

TABOGLU & DEMİRHAN

Quarterly Report

THE TURKISH CAPITAL MARKETS BOARD CONTINUES TO INTRODUCE NEW INSTRUMENTS TO THE MARKET: NOW IT IS TIME FOR BROKERAGE HOUSES AND BANKS TO ISSUE WARRANTS

By: *Esin Taboğlu*

Headlines

- (i) *The Turkish Capital Markets Board Continues To Introduce New Instruments To The Market: Now It Is Time For Brokerage Houses And Banks To Issue Warrants*
- (ii) *The Intermediary Institutions And Investment Trusts Are Allowed To Purchase Their Own Shares*
- (iii) *New Tender Offer Communiqué Is In Force*
- (iv) *Asset Covered Bonds*
- (v) *Amendments Re Principles Of Intermediation Activities And Intermediary Institutes*
- (vi) *Spin Off: Unchained Public Companies Guarantees: Under Scrutiny*
- (vii) *The Guidelines of the Competition Authority re Technology Transfer Agreements*
- (viii) *A Detailed Guidance For Vertical Agreements*
- (ix) *Amending Regulation On Applications Against Public Procurement Tenders*
- (x) *Implementation Regulation On Organized Industrial Zones*
- (xi) *Number Portability*
- (xii) *Funding Energy Investments is Easing Up*

The Capital Markets Board of Turkey (the “CMB”) has issued a new Communiqué on the Principles relating to the Registration and Sale of Warrants by Brokerage Houses (the “Communiqué No. III/37”) published in the Official Gazette on 21 July 2009.

The Communiqué No.III/37 applies only to index warrants and basket warrants to be trading on the Istanbul Stock Exchange (the “ISE”). The Communiqué No.III/37 defines “index warrants” as “warrants using the indices of the ISE as underlying assets, whereas “basket warrants” are defined as “warrants attached to equity security within ISE-30 Index or a basket of equity securities within the same index”. It is further stated that warrants can be attached to other underlying assets, including but not limited to convertible currencies, precious metals and indices acceptable in international markets subject to prior approval of the CMB.

Domestic and international brokerage houses and banks with high ratings given by the rating agencies authorized by the CMB or international rating agencies approved by the CMB to perform rating activities in Turkey are allowed to issue warrants under the Communiqué No.III/37. Application by international brokerage houses and banks to register warrants under the Communiqué No.III/37 shall be reviewed by the CMB in light of the information flow from the regulatory authority of the country where the applicant is resident.

Warrants are issued for a term of at least 2 months and at most 5 years. There are certain issuance limits depending on the type of the warrants and their settlement principles. If warrants are attached to ISE-30 Indexed equity securities or a basket consisting of the same securities and they are deliverable warrants, *i.e.* warrants with settlement through transfer of underlying instruments, the underlying securities cannot represent more than 20% of the share capital of the originating company. In case of cash-settled warrants, there is no such limitation. Warrants other than those attached to ISE-30 Indexed equity securities or a basket consisting of the same are required to be cash settled. Issuers of warrants cannot use their own equity securities as underlying assets.

Application to the CMB for the registration of warrants is similar to the registration process of any other securities with the CMB, provided that the application to the CMB shall be made within three months as of the decision of the issuer. The application shall include, among others, last three years’ annual IFRS audited financials of the issuer audited, most recent quarter financials, rating report of the issuer, information on the use of proceeds and offering circular. The offering circular shall include information on the financial status of the issuer and guarantor, if any, risks associated with the warrants, disclosure of material events and adjustment process if there are any corporate actions, affecting the underlying assets, *e.g.* distribution of dividends, capital increase etc. The CMB’s normal review period is 30 days, provided that all required documents and information are submitted.

Warrants registered with the CMB are required to be listed on the ISE and traded in the relevant market of the ISE. Therefore, a separate application for the listing of the warrants with the ISE is needed. However, as to date, the ISE has not yet issued any regulation dealing with the listing requirements of the warrants by brokerage houses and banks.

THE INTERMEDIARY INSTITUTIONS AND INVESTMENT TRUSTS ARE ALLOWED TO PURCHASE THEIR OWN SHARES

By: Pelin Baykara

Under Article 329 of the Turkish Commercial Code (the “TCC”), companies are not allowed to purchase their own shares and transactions resulting in acquisition of these shares are deemed void. Although the TCC includes such restriction, it also stipulates some exceptions to this rule. In case the acquisition of shares is considered as one of the transactions that are within the company’s scope of activity in accordance with its articles of association, such transaction is regarded as one of the exceptions specified under Article 329 of the TCC. On the basis of this exception, the Capital Markets Board of Turkey (the “CMB”) has adopted a resolution dated 1 September 2009 and numbered 27/748 and introduced the principles and guidelines allowing the intermediary institutions and investment trusts traded on the Istanbul Stock Exchange (the “ISE”) to purchase their own shares. The CMB aims to provide a transparent environment for the transactions of the companies performed in relation to their own shares and to ensure more accurate information to the investors.

As per the above-mentioned resolution of the CMB, the repurchase procedures shall be performed by the board of directors of the company within the framework of the stock repurchase program approved by the general assembly and within the scope of the authorization to be granted for 18 months at most. In case of reasonable cause, the repurchase transactions may be performed by the board of directors without the resolution of the general assembly concerning such authorization.

The shares to be repurchased shall be traded on and repurchased from the ISE. Furthermore, the nominal value of the shares to be repurchased shall not exceed 20% of the paid-in/issued capital of the company including formerly acquired shares. Should the nominal value of those shares exceed the given ratio; the exceeding amount shall be disposed of within the following 6 months as of the repurchase date. The repurchase of shares shall be realized without causing any loss in the net active capital of the company stated in its recent financial statements which are announced to public. The voting rights in relation to the repurchased shares shall not be exercised by the company.

The repurchased shares and bonus shares acquired within such shares shall be hold for a maximum period of 3 years and such period shall be determined by the company. The shares not disposed within this period shall be cancelled through capital decrease. The repurchased shares and bonus shares acquired within such shares shall only be disposed through their sale on the stock exchange and after the end of the declared repurchase program.

No purchase or sale transactions shall be realized in case there is internal information, announcement of which is delayed by the companies, or in case there are special circumstances that may affect the price of the shares. In addition, no repurchase transaction may be performed as of the date of the general assembly and, in case of registered capital system, as of the date of the board of directors’ resolution regarding capital increase until the completion thereof.

As a final point, the CMB has also determined rules in addition to the rules determined by the ISE in relation to the repurchases to be performed on the ISE. Accordingly, the price order given for the repurchase shall not be higher than the current price offers or the price of the latest sale. The total share amount to be repurchased per day shall not exceed 25% of the average daily trading volume of the shares in the last 3 months.

NEW TENDER OFFER COMMUNIQUÉ IS IN FORCE

By: Tolga Tulgar

The new Communiqué on Voluntary and Mandatory Tender Offers (the “Communiqué No.IV/44”) issued by the Capital Markets Board of Turkey (the “CMB”) on 2 September 2009 makes significant changes to the mandatory tender offer rules. The changes are geared to minimize encountered problems arising from the obligation to initiate tender offers and its exemptions.

cont’d.

cont'd.

The Communiqué No.IV/44, as being a tool for the protection of the minority shareholders' interests in the context of takeover and changes of control, provided for a broad range of new rules, including the acquisition of control, determination of tender price, tender exemptions and tender periods in line with the European Union's Directives. According to the Communiqué No.IV/44, the mandatory tender offer shall be triggered when, directly or indirectly, more than 50% of a shareholding of a public company is acquired or management control of a public company is taken over through acquiring *(i)* the necessary number of shares granting the right to elect, or *(ii)* privileged shares allowing the nomination of the majority of the board of directors. Communiqué No.IV/44 also lays down some circumstances, which shall not trigger a mandatory offer such as management control changes of the company by a voluntary tender offer and share transfers by privileged shareholders with management control or persons acting together resulting in a possession of more than 50% of the capital or voting rights.

The mandatory offer price is stipulated under the Communiqué No. IV/44 as the highest price paid by the acquirers to the shareholders for any offer realized within a 6-month period prior to the acquisition leading to the mandatory offer. The Communiqué No.IV/44 also provides that any additional adjusted payment mechanisms, earn out payments and further allowances shall be taken into consideration.

The Communiqué No.IV/44 sets forth different rules for determination of the offer price in the indirect share acquisitions of parent companies. If the mandatory offer has arisen due to an indirect share acquisition in parent companies, then the price prescribed under the Communiqué No. IV/44 is equal to or more than the highest of *(i)* the price determined as a result of an evaluation; *(ii)* the average of the weighted daily stock market price within a 6-month period prior to the execution of the share purchase agreement for the shares of the parent; and *(iii)* the highest price paid by the acquirers for any shares of the company subject to the mandatory offer within the 6-month period prior to the first announcement of acquisition.

The Communiqué No.IV/44 also lays down principles in order to assure price equality. It is provided that if acquirers purchase shares at a price more than mandatory tender offer price after the announcement of the tender and before the end of the offer period; the mandatory tender offer price shall be adjusted and determined as equal as or more than the acquired shares' highest price.

Time periods for the mandatory tender offer have also been significantly changed. As per the Communiqué No.IV/44, the acquirer shall apply to the CMB in order to initiate the mandatory tender offer within 6 business days starting from the acquisition date and shall initiate such tender offer process within 45 business days as of the date the tender offer has been triggered. Offer period has been determined as at least 10 business days and at most 20 business days and shall start within 6 business days as of the CMB's approval, the latest.

The Communiqué No.IV/44 regulates some circumstances, in which the CMB may grant an exemption to the acquirer who would otherwise be required to make a mandatory offer. Pursuant to the Communiqué No.IV/44, *(i)* if the acquisition of shares or voting rights is necessary to strengthen the company's financial structure (the CMB may ask for a report prepared by an independent firm evidencing that such capital increase is for the company's financial needs); *(ii)* if the acquiring party undertakes to dispose the excess portion within a period of time to be determined by the CMB (there should be no change on the board of directors of the company during the time determined by the CMB); *(iii)* if such acquisition does not aim to gain control in the management of the target company; or *(iv)* if such acquisition is for the sale of the public shares of a company within the privatization process, the CMB may grant an exemption to the acquirer.

The Communiqué No.IV/44 also lays down public disclosure of events concerning the mandatory and voluntary tender offers. As per the provisions of the Communiqué No.IV/44 mandatory tender offer decision, tender offer obligation, the application for exemption, result of the exemption application, evaluation report's results, information regarding the shares purchased after the tender period; and information regarding the structure of such legal entity and its management after the tender period should be disclosed to public pursuant to the public disclosure principles of the CMB.

ASSET COVERED BONDS

By: Ebru Demirhan

The Capital Markets Board of Turkey (the “CMB”) has issued a new piece of legislation on 12 September 2009 setting forth the principles on the asset covered bonds, which will enable the new capital markets instruments to be traded on the financial markets of Turkey. Under the Communiqué III/38 on the Principles relating to Asset Covered Bonds (the “**Communiqué No.III/38**”), general standards with respect to issuance of asset covered bonds and their registration with the CMB and sale principles together with the cover supervisor (*teminat sorumlusu*) and cover pool (*teminat havuzu*) have been determined.

The banks, finance companies, the companies authorized to perform financial leasing, real estate investment trusts (REIT), public organizations and institutions issuing securities according to their legislation and other issuers to be defined by the CMB shall be deemed as *issuers* as to Article 13/B of the Capital Markets Law and the Communiqué No.III/38. The asset covered bonds are debt instruments secured by a pool of assets determined under Article 5 of the Communiqué No. III/38 and issued, directly or via assignment of claims, upon registration by the CMB. Such bonds provide full recourse to the issuers. Pursuant to Article 5, the types of assets and credits that can be the subject matter of asset covered bonds are as follows: (i) consumer loans verified by the Consumer Protection Law No. 4077; (ii) commercial loans; (iii) claims arising from the financial and operational leasing agreements; (iv) claims arising from the export transactions; (v) other claims attached to a deed arising from forward sales that are made to their customers by the joint stock companies facilitating in goods and services, save for banks, and the state economical enterprises including those that are in the scope of privatization; (vi) specialized claims arising from loans granted to small traders including craftsmen and artisans by the banks; (vii) claims arising from sale or promise to sale agreements in connection with the real estates within the portfolio of REITs; (viii) claims arising from the real estate sales of the Housing Development Administration of the Republic of Turkey; (ix) substitute assets such as cash including cover assets, liquidity deeds issued by the Central Bank of the Republic of Turkey (the “**Central Bank**”) and free deposits kept by the Central Bank out of the legal requirements and public domestic and foreign borrowings, provided that these assets shall not exceed 10% of the total cover pool, which includes bill of exchanges, agreements and other documents representing the assets securing the asset covered bonds; and (x) other assets quality of which will be determined by the CMB. A bank guarantee may be asked for an asset covered bond to be issued. In this case, the issuer must provide such guarantee.

According to the Communiqué No.III/38, the issuers must manage the cover assets separate from their own assets in different and private accounts. The records in the cover book (*teminat defteri*) are taken into consideration in case of any transactions and disputes with respect to cover assets. Until the asset covered bonds are redeemed, the assets in the cover pool cannot be (i) used for any purpose other than securing the asset covered bonds, (ii) pledged, (iii) used as a collateral, (iv) seized for any purpose including collection of public receivables, (v) included in the bankrupt’s estate, and (vi) subjected to preliminary injunction decisions of the courts.

The net actual value of the assets that are determined in Article 5 is calculated based on the principles of the International Financial Reporting Standards. Nominal value of cover assets cannot be less than the asset covered bonds to be issued. Total amount of interest, profit share and similar incomes expected to be obtained within one year from the date of examination pursuant to Article 13 (1) (ç) of the Communiqué No.III/38 shall not be less than the interest and similar liabilities expected to be emanated from the asset covered bonds to be issued within the same period of time. In respect of the calculation of the nominal value, balance capital amount of the loans and issue price of the discounted debt securities are taken into consideration. Net actual value of cover assets shall be more than net actual value of asset covered bonds to be issued, at a rate to be determined by the issuer, but not less than 2%.

cont’d.

cont'd.

The issuers, except for the public organizations and institutions, must appoint an independent audit firm, which is in the list of the CMB, as a cover supervisor (*teminat sorumlusu*), who will be responsible for controlling the cover book and cover pool according to the principles of the Communiqué No.III/38. The CMB may oblige the public organizations and institutions authorized to issue asset covered bonds according to their legislation, to appoint a cover supervisor. The CMB is to be informed in case of appointment of the cover supervisor and any change thereof. No asset is excluded from the cover assets and no record is deleted from the cover book without the permission of the cover supervisor. If the issuer fails to fulfill its liabilities, the issuer with the approval of the cover supervisor shall promptly transfer the funds obtained from the cover assets to the holders of the asset covered bonds, and in case the assets included in the cover pools do not meet the claims of the holders, the asset backed bonds holders may recourse to the other assets of the issuer.

The issuers must apply to the CMB with the required documents for the registration of the asset covered bonds prior to their issuance. In case of a *public offering*, the application may be made separately for each issue or for all issues to be made within a 5-year period starting from the date of registration of the asset covered bonds with the CMB. The sale process of the asset covered bonds does not start without the approval of the CMB. Application to the CMB for the registration of bonds is quite similar to the registration process of any other securities with the CMB. The asset covered bonds may be sold to the eligible investors *without public offering*. According to the Communiqué No.III/38, these investors are defined as local and foreign investment funds, retirement funds, investment companies, intermediary institutions, banks, insurance companies, portfolio management companies, mortgage finance corporations, pension funds, foundations, funds established as to temporary Article 20 of the Social Insurance Law, public associations, other similar investors determined by the CMB and real persons and legal entities holding Turkish Lira or foreign exchange and capital markets instruments equal to minimum TRY 1 million at the time of asset covered bonds sale. The asset covered bonds may be sold on discount basis or issued as periodical and flexible interest or yield payment. The asset covered bonds that are not sold within its sale period are cancelled.

In conclusion, the asset covered bonds, as safe investment instruments, will provide benefit not only for the investors but also for the issuers. Firstly, the asset covered bonds enable the investors to issue debt instruments to with low costs by courtesy of additional security mechanism supported by the cover pool system existing in the balance sheet and liability of the issuers with its entire assets against the investors. Besides, such instruments have other advantages such as increase in securitization and liquidity of the assets kept in the balance sheet of the issuer and capital and active profitability. Additionally, such bonds will make a contribution in diversification of fund sources for the issuers and investor types, and will be used as an alternative method for protection of the interest risk regarding the claims.

AMENDMENTS RE PRINCIPLES OF INTERMEDIATION ACTIVITIES AND INTERMEDIARY INSTITUTES

By: Sezi Tezcanlı

The Capital Markets Board of Turkey (the “CMB”) has issued a communiqué (the “**Amending Communiqué**”) amending the Communiqué No.V/46 on Principles regarding Intermediation Activities and Intermediary Institutions (the “**Communiqué No.V/46**”) and the Communiqué No.V/6 on Principles regarding the Organization of Documents and Records for Intermediation Activities (the “**Communiqué No.V/6**”). The Amending Communiqué has been published in the Official Gazette and come into effect on 28 July 2009.

cont'd.

cont'd.

Prior to the Amending Communiqué, the relevant provision of the Communiqué No.V/46 stipulated that within 2 days as of the execution date of the framework agreement the intermediary institutions were obliged to open custodian base accounts in the name of their clients or to ensure that such accounts were opened at the authorized settlement and custody center. Under the Amending Communiqué, the wording of the relevant article has been amended and the two-day period has been cancelled. The intermediary institutions shall now open the custodian base accounts or ensure that the accounts are opened at the authorized settlement and custody centre before they accept any orders of their clients. Such amendment shall result in preventing the intermediary institutions taking any orders from their clients without a custodian base account.

The Amending Communiqué has also amended the related article of the Communiqué No.V/46 regarding the intermediary institutions' two-day period obligation to inform the authorized settlement and custody centre of the changes made in the name or in the title of their clients. Instead, the intermediary institutions shall now fulfill such obligation immediately as they have been acquainted with the amendment. The same amendment has been made to the related article of the Communiqué No.V/6 and the intermediary institutions shall inform the authorized settlement and custody centre and/or the Central Registry Agency (the "Agency") of the changes made in the address details of their clients as soon as they are acquainted with the said information.

The related legislation applied to intermediation activities and intermediary institutions provides that the investors shall receive a registration number at the authorized settlement and custody centre and/or the Agency. The Amending Communiqué sets forth that the registration numbers of the investors shall match with the customer account numbers at the intermediary institution. Unless the client of the intermediary institution has a registration number, or the registration number matching with customer account number, the order of the client regarding a capital market instrument monitored at the Agency will not be accepted by the intermediary institution. However, the CMB is entitled to make an exception to such rule by taking into consideration of the type of the capital markets instrument. The principle of matching the customer account number and the registration number of the client shall also apply to matters where the intermediary institutions take electronic orders in order to forward them to the stock exchange market.

SPIN OFF: UNCHAINED PUBLIC COMPANIES' GUARANTEES: UNDER SCRUTINY

By: Enver Sezer Çalışkan

Two important pieces of legislation have been adopted within the last two months which attracted most of the corporate lawyers' interest. The first piece of legislation is the amendment to the famous Article 404 of the Turkish Commercial Code (the "TCC") and the second one is the adoption of new standards by the Capital Markets Board of Turkey (the "CMB") for the sureties, guarantees and pledges to be granted by publicly traded companies. A bizarre nexus may be observed in respect of these two legislations. Both legislations, in comparison to their importance, have been embedded in certain legislative instruments which primarily regulate other matters of law. The amendment to the TCC is regulated in Article 30 of the Law Amending Income Tax Law and "Some Other Laws", published in the Official Gazette on 3 July 2009 whereby the new standards for the sureties, pledges and mortgages of publicly traded companies are regulated as a principle decision of the CMB and published in the Weekly Bulletin of the same on 11 September 2009. These legislations carry great importance for corporate law practices.

In a nutshell, according to Article 404 of the TCC, the shares of a company which have been issued against the contribution in kind (non-cash contribution) through capital increase are not allowed to be transferred to third persons for a term of two years. This case generally arises when a shareholder contributes directly non-cash assets through subscription in the share capital of a company or in the event a spin off transaction is exercised. The new amendment to the TCC refers to an exception with respect to Article 404 in case of spin off transactions.

cont'd.

cont'd.

Spin off is firstly introduced to the Turkish legal system by the Corporate Taxation Law No.5422, published in the Official Gazette on 3 July 2001, which has been replaced by the new Corporate Taxation Law No.5520 published in the Official Gazette on 21 June 2006. The Corporate Taxation Law No.5520 introduces two types of spin off transactions. Accordingly, a full spin off is defined as conveyance of all assets, receivables and undertakings of a full-fledged corporate tax payer company to a single or more to-be incorporated companies or existing full-fledged tax payer companies over such assets, receivables and undertakings' recorded values for the acquisition of the transferee company's shares by the existing shareholders of such transferor company. On the other hand, a partial spin off is described as conveyance of real property, shares of subsidiaries being hold at least for two years, production facilities and service enterprises in the balance sheet of a full-fledged tax payer company or a foreign incorporation's representative office in Turkey as capital in kind to a newly established or existing full-fledged tax payer company over their recorded values in return for the acquisition of the transferee company's shares either by such transferor company or the existing shareholders thereof. As may be easily observed, all transferred assets within the scope of a spin off transaction are deemed as contribution in kind and thus, in absence of exception to Article 404, they are subject to transfer restriction. When spin off rules first promulgated in 2001, the Corporate Taxation Law No.5422 set forth an exception to Article 404 with a provisional Article and thus, transfers were allowed. However, when the concept is revisited in 2006 by the Corporate Taxation Law No.5520, this provisional Article has been omitted. This approach led a long lasting debate among corporate law practitioners as to whether the omission is intentional or it is simply neglected. Notwithstanding such debate, the corporate law practitioners have issued legal opinions in favor of "transfer restriction for a term of two years due to lack of explicit exception". Given that fact, spin off transactions have decreased drastically. However, the new amendment to the TCC dated 3 July 2009 rewinds the current status to the system when spin off has been first introduced and thus, there will be no transfer ban for the shares issued in return for the assets subject to spin off which are deemed as contribution in kind in a spin off transaction.

As mentioned above the second important piece of legislation is related to the guarantees to be provided by publicly traded companies. According to the principle decision of the CMB published in the Weekly Bulletin dated 11 September 2009, the companies (excluding publicly traded investment companies and finance institutions) whose shares are traded on the Istanbul Stock Exchange (the "**Grantor Companies**") are only allowed to grant sureties, pledges or mortgages on behalf of (i) themselves; (ii) their affiliates within the scope of full consolidation; and (iii) third parties in line with pursuing the ordinary business activities of the Grantor Companies. Therefore, the Grantor Companies' activities on issuing sureties, pledges or mortgages are limited. The CMB has proclaimed that those transactions principally may cause publicly traded companies incur serious risks and therefore, their assets and the rights of the investors related thereto are required to be protected. In line with the limitation standards, the CMB has also set forth that the sureties, pledges or mortgages granted before the principle decision of the CMB which are in violation of the standards above are required to be abolished until 31 December 2014. As observed, the CMB does not allow publicly traded companies to have grandfathered surety, pledge or mortgage transactions. Additionally, the CMB has adopted disclosure matters in connection with the standards above and require the Grantor Companies to disclose those transactions in their financial statements commencing from 31 December 2009. In parallel, the Guarantor Companies are also requested to take into consideration the public disclosure legislation of the CMB in the event that such a transaction is made. As to provide harmonization between the legislation and the company statutes, the CMB requires the Guarantor Companies to amend their articles of association in their upcoming general assemblies in line with the standards above. Finally, the CMB has also necessitated the Guarantor Companies to inform their shareholders thereon in each annual general assembly. To sum up, the CMB has introduced new guarantee standards and required all the Guarantor Companies to integrate in the new system immediately.

As highlighted above, these two corporate law matters have great importance for corporate law practitioners in Turkey. The first one disperses the clouds over spin off transactions and triggers a new era for spin off transactions whereas the second one draws the boundaries to publicly traded companies on providing guarantees to other persons and thus, creates another control mechanism on the assets of those companies in favor of their investors.

THE GUIDELINES OF THE COMPETITION AUTHORITY RE TECHNOLOGY TRANSFER AGREEMENTS

By: Adnan Eren Ürey

Technology transfer agreements involving in intellectual property rights (e.g. patents, utility models, industrial designs, integrated circuit topographies, plant breeders' rights or software rights) and know-how, may bring various economic efficiencies such as encouraging research and development activities, preventing waste of resources, facilitating the dissemination of the knowledge and technology resulting from the aforementioned research and development activities, increasing competition by new and higher quality products brought to market. However, since the intellectual property rights grant monopolistic powers to their holders, technology transfer agreements involving such rights, may lead to the restriction of competition to a certain extent, and thus, these agreements are required to be evaluated in respect of the competition law.

In the light of the foregoing, the Competition Authority (the "**Authority**") issued the Block Exemption Communiqué No. 2008/2 relating to Technology Transfer Agreements (the "**Communiqué**") on 23 January 2008 in order to determine the terms and conditions of the block exemption granted to technology transfer agreements. Accordingly, the Authority has prepared and published the Guidelines on the Implementation of Articles 4 and 5 of the Law No. 4054 on the Protection of Competition to Technology Transfer Agreements (the "**Guidelines**") on 18 August 2009 to improve the application regarding thereto, and explain the application of Articles 4 and 5 of the Law on Protection of Competition No. 4054 (the "**Law**") to the technology transfer agreements that are not within the scope of the Communiqué. The aim and purpose of the Guidelines is to determine the fundamental issues relating to the evaluations of the technology transfer agreements within the scope of the Law.

The definitions of technology transfer agreements set forth in the Guidelines are much broader than the definition indicated in the Communiqué. As per the Communiqué, technology transfer agreement means an agreement in which the relevant intellectual property rights and know-how are licensed individually or together. Agreements containing provisions which relate to the sale and purchase of products or which relate to the licensing or assignment of other intellectual property rights shall be considered within the scope of this definition, provided that such provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products. In addition to this definition in the Communiqué, the Guidelines also covers the technology transfer agreements that are not covered by the Communiqué, such as the agreement executed by more than two parties and agreements not relating to the production.

The Guidelines explains the application of the provisions of the Communiqué in respect of the technology transfer agreements that are within the scope of the Communiqué, and of Articles 4 and 5 of the Law to those not covered by the Communiqué. The Guidelines sets forth evaluation standards under the Law, for the agreements not covered by the Communiqué. As per the Guidelines, in order to determine whether technology transfer agreements are consistent with the Law, the economical power held especially by the undertakings which are party to such agreements within the relevant product and technology market must be taken into account or not. In other words, the existence of substitutable technologies and products at the disposal of the competitors of the aforementioned undertakings is important for the application of Articles 4 and 5 of the Law. Additionally, the Guidelines states that the barriers of entry to the relevant market and the status of the licensor, licensee and licensees' customers and their competitors in the market are to be evaluated by the Authority.

Due to economical importance of the technology transfer agreements and their adverse effect on the competition, status of these agreements in respect of competition legislation has to be analyzed and clarified. Through the publication of the Guidelines, the application of the Law with respect to the technology transfer agreements that are not within the scope of the Communiqué has been clarified and the ambiguity relating to the evaluation of these agreements under the Law has been dispersed to a certain extent.

A DETAILED GUIDANCE FOR VERTICAL AGREEMENTS

By: Armağan Yıldırım

The new Guidelines on Vertical Agreements (the “**Guidelines**”), replacing the previous one, has been issued by the Competition Authority (the “**Authority**”) on 3 June 2009. The Guidelines aims to clarify the application of the Block Exemption Communiqué on Vertical Agreements No.2002/2 (the “**Communiqué**”) as amended by the Communiqués No.2003/3 and No.2007/2. The Guidelines provides detailed guidance for both the Authority and the enterprises to evaluate whether the vertical agreements are within the scope of the Communiqué.

The principles of block exemptions, which can be granted to the agreements, concerted practices and decisions between the undertakings, have been specifically regulated by the Authority in 2002 through adopting the Communiqué. Subsequently, the Authority issued guidelines within the same year in order to clarify the principles for the vertical agreements falling within the scope of the Communiqué. However, due to the harmonization process with the European Union’s competition policies and local developments, the Communiqué and the Law on the Protection of Competition Law No. 4054 (the “**Law**”) have been amended in due course. First of all, the Communiqué No. 2003/3 has amended the non-compete clause of the Communiqué and shortened the period to 5 years in order to benefit from the block exemption. Also, the amendment, which came into force in July 2007 through enactment of the Communiqué No.2007/2, has restricted the scope of the Communiqué by introducing a 40% market share threshold. Thus, the enterprises holding more than 40% market share are currently unable to benefit from the block exemption. Accordingly, an ambiguity has arisen from the application of the Communiqué considering Article 5 of the Law that is related to the individual exemption. The Guidelines, therefore, aims to clarify the assessment to be conducted within the framework of the individual exemption for vertical agreements executed by enterprises whose market share exceed 40% threshold, and thus, falling out of the scope of the Communiqué. In addition to the amendments made to the Communiqué, Article 4 of the Law (Agreements, Concerted Practices and Decisions Restricting Competition) was also amended in July 2005 and the notification obligation for the agreements, concerted practices between undertakings, and decision and practice of association of undertakings which met the conditions specified in Article 4 of the Law, was lifted.

In light of the aforementioned issues, the Guidelines sets forth 9 headlines which cover the said amendments as well as the remaining clauses of the Communiqué. In general, the Guidelines provides a comprehensive and practical commentary on each clause of the Communiqué including the scope of the block exemption, the definition of market share, non-compete obligation and individual application. It is also highlighted that the vertical agreements falling out of the scope of the Communiqué, are not automatically contrary to Article 4 of the Law and the undertakings may apply for individual exemption in accordance with Article 5 of the Law if their benefits to general welfare outweigh their restrictive effects on competition. Moreover, it is set out that in the event of the voluntary notification for the vertical agreements which are not within the scope of block exemption due to the 40% market share threshold, enterprises should use the notification form attached to the Guidelines on Voluntary Notification of Agreements, Concerted Practices and Decision of Association of Undertakings.

Nevertheless, it is noteworthy to underline that principles laid down in the Guidelines are not formally binding and subject to review of the Authority on case by case basis. Meantime, the European Commission has also launched a revised regulation and guidelines on vertical agreements on 28 July 2009. The revised regulation and guidelines will replace the current Block Exemption Regulation on Vertical Restraints numbered 2790/1999 (the “**Regulation No. 2790/199**”), which will expire in May 2010, and the relevant guidelines. It is stated that the European Commission intends to regulate the market based on two major developments; namely an increase in large distributors’ market power and the evolution of sales on the internet. Since the current Turkish block exemption rules are based on the Regulation No. 2790/1999, it is expected that the Authority will harmonize the current regulations with the new policies of the European Commission in the forthcoming years.

AMENDING REGULATION ON APPLICATIONS AGAINST PUBLIC PROCUREMENT TENDERS

By: Onur Ergün

The Public Procurement Authority (the “PPA”) has issued a new Regulation (the “**Amending Regulation**”) amending the Regulation on Applications against Public Procurement Tenders (the “**Regulation**”). The Amending Regulation has been published in the Official Gazette and has come into effect on 22 July 2009.

The Amending Regulation sets forth certain additions to defined terms in the Regulation and adopt a new section named “Framework and Individual Agreement Tenders” in order to provide harmonization between the Regulation and the Public Procurement Law No. 4734 (the “**Law**”) and the Public Procurement Contracts Law. Since the concept of “individual agreement” has been covered by the Law due to latest amendments, individual agreement process and applications thereon have been defined and regulated by the Amending Regulation. Accordingly, this process means the process starting from the date when the procurement of goods or services is approved by the contracting officer and ending by signing of the individual agreement.

The principles and procedures regarding objecting complaint and application against procurement tenders of framework agreements and individual agreements have been determined under an additional section mentioned above. Accordingly, in relation to the framework agreement tenders, the bidders have the right to apply a complaint and objecting complaint with respect to the administrative transactions and operations concerning tender processes such as submission and evaluation of the offers and finalization of the tender whereas the bidders with whom framework agreement is signed, can apply such complaints regarding the administrative transactions and operations in relation to the pre-qualification evaluation made once in every 12 months. In addition, these bidders may directly apply objecting complaint with the PPA with regard to the administrative transactions and operations concerning the (i) invitation to the individual agreement and signing thereof; (ii) evaluation of the offers and; (iii) determination of the economically most advantageous offer. However, the bidders who have not submitted their offers even though they were invited to the individual agreement can solely apply for the provisions in tender documents and/or the incongruity between such provisions and administrative practice.

For determination and implementation of the duration for initiating complaint and objecting complaint regarding administrative transactions and operations during the tender process including the signing of the framework agreement and pre-qualification evaluation made once in every 12 months, the Amending Regulation has referred to the related section of the Regulation. Under the Amending Regulation, the duration of objecting complaint with respect to the administrative transactions and operations during the individual agreement process has been determined as 3 business days.

As per the Amending Regulation, the objecting complaint applications during the individual agreement process shall be examined and concluded by the PPA provided that such applications are submitted duly and in due time. As regards the objecting complaint applications, the PPA shall examine whether the equal treatment principle is violated in terms of the applicants allegations and transactions against which are applied for. Finally, the PPA shall give its final decision within 10 business days starting from the date when the transaction file of individual agreement and necessary information and documents regarding the tender have been recorded by the PPA.

IMPLEMENTATION REGULATION ON ORGANIZED INDUSTRIAL ZONES

By: Zeynep Ahu Akın

The Implementation Regulation on Organized Industrial Zones (the “**Regulation**”) has been recently published in the Official Gazette dated 22 August 2009 and No. 27327, and came into effect on the same date.

Accordingly, a substantial number of issues in relation to the organized industrial zones (“**OIZ**”) have been defined and covered under the Regulation as an overhang to the Law on Organized Industrial Zones No. 45562 (the “**Law**”).

The Regulation basically sets forth the guidelines and principles on planning, site selection, designation of the sites that have been approved as boundaries falling outside the OIZ regarding technical infrastructure, as deemed appropriate by the Ministry of Industry and Commerce (the “**Ministry**”) and are mandatory for the realization of OIZ; approval procedure of modifications on zone plans and allotment plans; utilization of lands; preparation of projects regarding buildings and facilities; certifications and permissions regarding utilization and construction of such buildings and facilities; form and content of the establishment protocol; constitution, tasks and duties of the organs and their working principles and procedures; qualifications, numbers and manner of assignment of personnel as well as the zone manager in terms of OIZ which utilize loans for the costs of general management, merits and principles of repayment of such loans; land allotment; issues regarding establishment, utilization and operation rights of infrastructure facilities; tender principles and procedures regarding the OIZ utilizing loans; determination of entitlements and approval of the same; procedures and principles of leasehold; tasks and duties of the superior board of OIZ; and other relevant issues with respect to the implementation of the Law.

In terms of application process, the Regulation provides that legal entities and real persons willing to set up the OIZ has to apply to the Ministry together with the affirmative opinion of the Governor’s Office, and extent of their request of site selection, and the OIZ disclosure report to the Ministry. In order for the evaluation of site selections for the new OIZ and additional requests, production or construction process must have been initiated on at least 75% of total industrial plots of OIZ except for the Special OIZ throughout the province. *Special OIZ* is defined as the organized industrial zones where small enterprises operating in sub-sectors included in the same sector group, and the other OIZ established for logistical purposes display activity. Nevertheless, it has been specified that the aforementioned ratio of 75% shall also be sought for Special OIZ, but not for Private OIZ and projects for which investors are promoted by the Investment Supporting and Promotion Agency. *Private OIZ* is defined as organized industrial zones that are requested to be established by private legal persons or legal persons pursuant to Article 26 of the Law.

Site selection, nevertheless, shall be made in accordance with the Regulation on Site Selection regarding the Organized Industrial Zones whereas no establishment proceeding is allowed to be performed for the OIZ site selection of which is not finalized yet. Planning of the sites outside the OIZ boundaries shall be accomplished by the Ministry of Public Works and Settlement or the relevant administrations within one year utmost, after the selection becomes final.

In cases where lands owned by the Treasury or public institutions are requested for site selection, such lands shall be allowed to be transferred to the OIZ in the provinces, that fall under the scope of the Law which amends the Law on Encouragement of Investments and Employment, and certain Laws dated 2004, for no cost. In terms of remaining provinces, lands in the ownership of the Treasury and public institutions are allowed to be sold to the OIZ in return for cash payment or in installments based on the value as specified under the Law on Fees.

The Regulation also vests the Ministry with the right to confiscate the areas within the OIZ without impairing the integrity of the planning, or decide on public benefit.

NUMBER PORTABILITY

By: Çiğdem Ocak Ünal

The very initial step for the number portability had been taken by the Information and Communication Technologies Authority (the “**Authority**”) by publication of the former Regulation on Number Portability (the “**Former Regulation**”) on 1 February 2007 determining the kick off date of mobile number portability as 9 November 2008 and of fixed line number portability as 9 May 2009. As a result of the establishment of technical infrastructure and completion of testing periods during 2008, the Regulation on Number Portability (the “**Regulation**”) which has superseded the Former Regulation has also been promulgated by the Authority on 2 July 2009 in order to (i) complete the harmonization with the related European Union legislation; (ii) promote the effective competition in the market; (iii) abolish the expenses arising from number changes which are mandatory for operator changes; and (iv) enable subscribers to decide on operators.

Scope of the number portability is defined under the Regulation as: (i) geographic numbers, non-geographic numbers and mobile numbers in the National Numbering Plan are within the scope of number portability; (ii) operator number portability shall be conducted between the fixed electronic communication networks or the mobile electronic communication networks; (iii) geographic number portability shall be conducted without changing geographic meaning of the number; (iv) obligations, procedure and principles in connection with the location portability and/or service portability may be determined separately by the Authority; (v) subscriber numbers used for the Global Mobile Personal Communication System service are not within the scope of portability; (vi) number allocated to the subscriber shall be within the scope of portability so long as the subscription with number continues.

The donor operator, which is the operator from whom the number is ported, shall reject the number porting request in the following conditions and shall notify the recipient operator together with the reasons: (i) number to be ported belongs to another subscriber; (ii) subscriber requesting to port has a request to change his number within his existing operator; (iii) identity information of the subscriber is incorrect or missing which could not be accepted in terms of proof of the identity of the subscriber; (iv) existence of already initiated or still continuing number porting process for the requested number; (v) subscriber requesting for porting has a request in writing for cancellation or transfer of the subscription agreement in the existing operator; (vi) subscription agreement with the number holder is less than 3 months old. In addition to the above, the Authority may always define further rejection reasons on geographic and non-geographic number portability. Under the Regulation, the period to be applied within the scope of the porting period by the operators is defined as maximum 2 days for the submission and review period of the porting request and minimum one day before the date determined for actual porting for announcement period of porting number.

The Regulation aiming to promote implementations regarding tariffs, quality and service diversity in favor of the subscribers, sets forth the cost items for number portability as only system set-up cost, administrative cost per ported number and additional conveyance cost. Finally, the Regulation states that the quality of service criteria applied on the non-ported numbers are also applicable for ported numbers. Therefore, the conciliation process for all disputes arising from access and interconnection fees or other subjects which are within the scope of the Regulation shall be settled by the Authority in accordance with the related provisions of the Access and Interconnection Regulation.

FUNDING ENERGY INVESTMENTS IS EASING UP

By: Inci Alaloglu

Turkey has a great potential for the energy investments; however, despite the recent developments taken place in local legislation in order to raise the amount of investments, such investments have come to a halt due to financial global crisis as well as the procedural obstacles in project finance transactions. With a view to alleviate the procedural obstacles and to facilitate the project finance for energy investments, the Energy Market Regulatory Authority (the “**Authority**”) has issued the Regulation Amending the Electricity Market Licensing Regulation (the “**Regulation**”) which has been published in the Official Gazette on 20 June 2009. In addition to some minor changes and new provisions, the Regulation has introduced major amendments regarding the pledge of shares, issuance of dividend right certificates in legal entities holding a license (the “**Licensee**”) and issuance of usufruct right on the Licensee’s shares.

cont'd.

The major amendments are introduced with Article captioned "Transfer of Shares". As per the Regulation, the pledge of shares shall be no longer subject to the Authority's approval. A further amendment in the same article concerns the issuance of dividend right certificates. Accordingly, the Regulation abolishes the necessity of the Authority's approval in terms of issuance of dividend right certificates. In addition to such abolishment, the real persons and legal entities having usufruct right on the shares of the Licensee, which provides the privilege of appointing members for the board of directors and board of auditors, are no more required to have the qualifications required from the shareholders of Licensee in order to apply for a license. In consideration of such amendments, the Authority has amended the procedures and requirements of the borrowing transactions that are realized mostly for investments. By virtue of those, project finance for investments in energy market is simplified. For instance, the abolishment of the requirement regarding the Authority's approval for the pledge of shares and issuance of a dividend right certificate shortens the process for 1 to 2 weeks, and anyone, not limited with the persons having the requirements for the shareholders of the Licensee, may have the usufruct right on the shares.

In addition to the foregoing, as a new rule, the Regulation provides that wholesale licensees are allowed to participate in legal entities that engage in the generation of electricity. In a nutshell, the Regulation stressed out that other than the shares publicly traded on a stock exchange in accordance with the capital markets legislation and the shares of auto-producer licensees, all shares of the Licensee incorporated as a joint stock company shall be registered shares. Under the Regulation, the agreement executed with TEIAS (Turkish Electricity Transmission Company) regarding the contribution of renewable energy power plants is required to be submitted for applications of establishment of wind power plants.

One of the minor changes under the Regulation is brought to the practice of provisional Article 10 which enables Licensees to carry out the complementary activities and the by-product activities for the generation of electricity in the generation facilities located on rural areas. Accordingly, the time setting forth for carrying out such activities is extended until 31 December 2012. The Regulation also introduces new standards regarding ancillary services provided by generation Licensees and auto-producer Licensees to TEIAS and distribution companies. As per the Regulation such ancillary services shall be provided in accordance with Ancillary Service Regulation dated 27 December 2008 and Electricity Market Network Regulation dated 22 January 2003.

In a nutshell, the Regulation provides the Licensees and prospective investors with a more friendly legislation. The amendments are hopefully expected to set the stage to enhance the level of investments despite the scraps of the global financial crisis.

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

www.taboglu.av.tr

PHONE: (212) 339 8800

FAX: (212) 339 8899