stock Exchange had sent a letter to all public companies referring to the draft communiqué stating that during the transition period, the listed companies have to forward their disclosures via fax to the Istanbul Stock Exchange after such disclosure is issued in the PDP. The listed companies are under an obligation to assure that both PDP and the Istanbul Stock Exchange disclosures are made without any change.

## PRINCIPLES FOR LICENSING OF CAPITAL MARKETS PROFESSIONALS

*By: Sezi Tezcanlı*

In an effort to provide principles regarding licensing and recording in capital markets activities, the Communiqué Serial: VIII No: 59 amending the Communiqué on Principles Regarding Licensing and Recording for the Professionals Engaged in Capital Markets Activities (the “**Communiqué VIII/59**”) has been published in the Official Gazette on 30 May 2009 by the Turkish Capital Markets Board (the “**CMB**”).

The Communiqué VIII/59 mostly focuses on the title definitions of the professionals engaged in capital markets activities along with the licenses to be obtained with regard to such titles. Pursuant to the Communiqué VIII/59, the job description of the dealers has been amended as professionals in intermediary institutions including their branches, agencies, liaison offices, trading rooms and call centers who shall be responsible for accepting (i) customer orders in relation to domestic and international markets according to the account balance and risk preferences of the customers; (ii) observing purchase and sales transactions and transmitting the orders to related stock exchange during sessions; (iii) following up investment instruments, markets, issuers, legislation and notifying the customers on the same; (iv) following up dates of contracts and payments and preparing the preliminary details related to these issues; and (v) following up risks regarding the customers; evaluation of the cash receivables of the customers in terms of the contracts of engagement and dealing with marketing and similar activities. In addition to the above description, the professionals who conduct the above mentioned activities with regard to derivative instruments shall receive the title “Derivative Instruments Dealers”.

Before the Communiqué VIII/59, the professionals working in branches of banks and dealing with mutual funds, fixed income capital markets instruments and repurchase and reverse repurchase transactions and providing such service for operational banking service without providing any investment advice were not considered as dealers and therefore were exempt from the exams to qualify for.

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By way of the amendment to the Communiqué VIII/59, such limitation has been broadened and the professionals who deal with securities other than share certificates will also not receive the title “Dealer”. Determining the scope of the job description as dealer, derivative instruments dealer or any other title as specified under the Communiqué VIII/59 is important due to the fact that the professionals working with a title with the job descriptions specified under the Communiqué No: VIII/59 shall take the necessary exams and qualify for the relevant licenses.

Furthermore, the exams which the professionals are obliged to take in order to receive their titles are also determined under the Communiqué VIII/59. The Communiqué VIII/59 also amends the grading system of the said exams. Finally, the professionals who take the necessary exams and met qualification standards before 30 May 2009 are obliged to apply for the relevant licenses within three years. Otherwise their exams will be deemed invalid.

### **CAPITAL DECREASE AS A SOLUTION**

*By: Canan Ünal*

The Turkish Capital Markets Board (the “CMB”) has regulated and announced the principles regarding capital decreases not requiring funds outflow carried out by public companies in its Weekly Bulletin dated 20-24 April 2009. These principles create a new solution to disregard the economic and legal barriers that exist in capital increase in cash, in the event that the share values of the companies have decreased below their nominal values.

Under the effect of the current global economic crisis, values of securities of a number of companies trading on the Istanbul Stock Exchange have decreased below the minimum level of the nominal value of shares. As per the Turkish Commercial Code, the shares cannot be sold below their nominal values. Therefore, it is economically impossible to contemplate a rights issue by these companies and thus, these companies tend to do private placement instead.

The CMB, through new principles, has paved the way for these companies to decrease their share capital without any fund redemption so that they can reach a share capital level enabling them to contemplate a rights issue. The CMB defines this restructuring as a reverse bonus issue. Normally, capital decrease is a lengthy process and the creditors consent are required. In the new structure, no fund outflow is foreseen and therefore, assets, shareholders and creditors would not be affected. It is regarded as a kind of balance sheet adjustment.

As per the principles, capital decrease may be performed to eliminate a balance sheet deficit, if the capital decrease amount is equal to or less than the deficit amount. In case, there is no deficit or the share capital decrease amount is more than the deficit, then a simultaneous share capital increase is a must. The principles define the deficit as “losses of previous years and the interim period stated in the audited financial statements”. However, financial statements with qualified opinion by the independent auditors cannot be a basis for capital decreases.

The procedure of capital decrease not requiring funds outflow has been detailed in the weekly Bulletin of the CMB. First, an application to the CMB shall be filed with an amendment to the articles of association of the company. Upon approval of the CMB, the draft amendment to the articles of association shall be submitted to the Ministry of Industry and Trade to obtain its approval. Thereafter, shareholders of the company undergoing a capital decrease shall approve such process and the amendment to the articles of association. If there are privileged shareholders and their rights are affected, their separate approval shall also be secured.

As per the principles introduced by the CMB, the boards of directors of the public companies are responsible for the conclusion of the relevant transactions and such transactions shall be disclosed to public in accordance with the Communiqué VIII/54 of the CMB on the Principles Regarding Public Disclosure of Material Events.

## THE AMENDING COMMUNIQUÉ ON REAL ESTATE APPRAISAL COMPANIES

*By: Adnan Eren Ürey*

The Turkish Capital Markets Board (the “**CMB**”) has issued a new Communiqué (the “**Amending Communiqué**”) amending the Communiqué on the Real Estate Appraisal Companies Conducting Activities within the scope of the Capital Markets Legislation and the Principles of Listing of these Companies by the CMB (the “**Communiqué**”). The Amending Communiqué has been published in the Official Gazette and has come into force on 30 May 2009.

The Amending Communiqué mainly governs the situations in which the CMB shall suspend the activities of real estate appraisal companies, and aims to rearrange several provisions of the Communiqué in line with the amendments. In this respect, Article 8/A captioned “Suspension of Activities” has been included within the scope of the Communiqué. According to Article 8/A, the CMB shall suspend the activities of an appraisal company in two cases: (i) non-existence of any responsible appraiser within the company; or (ii) incompliance with the conditions set forth in Article 4 (g) and/or (h) of the Communiqué for a period of 6 month. According to the latter, the CMB shall suspend appraisal company’s activities if at least 51% of its capital is not held by 2 or more responsible appraisers (Article 4 (g)), or if the company does not employ at least 5 appraisers including minimum 2 responsible appraisers (Article 4 (h)), for a 6-month period.

Before the Amending Communiqué, whilst the non-existence of any responsible appraiser had been governed as a cause for suspension by Article 8 of the Communiqué, the incompliance with Article 4 (g) and/or (h) of the Communiqué for a 6-month period had been defined by Article 9 of the Communiqué as causes for disqualification.

Additionally, a notification obligation has been imposed on the appraisal companies. According to the amendment to Article 22 of the Communiqué, in case of existence of any of the suspension causes set forth in Article 8/A, the appraisal companies must inform the CMB with respect thereto within 6 days of occurrence of such causes.

## PROTECTION OF TRADE SECRETS

*By: Ebru Demirhan*

The Information and Communication Technologies Authority (the “**Authority**”), the regulatory body responsible for the supervision and regulation of telecommunications sector, has issued the Regulation on the Procedures and Principles regarding Protection of the Trade Secrets that belong to the Operators and Publication of the Information to be Announced to Public (the “**Regulation**”) on 28 May 2009. The aim of the Regulation is to set forth the scope of keeping the trade secrets of the operators which are authorized by the Authority and the information to be shared with the public. On the other hand, the evaluation of personal information claims of third parties is not covered under the Regulation.

An operator is defined as the company providing electronic communication services and/or electronic communication network and operating its infrastructure.

During the publication of information that belongs to the operators, principles such as (i) increasing the transparency; (ii) informing the consumer at a maximum level; and (iii) protection and development of the competition, shall be considered. The operators are obliged to meet all information and document requests of the Authority. According to Article 6 of the Regulation, the Authority shall not disclose the following information received from the operators unless they are requested by the judicial authorities: (i) investment plans; (ii) business plans and activity strategies; (iii) marketing and pricing policies; (iv) searching and improvement projects; and (v) balance sheet and income statements of the operators that are not listed, except for the operators having an effective market power. The information defined under Article 6 is deemed as “trade secrets”.

The Authority may announce or publish the following information via the determined vehicles within the framework of the principles that are stated above:

- Number of subscribers;
- Amount of traffic;
- Net sale income;
- Market shares in respect of number of subscribers, traffic information and net sale income;
- Amount of investments;
- Number of employees and demographic distribution;
- Income per subscriber, traffic, investment and employee number;
- Number of subscribers who change the operator;
- Service quality values that are calculated according to the criteria pre-determined by the Authority and obtained from the operator network (locations and/or cities);
- Coverage area values calculated according to the criteria pre-determined by the Authority;
- Area measurement results done according to the criteria pre-determined by the Authority;
- Other service quality measurement results with respect to electronic communication service and infrastructure.

The Authority may publish such information in detail under sector, tariff package, service, call or interconnection types, subscriber types and similar categories. The information *(i)* received from the publicly known sources, *(ii)* that is out of Article 6 of the Regulation, or *(iii)* derived from such information are not accepted as trade secrets and may be published by the Authority.

In case of any contradiction with the provisions of the Regulation, the Regulation on Fines issued by the Authority shall be applied.

The Regulation shall be effective when it is published, i.e. 28 May 2009.

## ELECTRONIC COMMUNICATIONS SECTOR

*By: Çiğdem Ocak*

The Information and Communication Technologies Authority (the “**Authority**”), formerly known as the Telecommunications Authority, maintains the adoption of new laws and regulations in order to accomplish full compliance with the European Union law and realize the modernization of the Turkish telecommunications sector. The Authorization Regulation on Telecommunications Services and Infrastructure (the “**Authorization Regulation**”), published in the Official Gazette on 26 August 2004, has been adopted as one of the milestones for establishment of new telecommunications services which has been amended significantly over the years.

Since the main target is to clear obstacles before the companies, which are candidates to obtain the Authority’s authorization regarding establishment of the electronic communication network or infrastructure, the Authority has issued the Authorization Regulation regarding the Electronic Communication Sector (the “**Regulation**”), published in the Official Gazette on 28 May 2009.

The Regulation aims to determine the procedures and guidelines for the authorization of the companies willing to provide electronic communication services and/or to establish and operate an electronic communication network or infrastructure. As per the Regulation, the authorization shall be realized either by notification or by providing usage rights. The companies shall be authorized by notification in case they do not need any resource allocation such as allocation, numbering, frequency or satellite. The authorization shall be realized through providing usage rights by the Authority if the companies need such kind of resource allocations. The Authorization Regulation was imposing license application and determining minimum license fee for each type of telecommunication licenses, however, the Regulation does not even use the word “*license*” and defines the authorization fee as an administrative and usage fee.

Pursuant to the Regulation, requirements to be satisfied by the applicants shall be as follows; *(i)* establishment as a joint stock company or a limited company in accordance with Turkish laws in order to fulfill solely the activities subject to authorization or nevertheless, equipment sale, establishment, maintenance-repair and consultancy which are essential or relevant to the service subject to the authorization; *(ii)* having scope of activity in the articles of association as published in the Trade Registry Gazette to include the wording “providing telecommunications/electronic communications service and/or building and operating telecommunications/electronic communication infrastructure” or the electronic communication activity for which it seeks authorization; and *(iii)* shareholders holding at least 5% of the company shares and persons authorized to manage and represent the legal entity should not have been convicted to an imprisonment due to offenses committed against the personality of the State and they should not have been convicted due to contravention of certain provisions of the abolished Banking Law No. 4389, the Banking Law No. 5411 and the Capital Markets Law No. 2499, or ordinary or repugnant embezzlement, bribery, theft, fraud, forgery, faith abuse, fraudulent bankruptcy or dissolution, smuggling, mischief in public tendering and procurement-sale procedures, money laundering, tax evasion, or attempt at or involvement in tax evasion.

In case of authorization to be provided as a usage right to the limited number of companies such as GSM operators, above requirements *(ii)* and *(iii)* shall also apply thereto. Additional requirements to be satisfied by such companies are; *(i)* establishment as a joint stock company in accordance with Turkish laws in order to fulfill solely the activities subject to authorization or to be established as per the timing which is stated in the related tender specification; *(ii)* having company shares in registered form; and *(iii)* compliance with the related tender specifications.

The term of usage right shall be determined by the Authority for maximum 25 years unless such term is stated under the Term, Scope and Definition of Electronic Communication, Network and Infrastructures (the “**Addendum**”). The Addendum simply determines the terms and conditions for different electronic communication services such as satellite communication service, satellite platform service, internet service, fixed line telephone service, cable line broadcast service, virtual mobile network service, joint usage wireless service, infrastructure management service, directory assistance service, GSM, broadband wireless provisioning service. Such services were used to be regulated under the Authorization Regulation, however, since the Addendum is not published as an annex of the Regulation, the Authority is entitled to amend it when electronic communication services changing rapidly through the new technologies so require.

#### **A CLEAR GUIDANCE FOR REGISTRATION OF UNINCORPORATED PARTNERSHIPS BY COMPANIES**

*By: Armağan Yıldırım*

Nowadays, current financial conditions lead more and more companies to prefer forming unincorporated partnerships through merging their forces for the same goal.

Since unincorporated partnerships do not bear a legal personality, under Turkish law they are not obliged to be registered with the Trade Registry. On the other hand, certain unincorporated partnerships can be subject to the Corporate Tax Law irrespective of their legal personality. As needs have arisen in the recent years, the Ministry of Industry and Trade has issued a communiqué to determine the principles of registration process of unincorporated partnerships which are formed and managed by companies.

The Communiqué Regarding the Registration of Unincorporated Partnerships Managed by Companies numbered 2009/2 (the “**Communiqué**”) has been published in the Official Gazette on 1 April 2009 and has come into effect on the same date. The Communiqué will apply to partnerships formed by minimum two legally and economically separate companies to achieve an economic activity and make profits.

Under the Communiqué, unlike companies, the registration process of unincorporated partnerships shall only be commenced upon the request of the parties by submitting the written and notarized agreement regarding their partnership. The agreement shall include (i) trade names, addresses and authorized persons of the parties; (ii) trade name, address, scope, purpose and the duration of the partnership; and (iii) names of the authorized people to represent the partnership and the names of the pilot or the leading partner of the partnership. The partnership must be established to operate a commercial enterprise and this matter should be stated in the partnership agreement. The agreement shall also include the provisions foreseen by social security, tax and public procurement laws.

In a nutshell, it seems that the Communiqué has given a clear guidance to investors in the registration of unincorporated partnerships managed by companies.

In line with the Communiqué, the registration of the partnerships managed by companies shall be realized with the relevant trade registry and published in the Turkish Trade Registry Gazette. Subsequently, the respective trade registry office shall inform the other relevant trade registry offices thereof. The registration of the unincorporated partnerships with trade registry will be cancelled upon the request of the parties in case of termination of the partnership agreement.

### **LIVELY DISCUSSIONS ON RENEWABLE ENERGY ARE STILL ONGOING**

*By: Zeynep Ahu Akın*

With a view to make widespread use of renewable energy resources for electricity generation and raising the investments that have come to a halt due to the global financial crisis, debates regarding amendment to the Law on Renewable Energy numbered 5346 and dated 10 May 2005 (the “**Law**”) have been held for a long time. For that purpose, the Sub-Commission of the Turkish Parliament involved in energy and natural resources affairs has been discussing a draft law which has been prepared and submitted to the Turkish Parliament on 14 November 2008 (the “**Draft Law**”). The Draft Law envisages new purchase guarantees in order to attract the investments in the renewable energy sector. It has also been reported that the Ministry of Energy and Natural Resources that has been collaborating with the relevant Commission of the Turkish Parliament for a while is also in an attempt to submit its proposals to make additions to the Draft Law.

The first amendment is on Article 1 by excluding “bio-gas” out of the scope of bio-mass definition.

A further amendment has been brought to Article 4 of the Draft Law stating that the general merits and principles regarding localizing the resources of renewable energy, protection and usage of the same shall be governed under a further regulation. In addition, the Draft Law also sets a task on the General Directorate of the Electricity Affairs under the same article to notify the fields of resources to the relevant authorities in order to have them recorded with their respective zoning plans.

The Draft Law most importantly envisages several purchase guarantee amounts. Accordingly, it is provided that the purchase guarantee amount for the first 5 years will be 6 Euro Cents/kWh for the generation facilities based on wind energy and 5 Euro Cents/kWh for the second 5 years; 14 Cents/kWh for the generation facilities based on bio-mass (excluding bio-gas) for the first 5 years and 10 Cents/kWh for the second 5 years; 7 Cents/kWh for the generation facilities based on geothermal energy for the first 5 years and 6 Cents/kWh for the second 5 years; 18 Cents/kWh for the generation facilities based on solar energy for the term of 10 years; and 5 Cents/kWh for the hydroelectricity generation facilities for the term of 10 years. The stated amounts are to be calculated over their Turkish Lira equivalent, and the captioned purchase guarantees shall apply to the generation facilities to start their operations until 1 January 2016, subject to the condition that the prices shall not fall under the average wholesale price of electricity as determined by the Energy Market Regulatory Authority (the “**Authority**”) pertaining to the previous year.

Furthermore, the Draft Law governs that the guaranteed price applicable for the facilities to start producing after 2016 shall be the average wholesale price of electricity as determined by the Authority pertaining to the previous year.

Finally, the facilities to begin their operations until 2016 shall fall into this scope after the envisaged 10-year period. Nevertheless, the Council of Ministers is entitled to determine the prices which shall not fall under the aforementioned average wholesale price of electricity.

It is worth to underlying that the lively discussions on the renewable energy resources are still ongoing and have not resulted yet in any official manner, and therefore it is anticipated that the aforesaid prices may likely change and further amendments may come up on the Draft Law as it is still under revision since the late months of 2008. Lately, in dailies, it is stated that discussions on the Draft Law have been suspended. However, there is no official announcement thereon yet.

#### **BALANCING AND SETTLEMENT MECHANISM IS UPDATED**

*By: İnci Alaloğlu*

For many years, it has been attempted to set a competitive, stabilized and transparent market and provide an independent regulation and supervision in electricity market. For this purpose, a number of legislation has been brought in force. In 2006, the Energy Market Regulatory Authority (the “**Authority**”) created a physical balancing and settlement mechanism based on the Electricity Market Balancing and Settlement Regulation issued in 2004.

Due to the fact that the necessities of balancing and settlement mechanism are not satisfied by the implementation of such regulation, the Authority has recently issued a new Electricity Market Balancing and Settlement Regulation (the “**Regulation**”) which was published in the Official Gazette on 14 April 2009 in order to set forth the principles and procedures regarding balancing of the active electricity demand and supply and settlement.

Under the Regulation, balancing is defined as the activities performed to keep balance between the demand and supply in electrical energy. Balancing mechanism shall complement bilateral agreements, commercial contracts for the sale and/or purchase of active electricity, and shall consist of day-ahead planning and real-time balancing activities. Settlement, on the other hand, is defined as the calculation of amounts of receivable and debts deriving from balancing mechanism and/or energy imbalances and hence the preparation of the respective receivable-debt statements.

Generation licensees, auto-producer licensees, auto-producer group licensees, wholesale licensees, retail licensees (the “**Market Participants**”) are listed as parties of balancing mechanism under the Regulation. The Market Operator, *i.e.* Market Settlement Center and the System Operator, *i.e.* Natural Energy Distribution Center, are parties to the mechanism as well. Market Participants are also required to register with the Market Operator within the framework specified under the Regulation. In case of failure to complete registration, Market Participants shall be subject to sanctions in accordance with the legislation to be imposed on a case by case basis.

As part of the registration process, Market Participants shall also register some information with regard to (i) their legal entities; (ii) their settlement aggregation entities registered under their settlement accounts; (iii) their meters; and (iv) their participation in balancing mechanism units, including but not limited to the group responsible for balancing, balancing power market and day-ahead market. Furthermore, as a part of registration process, all Market Participants shall participate in day-ahead planning and submit offers and bids in their own names. Such offers and bids submitted as block and/or hourly basis are valid for a certain balancing entity, certain day and a certain time in that day.

Lack or surplus of electricity arising from deviation of production and/or consumption of electricity is remedied by balancing and settlement system. Such balancing mechanism consists of two different organized wholesale markets which are day-ahead market and balancing power market. Day-ahead market is established for purchase and sale transactions of electricity to be delivered in the day-ahead on the basis of settlement period and is operated by the Market Operator. However, balancing power market is a market in which the reserve capacity and the change in output power within 15 minutes are sold or purchased to balance demand and supply of electricity in real time. The Regulation governs structure, principles and procedures of the markets in details.

Additionally, the Regulation governs provisions regarding settlement, including but not limited to, loss matters, verification and correction of supply-withdrawal values and calculation of settlement volumes and loss factor in transmission system.

As a part of settlement process, Market Participants are required to submit security for their liabilities to the Market Operator. In the event of failure to provide such security, Market Participants shall not complete the relevant market activities. Market participants can submit, including but not limited to, Turkish currency, bank letters of guarantees and government bonds as securities. Moreover, Market Operators may use an intermediary bank for the execution of security transactions. For convenience, the Regulation has a provisional article regarding security mechanism. Accordingly, until security mechanism is established and becomes operational, even if Market Participants fail to provide a security, they may participate in electricity market activities; however, their payment obligation continues.

The Regulation has also a special provision for build-operate, build-operate-transfer and transfer of operation rights of plants. Accordingly, the rights and obligations of Market Participants in the Regulation are exercised and performed by TETAS, namely Turkish Electricity Trading and Contracting Company, for generation plants selling electricity to TETAS through build-operate, build-operate-transfer and transfer of operation rights models.

Works carried out until now demonstrate that transitional period for restructuring process in electricity market takes a long time. The Authority provides how deviations arising from the bilateral agreements can be adjusted efficiently in a competitive market by issuing this Regulation.

#### **AMENDMENTS ON LICENSING OF MEDICAL PRODUCTS FOR HUMAN USE**

*By: Pelin Baykara*

The authorization for the placing of medical products into the Turkish market and the related marketing procedures are subject to the supervision and permission of the Ministry of Health (the “**Ministry**”) and other relevant authorities. A medical product can only be sold on the Turkish market with a license granted by the Ministry. The principles and procedures on the licensing process have been regulated under the Regulation on Licensing of Medical Products for Human Use which was published in the Official Gazette dated 19 January 2005. However, the Ministry has recently amended these principles and issued the Regulation Amending the Regulation on Licensing of Medical Products for Human Use, published in the Official Gazette on 22 April 2009 (the “**Regulation**”).

The most prominent change introduced by the Regulation is that the provision which requires obtaining a marketing permit has been repealed. Previously, the holder of the production authorization was required to apply to the Ministry and submit 2 samples of the product in order to obtain a marketing permit. The holder was granted a marketing permit upon the examination of accuracy of the labeling and package leaflet of the product and compatibility of the price by the Ministry. With the exclusion of such requirement, the Ministry will no longer be auditing the labeling and quality of the medical products for human use.

Previously, the validity period of the license was clearly determined as 5 years whilst the Regulation does not specifically indicate a period in which the license shall be valid. However, the Regulation provides that the information regarding quality, reliability and efficiency shall be submitted to the Ministry at least 3 months prior to the end of the first 5-year period from the date of the license.

The Regulation has launched some changes in the application process to obtain a license. Accordingly, the holder of the production authorization is required to inform the Ministry when the product is released to the market and the Ministry informs the holder of the production authorization within 5 business days at the latest that such information is registered with the records of the Ministry. Furthermore, the Ministry has expanded the list of the products for which a license is not obligatory. The list of information and documents required to be submitted to obtain a license has also been amended and new approvals and documents have been added within the scope of the list.

On the other hand, in relation to the imported medical products, the Ministry has repealed the requirement to submit a pharmaceutical product license granted by the authorized bodies of the countries in which the product has been released to the market. Instead, a copy of the license certified by the medical bodies of any country, in which an application to obtain a license has been made, has to be submitted. In addition, the Regulation has amended the provision pertaining to the short product information submitted with the application. Consequently, the information will be provided in line with the guidelines to be issued in accordance with the Regulation.

Another important amendment is made in the process for the evaluation of the application and licensing. In this respect, the applications for the products, which bring innovation or reduce the public health costs and need to be provided to the public promptly, shall be finalized by the Ministry within 180 days at the latest. Additionally, the applications for the products referred to in the application of the co-marketing products shall be finalized within 90 days at the latest.

The Regulation has limited the criteria for obtaining a license and the reasons for denial of the application. Accordingly, the application for authorization of a product shall not be denied in case the product does not have any effect on the existing treatments or if the bioavailability in the required products is insufficient. Thus, any medical product will be granted a license even though it does not have any effect on the existing treatments which will cause expensive and imported medicine to become more effective in the Turkish market.

Finally, the period, which the Ministry has to finalize the application for the change in the holder of the production authorization in case of a transfer of production authorization before a Notary Public, has been determined as 30 days, whereas it was 60 days previously.

*The aim of this quarterly report is to highlight mainly the regulatory changes made by the Turkish Government during the relevant quarter. The content of this report is limited to those areas Taboglu & Demirhan advises its clients. It contains a general summary of the changes and the areas it covers are broader. Thus, one should not rely on it for specific advice. For further information or advice please contact Taboglu & Demirhan, a full-service law firm based in Istanbul.*

**TABOGLU & DEMIRHAN**

**Attorneys at Law**

Levent Cad. No. 9

1. Levent, 34330, Istanbul, Turkey

E-MAIL: [enquiries@taboglu.av.tr](mailto:enquiries@taboglu.av.tr)

[www.taboglu.av.tr](http://www.taboglu.av.tr)

PHONE: (212) 339 8800

FAX: (212) 339 8899