

TABOĞLU & DEMİRHAN

Quarterly Report

WARRANTS ARE FINALLY REGULATED

By Esin Taboğlu

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The Turkish Capital Markets Board (the “CMB”), the regulatory body responsible for the supervision and regulation of capital markets, has issued a new piece of legislation on 21 January 2009 setting forth the principles on the issuance of warrants. This attempt starts a new era for Turkish capital markets as in the past several attempts to issue warrants by Turkish issuers failed due to lack of specific legislation.

Under the Communiqué III/36 on the Principles Relating to Registration of Warrants with the Capital Markets Board and Trading of the Same (the “**Communiqué III/36**”), only companies trading or applied for trading on the Istanbul Stock Exchange are allowed to issue warrants. Warrants are issued for a term of at least 2 months at most 5 years. Warrants could only be issued in connection with public offering of debt or equity securities of the issuers and grant the holders to purchase tradeable equity stocks of the issuer or a third party. Warrants can be issued with or without consideration. However, if such instruments are issued without consideration, all offerees in the public offering of the underlying securities shall be equally treated (i.e. warrants shall be distributed among the offerees pro rata to the number of offered instruments they are acquiring). If the warrant holders are given the right to purchase the equity stocks of the issuer (not a third party), then the issuer is required to adopt so-called “registered share capital system” which enables the issuer to issue new stocks easily (i.e. through decisions of the Board of Directors). Under the common share capital system, issuance of new stocks requires shareholders approval which is a lengthy process.

Application to the CMB for the registration of warrants is similar to the registration process of any other securities with the CMB. There is no requirement to file separate offering documents for warrants. All warrant related information goes in the offering documents of the underlying securities to be offered. In this respect, the offering documents shall include, *inter alia*, specifications and associated risks of warrants, how the holders will exercise their warrants at the end of the warrant period, pricing of the relevant equity stocks to be purchased and adjustment principles in case of dilution if the equity stocks to be purchased are to be issued by the issuers. Issuers are responsible for the information to be included in the offering documents. Also underwriters who have not paid their utmost attention shall be responsible towards those who incur losses; provided that their liability shall be secondary (i.e. underwriters liability will arise only in case the issuer do not indemnify the holders). The underwriters are required to fill in “risk information form relating to warrants”. The content of the form has not yet issued by the CMB.

Warrants can be exercised within 30 days of the end of their term. If the issuer has granted its own equity stocks, the issuer shall, within 30 days prior to the end of the warrant term, apply to the CMB to register new stocks to be acquired by the warrant holders. Right of the warrant holders to acquire new stocks is a vested right and cannot be eliminated. If at the end of 30-day warrant exercise period there are new stocks not acquired by warrant holders, they need to be cancelled by the issuer. At the end of the exercise period, all warrants become null and void. If the issuer has granted third party equity stocks, the issuer is required to explain in the offering documents how it will provide such securities during warrant exercise period.

The CMB, unexpectedly, has included a basket provision in the Communiqué III/36 stating that any other type of securities with similar features of warrants can be issued by issuers under the principles as applied to warrants. In the past, it was difficult for Turkish issuers to follow up the new types of securities usually issued in the western world due to the lack of specific legislation in Turkish law. Now, the CMB paves the way to catch up the western world through this provision.

ISSUE OF DEBT INSTRUMENTS

By Ebru Demirhan

The Capital Markets Board (the “CMB”) has issued the Communiqué on the Principles of Registration and Sale of Debt Instruments (the “**Communiqué II/22**”) on 21 January 2009 introducing the principles on the issuance and public offering of debt instruments.

Before the issuance of the Communiqué II/22, the CMB had separate communiqués for each type of debt instruments. What the CMB has done with this Communiqué II/22 is to combine all of those communiqués into one single regulation to simplify the process. The Communiqué II/22 provides for general principles for the issuance process of all types of debt instruments and then includes specific provisions for, among others, tenor, redemption and interest to be applicable for each type of debt instruments.

According to the Communiqué II/22, “debt instruments” include bonds, convertible bonds, exchangeable bonds, financial bills, gold, silver and platinum bills, banking bills and any other capital markets instruments which are not specified in this Communiqué but may be accepted by the CMB as debt instruments. Debt instruments may be issued to the name or in the registered or bearer form.

Debt instruments may be issued by, among others, joint stock companies, state economic enterprises including those which are included in the privatization portfolio and municipalities. If the issuer is a joint stock company, then the articles of association of such company must authorize the issue of debt instruments and the authorized body, i.e. shareholders or board of directors, as the case may be, must approve such issuance. Application to the CMB for the registration of debt instruments must be done within one year following the approval of the authorized body.

Debt instruments must be registered with the CMB as per the procedure detailed in the Communiqué II/22. Debt instruments registered with the CMB may be sold via public offering or private placement. Save for the qualified investors, the number of real persons and legal entities participating in a private placement must not exceed 100.

If debt instruments are to be offered to public, application to the CMB must be made through an intermediary institution. There are a number of documents to be submitted to the CMB, including but not limited to offering circular and prospectus (which is a short form of offering circular). However, in case of private placement, there is no need to prepare a circular and prospectus. Offering circular and prospectus shall include, among others, information on the issuer, its financial status, risks and assumptions about redemption of debt instruments and other information that will effect the investment decisions of investors. If the debt instruments are guaranteed, information on guarantors shall also be part of the offering circular and prospectus. Offering circular and prospectus are signed by the intermediary institution making the application and the issuer. Issuers are responsible for the accuracy and correctness of all information included in such documents. However, if the intermediary institution has not used its utmost attention, such institution shall also be liable for losses which are to be recovered by the issuer.

Subsequent to registration of the debt instruments to be sold via public offering with the CMB, the offering circular shall be registered with the relevant Trade Registry and published in the Trade Registry Gazette within 15 days from the date of registration of the debt instruments with the CMB. The prospectus must be announced at least in two daily newspapers or website of the issuer within 15 days from the registration of the prospectus and minimum 1 and maximum 5 days prior to commencement of the sale.

The Communiqué II/22 provides for specific provisions for each type of debt securities, including but not limited to the following:

- Tenor of bonds may be freely determined by issuers, provided that it cannot be less than one year.

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- Similar to bonds, term of convertible bonds cannot be less than one year. Convertible bonds which are to be offered to public can only be issued by issuers whose shares are trading on exchanges or other organized markets. Convertible bonds may be converted into equity securities upon the request of the investors or the issuer. Normally, upon conversion, the issuer is required to increase its share capital and issue new shares to meet the request of the investors. However, if the total number of equity securities to be delivered to the investors upon conversion is less than 20% of the total number of outstanding equity securities issued by the issuer, then there is no need to increase the share capital and issue new equity securities. In such case, the issuer shall include in the offering documents how the equity securities to be delivered to the investors upon conversion are to be procured.
- Exchangeable bonds are first time introduced to Turkish capital markets by the CMB. Similar to bonds, term of exchangeable bonds cannot be less than one year.
- Tenor of financial bills, gold, silver and platinum bills and banking bills cannot be less than 60 days and more than 360 days.

The Communiqué II/22 also very briefly regulates sale of debt instruments abroad. Debt instruments cannot be sold to investors abroad before they are registered with the CMB. The issuer is required to disclose how the sale proceeds are to be used.

For many years, issuance of debt instruments in international markets by Turkish issuers has been a headache as the CMB's rules were not compatible with those in international markets and the CMB's registration process was somewhat burdensome. Therefore, Turkish companies' only choice was to issue equity securities in the international markets. The new rules hopefully will pave the way to reach to foreign markets through issuance of debt instruments.

PUBLIC DISCLOSURE MADE MORE EFFECTIVE?

By Burcu Şener Sözer

Thanks to the persistent requests of public companies and investors and the efforts to harmonize the legislation with the European Union ("EU") norms, the Turkish Capital Markets Board (the "CMB") has made dramatic changes on the public disclosure rules applicable to companies, capital markets securities of which are traded on stock exchanges in Turkey, in February 2009. The Communiqué VIII/54 on Principles Regarding Public Disclosure of Material Events (the "**Communiqué VIII/54**") introducing these changes has been published in the Official Gazette on 6 February 2009 and came into effect as of same date (save for 3 provisions which will be effective as of 1 May 2009). The CMB has also issued a guideline, which intends to clarify the provisions and requirements of the Communiqué VIII/54, in its website (the "**Guideline**").

The preceding communiqués of the CMB provided for the public disclosure requirements by listing certain material events or referring to "any event which may affect value of the capital markets instrument and the investment decisions of investors". While the Communiqué VIII/54 provides for such list of material events, it also provides for a definition of "insider information" first time in the capital markets legislation and introduces provisions relating to disclosure and delay of public disclosure of insider information in line with the EU regulations. In that respect, the insider information is defined as non-public information that may affect the value of the capital markets instrument and the investment decisions of investors. The scope of such information should include an undisclosed and material event, which will be meaningful for a reasonable investor while adopting its investment decision, serve to the advantage of the user of such information for trading of capital markets instruments when compared to other investors and have an impact on the value of the respective capital markets instrument or investment decisions of the investors if disclosed. In line with the EU legislation, it is also now possible for companies whose capital market instruments are traded on any exchange in Turkey to delay disclosure of insider information. A company, at its own risk, may choose to delay disclosure of insider information to protect its legitimate interests; provided that such delay does not mislead the public and the company may be able to keep such

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information as confidential. As soon as the reason for delay in disclosure disappears, the company is obliged to disclose the insider information, as required by the Communiqué VIII/54, by stating the decision for delay and its grounds. These companies are also obliged to prepare a list of persons, who have access to insider information, either as a result of their employment with the company or by other means, to deliver such list to the CMB and the respective stock exchange and keep this list updated. The details relating to such list are indicated in the Guideline.

The Communiqué VIII/54 has also limited the disclosure requirements for certain minority shareholders in case of trading on the securities. Unlike the previous communiqué on public disclosures, minority shareholders, who are holding 5% or more of the company's total share capital and have no management responsibility or no power to intervene in the management decisions, are not obliged to disclose all sale and purchase transactions on the securities; their disclosure requirement would arise in case they exceed the shareholding ratios laid down in the Communiqué VIII/54 (i.e. 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 and 75%).

In general, the public disclosures should be made in a timely manner and be accurate, complete, direct, comprehensible and sufficient as well as facilitate decision-making of those to benefit from such disclosed information. If necessary, the counter-party of the disclosed event should also be identified and if possible, the relevant quantity or amount should be included in the disclosure. Additionally, in parallel to the Corporate Governance Principles prepared by the CMB, each company within the scope of Communiqué VIII/54 is obliged to establish its information policy and disclose it to the public through its website. In addition to the minimum context laid down in the Guideline for such disclosure policy, it should be expected that the information policy describes, among others, the information to be disclosed, the form, method and frequency of disclosures and frequency of meetings to be held for public disclosures.

The CMB has also issued the Communiqué VIII/57 on Principles Regarding Public Disclosure of Material Events by Companies Capital Markets Instruments of Which Are Not Traded on Stock Exchanges on 6 February 2009 (the "**Communiqué VIII/57**"). The Communiqué VIII/57 provides for rules applicable to public disclosures to the investors, shareholders and other stake holders in a timely manner by the companies that have issued capital markets instruments, which are not traded on any stock exchange. The information to be disclosed by such companies is limited in comparison to the Communiqué VIII/54 and the procedure for disclosure is different from the disclosures made by companies whose capital markets instruments are traded on stock exchanges in Turkey. For instance, the disclosure of any material event under the Communiqué VIII/57 should be made within 5 days upon occurrence to the CMB, whereas under the Communiqué VIII/54, it is mandatory to disclose any material information subject to public disclosure as soon as possible to the respective stock exchange (or in certain cases, within 3 business days following the event to be disclosed).

Taken as a whole, the Communiqué VIII/57 provides for a more alleviated set of rules for the companies whose capital markets instruments are not traded on any exchange. In any case, the promulgation of both the Communiqué VIII/54 and Communiqué VIII/57 described above seems to provide a relief to the companies to make the disclosures as they now have a clearer set of rules and the Guideline to assist them.

VENTURE CAPITAL INVESTMENT COMPANIES: CROSSING THE BORDERS WITH NEW ACTIVITY STANDARDS

By Enver Sezer Çalışkan

The Capital Markets Board (the "CMB") has first adopted the venture capital investment companies' regime in 1998 through promulgation of the Communiqué VI/10 on Venture Capital Investment Companies, published in the Official Gazette on 6 November 1998. This legislative movement has continued with the Communiqué VI/15 on Principles Regarding Venture Capital Investment Companies, published in the Official Gazette on 20 March 2003 (the "**Communiqué VI/15**"). These communiqués have aimed to develop Turkey-based private equity firms having sustainable investment portfolios which are willing to allocate investment support to Turkish entrepreneur companies. According to the Capital Markets Law and those Communiqués, those companies are named as venture capital investment companies (the "**VCIC**").

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As the legislative authorities are aware of the legal option that Turkish holding companies can also engage in similar activities without being subject to the standards applied to the VCICs, they have adopted tax immunizations so as to attract interest in the VCIC formations. Tax immunizations may be attractive in terms of investment costs; however they are not that attractive to overcome the obstacles with respect to the investment standards applied to the VCICs. Accordingly, all investment activities of the VCICs are exhaustive, therefore the VCICs are not allowed to engage in activities other than those set forth in the legislation. Those investment activities are grouped in two classes, *i.e.* venture capital and non-venture capital investments. Non-venture capital investments are mainly referred to as the investments on the secondary markets whereas venture capital investments are mainly deemed as the investments in venture companies.

A venture company is defined as the company already established or to-be established *in Turkey*, having a potential for growth and requesting a need of investment with the aim to manufacture or develop, equipments, tools, materials, services or new products, methods, systems and production techniques. Beside the scope limitations with respect to the venture companies, one may easily observe that those venture companies are required incorporated in Turkey. There are two consequences of this limitation. The VCICs should always target Turkish companies. Investing only in Turkish companies may be reasonable since the CMB has adopted the VCIC scheme to support the entrepreneurship in Turkey. On the other hand, this limitation has also prevented the VCICs to team up with other private equity companies aiming to invest in Turkey through forming special purpose vehicles abroad. Such a controversial issue has been discussed between the sector representatives and the CMB and amendments to the legislation allowing the VCICs to invest abroad with the aim of ultimate investments in Turkish venture companies are requested.

The CMB, being aware of the fact that the VCICs are deprived of one of the most common investment schemes in the private equity investment sector, has taken a revolutionary step and amended the Communiqué VI/15 with the Communiqué VI/23, published in the Official Gazette on 21 January 2009. According to the amendment, *(i)* the VCICs are allowed invest directly or indirectly in special purpose vehicles incorporated abroad for the purposes of joint investments only in venture companies incorporated in Turkey; provided that the risk with respect to that investment shall only be limited to the principal amount directed to the investments in venture companies; *(ii)* the VCICs may invest in consultancy companies incorporated in Turkey or abroad for providing consultancy services to venture companies incorporated in Turkey; and *(iii)* the VCICs may invest in portfolio management companies incorporated in Turkey or abroad, activities of which solely target venture companies incorporated in Turkey.

As may be reviewed in the amendments, the CMB not only has introduced the special purpose vehicle regime to the investment standards of the VCICs, but also recognized investments in portfolio management companies and consultancy companies incorporated abroad. Therefore, the limited investment standards which have been asserted as the most important obstacle before the establishment of new VCICs have been softened to increase the VCICs' investment options. One may argue that these amendments will not create a march of conversion to the VCIC structure; however it will help the VCICs to better contribute to the improvement of entrepreneurship in Turkey.

NEW LEGISLATION FOR INFRASTRUCTURE INVESTMENTS

By İnci Alaloğlu

Infrastructure investments in Turkey were financed by governmental funds until 1980s. As of the beginning of 1980s, the role of private sector has increased considerably due to high cost of such investments and insufficient governmental funds. With the development in the sector in recent years, the Capital Markets Board (the "CMB") has published the Communiqué VI/24 on Principles regarding Infrastructure Real Estate Investment Companies ("**Communiqué VI/24**") in the Official Gazette on 29 January 2009 to regulate the principles and procedures with respect to *(i)* their founders and incorporations; *(ii)* permissions for portfolio management activity; *(iii)* their organizational structure; *(iv)* the registration of capital markets instruments to be issued; *(v)* their investment activities and *(vi)* disclosure of material events to the public.

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Under the Communiqué VI/24 that has parallel provisions with the Communiqué VI/11 on Principles regarding Real Estate Investment Companies (the “**Communiqué VI/11**”), infrastructure investment companies (“**Companies**”) can be incorporated by way of new establishment or conversion of an existing company, articles of association of which will be amended. Within a 2-year period following the registration of their incorporation, such Companies are obliged to apply to the CMB for the official permissions for portfolio management activities and registration of their shares. The sufficient organizational structure of the Companies to conduct their activities shall be considered for issuance of certificate of activity for portfolio management.

Like the Communiqué VI/11, the Communiqué VI/24 requires the Companies to fulfill certain obligations in terms of public offering. The Companies are obliged to offer at least 49% shares of their issued capital to public and/or previously specified investors (*i*) within 2 years following the registration of certificate of activity for portfolio management in case the issued capital of respective company is less than TRY 200 million; (*ii*) within 4 years following the registration of certificate of activity for portfolio management in case the issued capital of respective company is TRY 200 million and more. Except for aforementioned cases, the Companies shall comply with the general principles issued by the CMB regarding public offerings and sale methods of shares. In order to list issued shares in stock exchange, the application to the CMB shall be realized within 15 days following the end of sale period.

Transfer of shares of the Companies prior to a public offering is subject to the CMB’s permission. The Communiqué VI/24 forbids transfer of shares representing the minimum share capital requirement for the leading shareholder (i.e. 20%) and the shares held by public institutions and organizations for a 2-year period following the completion of public offering. The Communiqué VI/24 requires the CMB permission for the transfer of privileged shares only, once the infrastructure investment company is open to public.

The Companies may issue privileged shares for granting the right to nominate members for the election of the majority of the board of directors before public offering. The Companies, on the other hand, cannot issue privileged shares granting any other privileges.

The Communiqué VI/24 also sets forth the activities that can be performed by the Companies. Accordingly, companies may invest in, *inter alia*, infrastructure projects and services; infrastructure projects-backed capital markets instruments; other infrastructure companies and other infrastructure real estate investment companies through becoming a partner and/or purchasing a debt instrument or other money and capital markets instruments.

The Companies shall not accept deposit funds and/or participation funds, and also shall not perform any activities having the same result. They shall not perform any commercial, industrial and agricultural activities other than prescribed in the Communiqué VI/24. They also shall not engage in capital markets activities with the exception of the portfolio management activities. Furthermore, they are not permitted to undertake construction and building operations of any infrastructure investments and projects by themselves or to grant loans, as well.

Besides, the Communiqué VI/24 imposes some obligations in terms of public disclosure and information to investors. Accordingly, the Companies are obliged to disclose their activity reports and portfolio tables semi-annually, which are prepared in accordance with the principles prescribed in the Communiqué VI/24. They are required to disclose the profit distribution policy and the information policy prepared by the Board of Directors and approved by the General Assembly to public and/or investors, as well.

A NEW APPROACH TO NON-VOTING SHARES

By Armağan Yıldırım

The Communiqué I/36 on Principles Regarding Non-Voting Shares (the “**Communiqué I/36**”) was published in the Official Gazette on 21 January 2009, and has repealed the previous Communiqué I/30 dealing with the same subject-matter. The Turkish Capital Markets Board (the “**CMB**”) has opted to issue a new communiqué instead of making amendments on the Communiqué I/30 to introduce two significant novelties; namely (i) obligation to prepare prospectus and circulars regarding non-voting shares and (ii) right to acquire company’s share certificates at the end of the due dates specified in the prospectus.

As per the Communiqué I/36, the companies are obliged to prepare a prospectus and a circular and submit them to the CMB for public offering of the non-voting shares. The prospectus and circular should include the details of the non-voting shares and other important issues that would be influential on the investors’ decision including the privileges that shall be granted by such shares. The CMB is entitled to disapprove the prospectus and the circular provided that the decision is justified. It has been also stipulated that subsequent to the registration of the non-voting shares that are subject to the public offering, the approved prospectus shall be registered in the relevant Trade Registry and published in the Trade Registry Gazette within 15 days as of the date of registration.

The Communiqué I/36 has also regulated that the non-voting shares can grant some privileges to the non-voting shareholders such as rights to acquire company’s shares or convert the non-voting shares to voting shares as of a specific due date or dates; provided that the respective term does not exceed 5 years. The shares to be given upon exercise of the right to purchase can be created by using two methods. In the event of exercise of such right, in order to deliver the shares to non-voting shareholders, the company may increase its capital by way of private placement or voting shareholders may commit that they would sell their shares to the non-voting shareholders at the end of the due dates or combination of these two methods can be used; provided that the prospectus and circular to be prepared for the issuance of non-voting shares should include the principles of the applicable method. The company is obliged to apply to the CMB 30 days prior to the due date, at the latest, in the event of allocation of the shares to be sold to the non-voting shareholders by way of capital increase through private placement. The non-voting shareholders can perform share purchase rights within 15 days following the announcement regarding the capital increase by way of private placement.

The Communiqué I/36 has also introduced another important right to which non-voting shareholders can apply. The non-voting shareholders, who attend the general assembly of the company and present their dissenting opinion, are entitled to file a lawsuit for annulment of the general assembly decisions.

Furthermore, the ratio for the limit of the non-voting shares to be issued has been increased. Accordingly, the total nominal value of non-voting shares can not exceed the amount of the paid-in or issued share capital of the company (excluding the capital representing non-voting shares), whereas the ratio was 75% of the total issued or paid-in share capital previously. On the other hand, the Communiqué I/36 limits the period for registration to issue and make a public offer of the non-voting shares. As per the Communiqué I/36, the relevant documents should be submitted to the CMB within 6 months as of the date of the authorized body’s decision regarding issuing the non-voting shares.

TELECOMMUNICATIONS SERVICES AND NUMBERING REGULATION

By Çiğdem Ocak

In the past decade, the Information and Communication Technologies Authority (the “**Authority**”) formerly identified as the Telecommunications Authority, has promulgated many circulars, communiqués and regulations and, at last, the Electronic Communications Law No. 5809, which was published in the Official Gazette in November 2008, entered into force in order to enable modernization and diversity of the Turkish telecommunications sector. Most of the new

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telecommunications services such as satellite service, GMPCS mobile telephone service, telephone message service, wired and wireless internet service, long distance telephone service (“LDTS”) and value added directory assistance service have been established by the Authorization Regulation on Telecommunications Services and Infrastructure (the “**Authorization Regulation**”). Those services shall be authorized by the Authority under either a 1st or a 2nd Type Telecommunications License and the certain operators who hold a telecommunications license shall be provided short numbers in different structures as per the Numbering Regulation (the “**Regulation**”), published in the Official Gazette dated 26 February 2004, and to be able to provide their licensed services.

Scope of the Regulation has been defined as the principles and procedures to be applied for planning the numbers used in telecommunications networks in nationwide scale, assigning the numbers in accordance with the plan, enabling effective and efficient use of the assigned numbers, revocation of the numbers and other related issues. The following basic principles shall be considered in enforcement of the Regulation: (i) unless the objective reasons require the opposite, quantitative and qualitative continuity, non-discrimination, orderliness, efficiency, openness, transparency and effective use of resources; (ii) priority for national security, public order and emergency needs, (iii) conformity with the applicable legislations of contracting international organizations; (iv) encouraging user friendly and public benefit seeking applications; (v) protection of consumer rights; and (vi) setting active and sustainable competition environment and encouraging applications for its continuity. The Regulation also determines conditions for number assignment, number usage and change, return or withdrawal process of numbers. The rights of operators regarding assigned numbers are not the right of ownership but the right of use. The operator may perform secondary assignment for the certain numbers assigned to it.

Recently, an Amending Regulation on the Numbering Regulation (the “**Amending Regulation**”) was published in the Official Gazette on 18 February 2009 setting forth the amendments to Annex-A7 related to Carrier Selection Code of the Regulation. Under the Authorization Regulation, LDTS can be carried out in three different methods; namely carrier pre-selection, call by call carrier pre-selection and pre-paid calling cards. As per the Amending Regulation, carrier pre-selection code shall be assigned to the operators who are authorized by the Authority to provide service within the scope of call by call carrier selection. Before the amendment, pre-selection codes were only to be assigned to LDTS operators, however, now with the amendments, fixed telecommunications service operators who provide all kinds of main and value-added telephony services with no technology restriction over fixed terrestrial telecommunications network are also entitled to apply to the Authority for pre-selection codes to provide their services like LTDS operators.

GOVERNING FORESTRY AREAS – THE MATTER OF 2-B REGIONS

By A. Eren Ürey

To govern the legal status of the lands that are considered as 2-B regions, which are no longer deemed to be forestry areas because of the usage of the citizens, the Law No. 5831 Amending the Title Deed Law and Certain Other Laws (the “**Law**”) has been published in the Official Gazette on 27 January 2009.

The Government aims to collect revenues amounting to approximately US\$ 25 billions upon sale of 2-B regions by governmental entities. On the other hand, this project has been criticized by the non-governmental organizations by alleging that the sale of 2-B regions will cause and start the violation of forestry areas of Turkey. As a response to these critics of the non-governmental organizations, the Government and especially the Ministry of Environment and Forestry declared that the areas called as 2-B regions have already lost their forestry qualifications and are being used as residential or commercial areas by the citizens.

In this respect, the proposed sale of the 2-B regions by the Government is an issue being disputed frequently in the last 7 years. In 2002, a draft law governing the legal status of 2-B regions had been prepared by the Government and cancelled by the Constitutional Court due to the fact that Article 170 of the Constitution of the Republic of Turkey does not allow the forestry areas to be subject to any sale transaction. Subsequently, the initiative started by the Government to amend Article 170 of

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the Constitution had been vetoed by Ahmet Necdet Sezer, the former President of the Republic of Turkey. Following the veto, the Government had suspended the project until the end of 2008. However, the project has always been an issue between the Government and non-governmental organizations.

Despite the non-governmental organizations' protests, the Law has been promulgated by the Government. The Law sets forth amendments to the Title Deed Law, Forest Law, Law on Charges and Cadastre Law. Among these amendments which are generally governing minor changes with respect to the charges and terminology, the ones to the Cadastre Law are important. Pursuant to Article 8 of the Law, provisional articles governing the cadastre transactions in relation to the 2-B regions are inserted into the Cadastre Law. As per such articles, the lands that are considered as 2-B regions, which are no longer deemed to be forestry areas, will be registered in the name of the Treasury following the completion of their zoning transactions. Such 2-B regions may be subject to allotment and unification by the General Directorate of Title Deed and Zoning upon request of the Ministry of Finance, without taking into consideration whether or not they were previously registered.

The Law constitutes an initial step of the sale of 2-B regions and is expected to be followed by supplementary applications of the governmental entities despite all protests of non-governmental organizations.

NEW REGULATIONS RE FINES IMPOSED BY THE COMPETITION AUTHORITY

By Pelin Baykara

The Turkish Competition Authority (the "**Authority**") has recently issued two new regulations: (i) the Regulation on Fines to Apply to the Agreements, Concerted Practices and Decisions Limiting the Competition and Abuse of Dominant Position (the "**Regulation on Fines**") and (ii) the Regulation on Active Cooperation for Detecting Cartels (the "**Regulation on Active Cooperation**") both of which are published in the Official Gazette on 15 February 2009.

The Regulation on Fines and the Regulation on Active Cooperation are issued in order to regulate the necessary process within the scope of Article 16 of the Law No. 4054 on the Protection of Competition (the "**Law**"). In general, Article 16 of the Law regulates the rules in relation to the administrative fines to be implemented by the Authority and paragraphs 3 and 4 of the said article specifically regulates the fines to be imposed on the undertakings and associations of undertakings or members of such associations engaged in activities prohibited under the Law and the directors and employees thereof having decisive influence on such violation.

The Authority has issued the Regulation on Fines to indicate the procedures and principles for the fines that will be imposed on the undertakings and the associations of undertakings and their managers and employees, which are engaged in activities prohibited under Article 4 and 6 of the Law prohibiting the agreements, concerted practices and decisions limiting the competition and prohibiting the abuse of dominant position, respectively. The Regulation on Fines seeks to ensure transparency, objectivity and consistency in the fining process. The issues such as assistance with examinations and active cooperation are therefore to be taken into account to determine the fines.

Under the Regulation on Fines, the amount of the fine shall not exceed 10% of the annual gross income of the undertakings and associations of undertakings or the members of such associations to be fined, that has been derived as of the end of the fiscal year preceding the final decision or, in case it cannot be calculated, by the end of the fiscal year closest to the date of the final decision. Furthermore, the fine that will be imposed on the directors and employees of undertakings or associations of undertakings shall not exceed 5% of the fine given to the undertaking or association of undertakings. When determining the amount of the fines, the Competition Board (the "**Board**") will calculate the annual gross income.

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The Regulation on Active Cooperation has been regulated by the Authority to specify the principles and procedures for relief of imposition and mitigation of fines in relation to those making an active cooperation with the Authority for detecting and investigating cartels. The Authority expects that this Regulation on Active Cooperation will be very helpful as it is difficult to detect and investigate cartels unless the undertakings engaged in cartels cooperate with the Authority.

Pursuant to the Regulation on Active Cooperation, the first undertaking, which submits the information and evidence, independently from its competitors, and meets certain requirements, before the decision of the Board to carry out a preliminary inquiry, shall not be subject to any fine. Additionally, the first undertaking which submits the information and evidence and meets certain requirements, independently from its competitors, as of the decision of the Board to carry out preliminary inquiry until the notification of the investigation report, shall not be fined provided that at the time of the submission the Authority does not have sufficient evidence to prove the violation of Article 4 of the Law. The directors and employees of such undertaking covered by this provision of the Regulation on Active Cooperation shall not be fined as well.

SHORT-HOURS AND SHORT-HOURS ALLOCATION LEGISLATION

By Zeynep Saydi

The Ministry of Labor and Social Security has issued new Regulation on Short-Hours and Short-Hours Allocation (the “**Regulation**”) on 13 January 2009 setting forth the principles on allocation of short-hours payments to employees whose work hours are cut down significantly by their employer or whose employer has temporarily suspended their business operations partially or in total; in other words whose employer implement “*short-hours*” at the work place. However, in order to be entitled to short-hours allocation, the said measures must be taken on two grounds: general financial crisis or force majeure.

General financial crisis, being a vague term, was determined as circumstances where the national economy and consequently the businesses are affected significantly by national or international events. As Turkey has a long history of financial crisis, a mere financial disturbance will not be deemed as significant and it will not be comprised within “general financial crisis.” Crisis in 1994 and 2001 constitute good examples to this. Considering the timing of the Regulation and the extent and the magnitude of affects of the global financial crisis started in late 2008 on national economy, this crisis can be comprised within the scope of the Regulation.

The other ground, which an employee may use to apply for short-hours allocation, is force majeure. Force majeure, deriving from French for “superior force”, is a notion frequently used in law of contracts as a clause to free both parties from liability/obligation in case of an extraordinary event or a circumstance beyond the control of the parties. The Regulation has determined force majeure as unpredictable and consequently unpreventable causes, arising not from the employer’s management or directives but from elements that are not attributable to the employer or the employee, resulting in the employer’s cutting down the work hours of the employee or suspension of business operations. The Regulation lists earthquake, fire, flood, epidemic diseases, and conscription as examples to force majeure.

The employer wishing to implement short-hours in its workplace must apply to the Labor Agency of Turkey (the “**Agency**”) and the trade union with which the respective company executed a collective bargaining agreement, if any. The application must state the scope of general financial crisis or force majeure, its impact on the business of the employer and concrete documents certifying these allegations and the company’s registry information (title, address, trade union, if any, the name of the Regional Directorate of Ministry of Labor and Social Security (the “**Ministry**”), social security registry number) must be attached. The list of employees, for whom short-hours will be implemented, will be submitted to the Agency and labor inspectors of the Ministry.

The Agency will notify the employer of the application results and the employer will notify the trade union, if any, and the employees.

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General financial crisis can only be declared by the Minister of Labor and Social Security, especially in the event that the confederations of labor and employer's unions assert such crisis and there are strong indications in that respect. Unless there is such declaration from the Minister, the short-hours application on the grounds of financial crisis will be rejected along with application where the alleged force majeure does not meet the criteria set out by the Regulation. It is indicated clearly that such as monetary pressure, payment difficulties or distress in the market do not constitute a general financial crisis.

In order for an employee to be entitled to short-hours allocation, the employee, in line with the related provisions of the Unemployment Insurance Law No. 4447 (the "**Law No. 4447**"), must have worked for the last 120 days without interruption and must have paid insurance premiums during such period. The employee meeting this requirement may apply for short-hours allocation, if his or her employer's short-hours application is accepted.

The amount of the allocation is also determined in the Regulation as equal to unemployment allocation. The daily allocation is calculated as the $\frac{1}{4}$ of daily average of the last 4 months' salary (base to premium payments). In all cases the allocation amount cannot exceed the 80% of minimum wage fixed for workers older than 16 years old.

The duration of the allocation period is limited to the duration of the short-hours and in all cases, it cannot exceed the duration for which the employee would have been entitled to unemployment allocation, had he/she been unemployed.

If the employee is no longer employed at the time of termination of the short-hours period, he/she will be entitled to unemployment allocation for a period to be calculated by deducting the time he/she received short-hours allocation from the statutory period set out in Article 50 of the Law No. 4447.

Short-hours allocation will be ceased if the short-hours practice is no longer implemented, when the short-hours period is terminated or in other cases determined in the regulation. Other cases are listed in the regulation as:

- If the employee takes a job;
- If the employee starts to receive old-age allocation;
- If the employee is conscripted;
- If the employee quits his or her job in order to perform a statutory labor duty; or
- If the employee starts to receive disability of service allocation.

If implementation of short-hours is ceased before the termination of the anticipated period, the employer must notify in writing the Agency, the trade union, if any, and the employees within 6 days.

FOREIGN ASSETS COVERING TECHNICAL PROVISIONS IN INSURANCE SECTOR

By Onur Ergün

Within the framework of European Union harmonization process regarding the insurance sector, there have been various amendments and new legislation enacted by the Undersecretariat of Treasury (the "**Undersecretariat**") from 2006 onwards. Recently, the Undersecretariat has promulgated the Communiqué on Foreign Assets Covering the Technical Provisions of Insurance, Reinsurance and Pension Companies (the "**Communiqué**"), published in the Official Gazette on 21 January 2009. The Communiqué sets forth the procedures and principles regarding use of immovable and deposits in foreign countries, financial assets issued by foreign countries and traded on the stock exchanges of foreign markets that are subject to rating, as technical provisions by the insurance and reinsurance companies incorporated in Turkey and the organization of such companies incorporated abroad and by the pension companies. The problem with using the assets covering the technical provisions in investments abroad is aimed to be resolved with this Communiqué, which is based on the Regulation on the Technical Provisions of Insurance, Reinsurance and Pension Companies and the Assets Covering These Provisions (the "**Regulation**").

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Pursuant to the Communiqué, in line with the principle of matching of the assets and liabilities, the companies may disclose the foreign assets categorized below with respect to the risks being outside Turkey; provided that the limitations under the Regulation are reserved and the assets covering the technical provisions allocated by the foreign-based branches of the companies under the respective local legislation are exempt therefrom. Accordingly, foreign assets under the Communiqué include the following: (a) fixed-income or flexible-income securities issued by the central managements and central banks of the Organisation for Economic Co-operation and Development (the “OECD”) member countries and European Central Bank; (b) time deposits and demand deposits kept in the banks incorporated in the OECD member countries; (c) shares quoted on the stock exchanges to be determined by the Undersecretariat; (d) mutual fund shares composed of the assets specified in subparagraphs a, b and c above and issued by and traded in the OECD member countries; and (e) immovable in OECD member countries.

In addition to this categorization, the Communiqué sets forth certain conditions on these foreign assets. The companies must undertake prior investigations regarding above mentioned foreign assets whether there are any restrictions under the applicable legislation with respect to the sale and transfer of its consideration in the stock exchange, given that assets have such restrictions they cannot be added to the portfolio. The companies in insurance sector may add instruments that are traded in secondary market and are rated in their portfolio; therefore these assets could also be sold on the stock exchange where they are quoted or were purchased. The shares that are to be contemplated as the foreign assets covering the technical provisions of the companies must be rated by the rating institutions determined by the Undersecretariat and must be given a minimum rating note by the same in order for it to be admissible. The documents determining the rating of the related assets shall be kept by the company. The reports of the international rating institutions shall be based on the determination of the immovable covering the technical provisions and located abroad.

The Communiqué also covers where these foreign assets will be kept. Such financial assets concerning the technical provisions reserved in relation to the risks outside of Turkey shall be kept in the sub-accounts that are to be opened on behalf of the company under the correspondent accounts of the ISE Settlement and Custody Bank whilst the definitive liability of the protection and keeping of these foreign assets shall belong to the company. The communications regarding the sales, purchase and keeping of the assets shall be conducted via SWIFT and instructions to be sent in writing.

APPLICATION GUIDELINES FOR INSURANCE REGARDING PERSONAL LOANS

By Sezi Tezcanlı

In an effort to provide principles applicable to insurance policies tied to personal loans, the Undersecretariat of Treasury’s Regulation on Application Guidelines of Insurance regarding Personal Loans (“**Regulation**”) has entered into force on 1 February 2009. One of the major purposes of the Regulation has been determined to provide unity and credibility regarding application of insurances related to the loans granted by deposit banks, participation banks, development and investment banks, financing companies along with similar other corporations authorised to grant loans which conduct business in Turkey (“**Loan Institutions**”). The regulation of substantive and procedural matters of the service to be provided by the above-mentioned Loan Institutions and protecting rights and benefits of the policy holders, policy owners and beneficiaries have also been targeted.

The Regulation focuses on the mandatory insurances as provided by the relevant article of the Insurance Law No. 5684 (the “**Law No. 5684**”) and optional insurances, if any, to be issued with regards to the subject of the loan agreement. As provided by the relevant article of the Law No. 5684, the borrowers are obliged to obtain certain insurances depending on the subject matter of the loan agreement where the legislation deems necessary. In accordance with the Regulation, in the event the borrower fails to obtain such mandatory insurance, the Loan Institution shall remind the borrower of such obligation. As to the optional insurances, the Loan Institutions shall inform the borrower of such opportunity and details related to such optional insurance.

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Another important issue in the Regulation is the amount of guarantee and premiums of the insurance to be obtained in connection with a loan agreement. Whilst determining the amount of the guarantee, the amount, term, interest rate and expenses as well as the value of insured asset or the asset subject to insurance have to be taken into consideration. In the event the loan is paid before it is due or structure of debt has been altered according to a lump sum payment, the Loan Institutions are authorised to make changes in the guarantee amount. Such change in the guarantee amount may cause the Loan Institutions to lower the premiums of the loan or the premiums may be returned to the borrower.

The most outstanding advantage arising out of the Regulation is that the loan borrower's right to choose the insurance company. Therefore, any provision restricting such right either in the insurance agreement or in the loan agreement shall be deemed null and void. Furthermore, the Loan Institutions are obliged to inform the borrower that the subject of the loan agreement can either be insured by the Loan Institution itself or another insurance intermediary. In the event the subject of the loan agreement has been insured by an insurance company or insurance intermediary other than the Loan Institution itself, if the insurance policy covers the requested amount of guarantee, the Loan Institution is obliged to accept such insurance policy.

DETERMINATION OF QUALIFICATION OF LOANS AND OTHER RECEIVABLES BY BANKS

By Tolga Tulgar

The Banking Regulation and Supervision Agency (the "BRSA"), the regulatory body responsible for the supervision and regulation of banking sector, has amended the Regulation on Determination of Qualification of Loans and Other Receivables by Banks and Procedures and Principles Regarding Allocation of Provisions Thereof (the "Amending Regulation") on 23 January 2009. The Amending Regulation mainly aims to secure the solvency of the loan debtors and to enhance the scope of the loan availability of the banking sector.

The Amending Regulation sets forth new criteria for the grounds of close tracking of loans and other receivables identified as Second Group. Further, pursuant to the Amending Regulation, persons, which are in the same risk group, shall be assessed separately within the context of the Regulation. The Amending Regulation also determines that specific provisions shall be enforced in a ratio of ¼ to the payment liabilities, which arise from the Law on the Check Payments and Protection of Check Holders and applicable law for each leaf of checkbook issued to loan customers in third, fourth or fifth categories described by the Amending Regulation and 5 years have elapsed since issuance of such checkbook.

As per the provisional article of the Regulation to be applicable until 1 March 2010 customers with several loans may be subjected to a specific provision practice by the banks. In addition, the principles relating to restructuring of loans and their receivables and execution of new agreements accordingly until 1 March 2010 are also governed by the Amending Regulation.

The Amending Regulation shall be effective from 1 October 2008.

TRADEMARK INFRINGEMENTS AND PENALTIES

By Betül Baykal

The Law No. 5833 amending the Decree regarding the Protection of Trademarks has been published in the Official Gazette on 28 January 2009 (the "Law"). This Law aims to fill the gap which has occurred due to the provisions annulled by the Constitutional Court. The provisions so annulled by the Constitutional Court were in contradiction with Articles 38 and 91 of the Constitution of the Republic of Turkey. According to the said articles, penalties or safety measures in substitution of penalties shall be regulated only under law and can not be regulated by decrees. Furthermore it should also be mentioned that the amended articles include new provisions as explained in details below.

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As per the amendments implemented by the Law, the rights arising from the registration of the trademark belong exclusively to the trademark owner. The trademark owner, in addition to certain actions infringing the trademark which already existed in the annulled article, is entitled to request prevention of the illegal and non-fair use of the same or similar signal belonging to the registered trademark, which would give rise to commercial affect in the internet by way of domain name, key word or similar forms; provided that the used signal of a good is the same or similar to the trademark signal, and not in the scope of the goods and/or services of the trademark. It should be noted that, in that case, the use of the trademark signal should cause damage to the reputation of the trademark or derive improper benefit through well-known trademark or harm the distinguishing character of the trademark.

The Law also provides for an additional action that may result in trademark infringement. Accordingly, expanding, or transferring the rights granted with a license agreement by the trademark owner to a third party without permission is also an action infringing the trademark. However, attending, helping or inducing any trademark infringement action, and avoiding declaration of the source of the goods in possession, which are identical or similar to a registered trademark, shall not result in trademark infringement anymore.

Article 61/A of the Decree stating the penalty provisions were also annulled by the Constitutional Court. The Law amended such Article 61/A to set forth the new penalties for the trademark, all of which are subject to complaint, provided that the trademark is registered in Turkey.

PROCEDURES APPLICABLE TO FRAMEWORK AGREEMENT TENDERS

By Zeynep Ahu Akın

In light of the most recent amendments on the Public Procurement Law No. 4734 (the “**Law**”) that has been changed severally in November 2008, the respective regulations are also being altered. In that respect, the Regulation on Procedures on Framework Agreement Tenders (the “**Regulation**”) has come into effect very recently on 5 March 2009. Accordingly tender procedures to apply on framework agreements in terms of construction affairs and procurement of goods and services by public administrations that are within the scope of the Law, as well as execution of separate agreements to that effect have been broadly regulated.

As per changes launched by the Regulation, public administrations shall be forthwith entitled to call for tenders and use the “framework agreements” as an instrument for the procurement of a wide range of goods and services. The former regulation had allowed solely the health services in terms of which framework agreements could have been entered into, and the new legislation allows now a diversified range of services for the use of the public bodies. By virtue of the afore-mentioned amendment, public bodies shall be at liberty to procure quiet a few services from certain companies for a term of four years without a need to call for tenders whereas the term of the respective framework agreement shall not exceed forty eight months. The scope of the Regulation expands from goods such as medicine and medical supplies, fuel products, cleaning materials, food, election and voting supplies and diversifies to services such as transportation, edition, market inspection and surveillance, maintenance and repair services of premises, railways, drinking water and canalization systems, energy transfer lines, natural gas and pipelines.

The bidders to act as a party to the framework agreement are to be determined in the tender documentation and the number of the bidders shall be at least three whereas consortiums are disallowed to participate in the tenders. In cases where the agreement is entered at the presidency or province level, each administration shall be entitled to execute separate agreements. Should the number of bidders drop below three, then the termination shall be notified to the parties. The bidders are to evidence their adequacy every twelve months. As a restriction, the Regulation governs that the framework agreements cannot be used for purposes of restricting competition and these agreements cannot be executed for a term longer than forty eight months. It has been further governed that the execution of framework agreements shall not burden public administrations to make procurement and the administrations shall be at liberty to use other methods provided by the law to procure goods and services.

It is reported that the amendments have been brought up for the purpose of speeding up the public procurement processes; nevertheless, the growing opinion is that such changes would serve to the benefit of certain major companies and would block out the market for the remaining ones. For example, if a public body would agree on terms of procurement of maintenance services with three bidders, than the remaining companies, either newly established or could not have participated in the tender, would not have the chance to deal with the said public body for a term of four years.

APPLICATIONS AGAINST PUBLIC PROCUREMENT TENDERS REVISED

By Canan Ünal

The Public Procurement Authority (the “PPA”), the public legal entity assigned and authorized for the implementation of the principles, procedures and proceedings specified in the Public Procurement Law No. 4734 (the “Law”), has issued two related legislations in January of 2009, while the Law No. 5812 Amending the Public Procurement Law and the Public Procurement Contracts Law (the “Amending Law”) was published in the Official Gazette on 5 December 2008 and the changes regarding applications against procurement entered into effect on 4 January 2009. In line with the amendments in the Law, the Regulation on Applications against Public Procurement Tenders (the “Regulation”) was firstly issued and published in the Official Gazette on 3 January 2009. Secondly, the Communiqué on Applications against Public Procurement Tenders (the “Communiqué”) was published in the Official Gazette on 28 January 2009. This article mainly focuses on the latest amendments on the procedure of administrative application against public procurement tenders made by the Regulation and the Communiqué in the light of the Law.

Through enactment of the Regulation and the Communiqué, applications against public procurement tenders are limited to two categories. Pursuant to new Article 54 of the Law and Article 5 of the Regulation, the candidates, bidders and persons who may become bidders are able to use two application ways, namely (i) complaint and (ii) objecting complaint, if they claim that they have incurred a loss of right or damage, or they are likely to incur damages. The Regulation and the Communiqué no longer covers investigation through claims of acts in violation of the Law and the related legislation in the procurement tenders as the third way of application in line with the cancellation of the respective provision of the Law.

Another major amendment envisaged in the Regulation is in relation to grounds of objecting complaint. Before the amendments, objecting complaints were solely referred to the applications that are submitted to the PPA if the resolution taken by the contracting entity is disapproved or any resolution is not taken within the time limits upon complaint. Under the Regulation, two more grounds have been determined to apply objecting complaint, which are (i) resolution of cancellation of the tender taken by the contracting entity as of the registration date of the complaint petition upon complaint, and (ii) resolution of cancellation of the tender taken by the contacting entity after the resolution of refusal of the application or determination of the corrective action is taken by the PPA upon objecting complaint. Accordingly, the scope of objecting complaints has been extended.

The Regulation has shortened and restructured the application procedure while the Communiqué has detailed this procedure. Before the Regulation, the duration for both complaint and objecting complaint applications were 15 days. Under the Regulation and the Communiqué, the duration of complaint application to the contracting entity is generally 10 days. Furthermore, the duration of objecting complaint applications to the PPA has been decreased to 5 days for the resolutions of cancellation of the tender taken upon complaint and objecting complaint; and 10 days for other cases. On the other hand, the duration of notification of the resolution concluding the complaint application to applicant, candidate or bidders has been determined as 3 days, while it was 7 days before the Regulation. Besides shortening the duration of the procurements, technological developments had necessitated new ways to notify the final resolutions taken upon the applications. In this respect, the Regulation has set forth that notification might be made through e-mail messages.

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Finally, under the relevant articles of the Regulation, the substantial part of the Regulation entered into effect as of 4 January 2009 and the applications made before the effective date are subject to the previous regulation, which has been abolished by the Regulation. On the other hand, the Communiqué entered into effect on 28 January 2009, however the applications made before 5 January 2009 are subject to the previous communiqué, which has been abolished by the Communiqué. Could a legal gap arise for the applications made between 5 January 2009 and 28 January 2009? The answer is no; as the provisions of the Regulation and the Law could be applied to these applications made in this period.

Consequently, the Regulation and the Communiqué have brought harmonization of the applications against public procurement tenders with the latest amendments in the Law as a result of the necessities of the technological era. Now, this procedure could be fulfilled in an easier and shorter process.

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.

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