

TABOGLU & DEMİRHAN

Quarterly Report

DRAFT MANUAL FOR THE PREPARATION OF PUBLIC OFFERING PROSPECTUS

By: *Enver Sezer Çalışkan*

A Draft Manual for the Preparation of Public Offering Prospectus (the “Manual”) is announced on the website of the Capital Markets Board (the “CMB”). The Manual has introduced detailed explanations in respect of the issues to be set forth in the prospectus and aimed to remedy the ambiguities concerning the scope and quantity of the information to be given therein.

The main principle in the Manual with respect to the provision of information regarding public offerings is to provide all necessary information to the investors so as to allow them to make safe and sound investment decisions. Such principle is embodied in the summary section of the prospectus. According to the Manual, this section should at least set forth the general information on the company, summary on offering and its rationale, risk factors, financial status, management, information on personnel of the company, shareholding structure, related party transactions, listing and other related information on institutional documents. The Manual has introduced certain samples for explaining the scope of the information with respect to the financial status of the company and the changes with regards thereto. The samples aims to provide a better understanding on the scope related thereto. Although, the Manual sets forth detailed explanations to many sections in the prospectus which are in certain events supported by sample cases, no detailed explanation or a sample case is provided with respect to the risk factors which are deemed as one of the most important section of the prospectus. It is set forth that this section must be prepared in detail so as to address any and all risk factors that may effect the investors’ investment decision.

The Manual asserts that it is essential to provide audited financial information in the prospectus; however, any un-audited financial information may also be presented therein provided that a specific annotation concerning thereof has been affixed. The Manual has also pointed out the principles on the scope of the data to be provided with respect to special financial information. Accordingly, the figures quoted in this section must be reader friendly, consistent with the other data provided in different sections of the prospectus and reliable in making assessments on the financial status of the company. The Manual has addressed certain standards to be met for the information on the general financial status of the company. It is mentioned that such financial status is required to be explained explicitly so as to allow the investors to realize any and all changes in the companies’ financial stability in years and the reasons behind those changes.

According to the Manual, any information that is given in the prospectus should quote the source of the information. Therefore, the provision of information relying on anonymous sources is tried to be prevented. The prospectus may also include the reports of the specialists. However, in this case, the information concerning such specialist must be specifically provided accompanying with the fact that such specialist has no relation in terms of shareholding or employment with the company.

Finally, the related party transactions are given great importance in the Manual. All detailed information on related party transactions is required to be provided. The criteria concerning the quantity of the data are determined as to whether the company is listed on Istanbul Stock Exchange or not.

It is presumed that the Manual will be an important tutor in preparation of the prospectus. When compared to its precedents, it is more explanatory and user friendly and it makes certain crucial points extremely clear which serves investors in a manner to better understand the prospectus and make realistic investment decisions.

Headlines

- (i) *Draft Manual for The Preparation of Public Offering Prospectus*
- (ii) *New Opportunity for Investors Interested in Dormant Intermediary Institutions*
- (iii) *Amendments Are Launched On Debt Instruments’ Legislation*
- (iv) *A More Flexible Mutual Fund Structure by The Capital Markets Board*
- (v) *Is The Independency of Independent Audit Firms Secured?*
- (vi) *Amendments Re Principles of Real Estate Investment Trusts*
- (vii) *Draft Communiqué on Principles Regarding Public Offerings of Capital Markets Instruments*
- (viii) *Tariffs Set Free In Electronic Communications Sector*
- (ix) *Draft Regulation on Protection Of Privacy In Electronic Communications Sector*
- (x) *The Maximum Limit for The Non-Compete Obligations in Dealership Agreements in The Turkish Fuel Sector*

NEW OPPORTUNITY FOR INVESTORS INTERESTED IN DORMANT INTERMEDIARY INSTITUTIONS

By: Onur Ergün

The global financial crisis had a significant effect on Turkish capital markets and their key players, intermediary institutions and the number of intermediary institutions the licenses of which are suspended or cancelled has rapidly increased in 2008 and 2009. Therefore, in line with the growing market expectations and investor interests, the Capital Markets Board (the “CMB”) has issued a Communiqué Serial V, No. 113 (the “**Amending Communiqué**”) amending the Communiqué Serial V, No. 46 on Principles Regarding Intermediary Activities and Intermediary Institutions (the “**Communiqué V/46**”) with the aim of simplifying the process for the intermediary institutions desiring to leave the sector without harming the investors and of reducing the problems faced by local and foreign institutions while starting capital markets activities. The Amending Communiqué also allows new entrants to enter into the market, as previously the CMB had announced not to issue new licenses to new entrants.

The Amending Communiqué has been published in the Official Gazette on 22 October 2009 and has come into effect on the same day.

According to the amendments, the CMB can grant permission for establishing a new intermediary institution in case a non-public intermediary institution ceases its intermediary activities by applying to the CMB to cancel its all licenses in order to establish a new intermediary institution; provided that the requirements for the establishment of a intermediary institution under the Communiqué V/46 are duly met. Such application shall be made by the founders of the intermediary institution to be established and the application is subject to the evaluation of the CMB.

Under the Communiqué V/46, in case of an application by an intermediary institution to cease its intermediary activities, the provisions of the Turkish Commercial Code with respect to the changes in the articles of association or liquidation of joint stock companies shall be applied. Throughout the process, cash and/or other assets in the accounts of the customers who could not be reached shall be blocked in the accounts to be opened on behalf of customers at the authorized custody agency and/or at the Central Registry Agency. Additionally, legal costs, cash and/or other assets concerning lawsuits and/or execution proceedings initiated due to the capital market activities of the intermediary institutions together with any interests accrued in connection therewith should be blocked in the same manner.

The Amending Communiqué has amended the undertaking obligation of the shareholders of intermediary institutions, whose licenses are to be cancelled to establish a new intermediary institution, so as to secure the rights of the investors more effectively. As per the additional paragraph introduced by the Amending Communiqué, in addition to the shareholders holding 10% or more of the shares of these intermediary institutions, any shareholder holding below 10% would be obliged to submit to the CMB a written undertaking, under certain conditions set forth in the Amending Communiqué, before the cancellation of the licenses that they are responsible for the liabilities of the intermediary institutions arising out of the capital market activities pro rata to their shares.

Finally, the licenses of the intermediary institutions, whose activities have been suspended upon their request, shall be cancelled if such intermediary institutions do not apply to the CMB within 12 months to re-start their activities or to cancel their licenses in order to establish a new intermediary institution. Pursuant to the Provisional Article, 12-month application period shall be applied as 3 years for the intermediary institutions whose activities have already been suspended upon their request prior to the effective date of the Amending Communiqué.

The Amending Communiqué will attract new investments banks who are interested in the market and do not want to take over liabilities of the existing players. In the past, they were required to acquire shares of intermediary institutions if they wanted to enter the market. With the amendments they will only take over the licenses without any liability relating to the past activities of ex-license holder.

AMENDMENTS ARE LAUNCHED ON DEBT INSTRUMENTS LEGISLATION

By: Zeynep Ahu Akın

Back on 21 January 2009, in an effort to harmonize the local arrangements with the international markets and constitute one piece of legislation, the Capital Markets Board (the “CMB”) had introduced the Communiqué on the Principles of Registration and Sale of Debt Instruments Serial II, No. 22 (the “**Communiqué II/22**”) and paved the way of issuing debt instruments by Turkish companies, state economic enterprises and municipalities.

As a further step and very recently on 25 November 2009, the Capital Markets Board (the “CMB”) has made an attempt to undergo some changes in the applicable debt instruments legislation and issued the Communiqué Serial II, No. 23 (the “**Communiqué II/23**”) with a view to amending certain provisions of the Communiqué II/22 in force. The new arrangements mainly include changes on sale and circulation limits of bank bonds and update the applicable issuance limits and quotient in line with the principles set forth by the decree of the Council of Ministers numbered 2009/15344 published in the Official Gazette on 3 September 2009 (the “**Decree**”).

The first alteration has been brought to the definition of bank bonds. Bank bonds were previously named as securities issued by *development and investment banks*, and through the amendment, a general phrase is used and bank bonds are defined as securities issued by the *banks* in accordance with the discount principle. Specific definition for development and investment banks is removed. Such change is consistent with the wording of the banking legislation.

Further, a supplementary provision is added to Article 5, which specifies offering documentation for registration of debt instruments with the CMB. Accordingly, it has been regulated that private companies are not to be subject to special independent auditing requirement if they opt to undergo private placement where issuance of securities shall not exceed their paid-in capital at the time of the issuance of such instruments.

As mentioned above, issuance limits and co-efficient are to be determined in line with the principles laid down under the Decree where the nominal value of debt instruments, which were previously issued by the same issuer and are still in circulation, shall be noted as a discount tool in calculation of issuance limits. Local authorities, on the other hand, and the relevant special institutions showing activity in connection with these local authorities are allowed to issue debt instruments in line with the Decree as well; provided that applicable legislation allow them to issue securities for the purposes of borrowing.

Issuers are obliged to deposit fees with the CMB at a rate to be determined by the legislation over the issuance value of the debt instrument subject to sale, before they are granted registration certificate. Registration fee may be deposited as withholding during the sale.

Amending also the sale period and starting date of maturity, the CMB obliges that in terms of private placements, where placements to be realized within 1 year are excluded, the sale of securities shall start in 30 days as of the registration date and be finalized within 7 days. Previously, such offer period has been 15 days. The Communiqué II/23 has also brought changes on commercial papers and governed that their term cannot be longer than 360 days. Before the amendment, the relevant legislation had stipulated that term of commercial papers could not be less than 60 days and longer than 360 days.

In a nutshell, the amendments introduced are mainly focused on bank bonds and commercial papers and their issuance process. Periods were another issue noted by the CMB whilst going through the legislation.

A MORE FLEXIBLE MUTUAL FUND STRUCTURE BY THE CAPITAL MARKETS BOARD

By: Mine Tuğçe Özdeş

The Communiqué Serial VII, No. 38 (the “**Amending Communiqué**”) amending the Communiqué Serial VII, No. 10 on Principles regarding Mutual Funds (the “**Communiqué**”) has been issued by the Capital Markets Board (the “**CMB**”). The Amending Communiqué has been published in the Official Gazette on 14 November 2009 and came into effect as of such date. The CMB has recently made an announcement in its website regarding such amendments. Accordingly, amendments made in the Communiqué are as summarized below.

Mutual funds are enabled to invest in the unlisted debt instruments:

As per Article 42(c) of the Communiqué, in principle, the assets listed on the stock exchange are included in the fund portfolio. However, investments can be made to the shares of joint stock companies, which are not trading on the stock exchange; provided that such investments do not exceed 10% of fund portfolio value. The condition of being listed on the stock exchange is not applied to reverse repo and capital market instruments which are taken into their portfolio by guaranteed funds and protected funds as per the first paragraph of Article 42(c). The Amending Communiqué has extended the investment area of funds as the ‘*unlisted debt instruments*’ are included in Article 42(c).

Furthermore, the obligation to maintain necessary liquidity in the return of fund participation certificates of founders investing in unlisted joint stock companies’ shares has also been extended so as to include investments in unlisted debt instruments. On the other hand, restrictions applied to founder or manager of the funds regarding the participation certificates included into their portfolio shall not be applied to funds making investments in unlisted debt instruments or hedge funds.

Mutual funds are enabled to invest in the securities of founder and manager:

The provision under Article 42(d) of the Communiqué regarding the purchase restriction of shares, bonds and other debt instruments owned by the founder or manager of the fund has been abrogated by the Amending Communiqué and thus, mutual funds are enabled to make investments in securities issued by manager and founder within the restrictions set out under relevant provision. Such investments can include listed or unlisted debt instruments issued by founder, as well.

The mutual funds are enabled to invest in real estate or venture capital investment corporations, the shares of which are held by founder or manager and their direct and indirect subsidiaries:

Pursuant to Article 42(g) of the Communiqué, the mutual funds are not allowed to make investment in the shares of *investment trusts* (securities investment trusts, real estate investment trusts and venture capital investment trusts) which are held by founder, manager and, their direct and indirect subsidiaries. The expression ‘*investment trust*’ in the Communiqué has been amended as *securities investment trusts* since the previous provision restrained the investments in the real estate investment trusts and venture capital investment trusts. Thus, mutual funds are enabled to make investments in investment trusts except securities investment trusts.

The borrowing and lending proportion of mutual funds to their portfolio has been increased:

According to Article 42(j) of the Communiqué, mutual funds were allowed to lend or borrow at most 25% of market value of securities in their portfolio. Following the amendments, such amount has been increased to at most 50% provided that an agreement within the framework of Article 11 of the Communiqué Serial V, No. 65 on Margin Trading, Short Sales, Lending and Borrowing of Securities is made.

IS THE INDEPENDENCY OF INDEPENDENT AUDIT FIRMS SECURED?

By: İnci Alaloğlu

Discussions regarding the independency of independent audit firms all around the world which have been come up since the Enron Scandal in the last quarter of 2001 still continue even after the financial global crisis in 2008 and 2009. In this context, the Capital Markets Board (the “CMB”) has issued a Communiqué regarding Independent Audit Standards Serial X, No. 22 (the “**Communiqué X/22**”) in 2006 with a view to harmonize Turkish legislation with general practice in the world, especially in Europe. The CMB has amended the Communiqué X/22 in line with the market demands through issuing an Amending Communiqué (the “**Amending Communiqué**”) which was published in the Official Gazette on 25 October 2009 and which came into effect as of the same date.

In addition to certain opportunities provided to independent auditors, the Amending Communiqué has mainly introduced an amendment regarding the rotation system of independent audit firms.

Generally speaking, two rotation systems, which are audit firm rotation and responsible lead auditor rotation, are utilized to ensure the independency of independent audit firms. Under Turkish practice, the CMB has introduced the audit firm rotation method and has governed that an independent audit firm is prohibited to audit the same company for more than seven consecutive years.

The Amending Communiqué, however, provides an exemption for independent audit firms meeting the corporate requirements set forth in Article 10 of the Amending Communiqué. Accordingly, independent audit firms evidencing their sufficiency in corporate governance and independence of their auditors may continue giving service to the same customer by rotating merely the responsible lead auditor after completion of seven consecutive years. This exemption shall be effective for the periods starting after the 1 January 2011. As per the Amending Communiqué, independent audit firms wishing to benefit from this provision shall provide the CMB with the information verifying that they meet the requirements, at least 9 nine months before the execution date of independent auditing agreement with such customers. Therefore, any independent audit firms active in Turkey shall apply to the CMB until 31 March 2010. There is no information as to the review period of the CMB and its evaluation process of the applications.

Additionally, the Amending Communiqué provides an opportunity for independent auditors who were prohibited to perform independent auditing for an indefinite period in capital markets by the CMB. Pursuant to the Amending Communiqué, the CMB has relaxed this sanction. In this context, such independent auditors may apply to the CMB for removal of such sanction after two-year period as from the date of the CMB decision regarding such sanction. Furthermore, through the Amending Communiqué, independent auditors proving that they met the requirements to be a lead auditor on the date of 12 June 2006 are now exempt from obtaining independent auditor license for capital markets.

Taken as a whole, the Amending Communiqué provides the independent audit firms and independent auditors with a more friendly legislation. In this respect, the CMB has introduced a mixed rotation system including both audit firm rotation and responsible lead auditor rotation. Through such system, the CMB seems to govern a quality control system in terms of corporate governance in order to maintain independency of independent audit firms. Some, on the other hand, believes that such mixed system has been introduced in favor of the leading international audit firms in Turkey. All big four audit firms, namely, Deloitte & Touche, Ernst & Yound, KPMG and PricewaterhouseCoopers, are present in Turkey for many years.

Despite the counterviews, it is hopefully expected that the CMB sets the stage to meet the market demands and to ensure most independent auditing system.

AMENDMENTS RE PRINCIPLES OF REAL ESTATE INVESTMENT TRUSTS

By: Sezi Tezcanlı

The Capital Markets Board (the “CMB”) has issued a communiqué (the “**Amending Communiqué**”) amending the Communiqué Serial VI, No. 11 on Principles regarding Real Estate Investment Trusts (the “**Communiqué VI/11**”). The Amending Communiqué was published in the Official Gazette and came into effect on 31 December 2009.

By way of the Amending Communiqué, the periods prescribed for the companies established as real estate investment trusts or the companies which have been converted into real estate investment trusts to offer their shares to public, have been combined and shortened to 3 months. With a view to enabling the public offering, the minimum share ratio has been decreased from 49% to 25%. Prior to the Amending Communiqué, the relevant article of the Communiqué VI/11 had called for 1, 3 and 5-year periods for public offering of the shares depending on the share capital level of the real estate investment trusts.

As per the Amending Communiqué, the shareholders and managers of the companies which apply to CMB to obtain the permit for establishing or converting into a real estate investment trust shall bear the conditions, which are mostly financial, set forth under the Communiqué VI/11. In addition to these conditions sought for the shareholders and managers, the assets which are already included or to be included in the portfolios of the real estate investment trust and the significance of the assets with regard to the company portfolio shall also be in compliance with the restrictions stipulated under the Communiqué VI/11.

Prior to the Amending Communiqué, the publicly held companies were not allowed to convert into real estate investment trusts; however the relevant article of the Amending Communiqué gives way to the publicly held companies to convert into real estate investment trusts by way of abolishing the restriction applied against the companies whose shares have been offered to public and/or the companies which are deemed to be publicly-held companies.

As to the minimum start-up share capital of the real estate investment trusts, the base amount has been increased from TRY 11,200,000 to TRY 20,000,000 and the required amount for the minimum current value of the movable and immovable assets owned by the leader shareholders has been increased from TRY 16,800,000 to TRY 20,000,000, in case there are more than 1 leader investors in the real estate investment trust.

With a view to enabling the establishment of or conversion into real estate investment trust companies, provisions under the Communiqué VI/11 providing that the leader investors shall have at least 3 years of experience in law, construction, banking and finance which is considered as closely related to the subject of the company provided that engaging only in real estate agency activities shall not be considered as experience, has been abolished. Similarly, the relative provision of the Amending Communiqué serves the same purpose providing that only the majority of the members of the boards of directors are required to have sufficient experience rather than all members, as previously required.

With regard to the amendments applied in the investment activities provision, the real estate investment trust companies are free to include in their portfolios; buildings, lands, areas or similar type of immovable properties along with rights on the immovable properties that are free of mortgage or any kind of encumbrances directly and materially affecting the value of the property. Furthermore, the real estate investment trust companies shall be entitled to develop projects on lands which have been burdened with mortgage provided that the mortgage value does not exceed 50% value of the actual land and is less than 10% of the net asset value of the real estate investment trust company as disclosed in the company’s quarterly portfolio chart.

DRAFT COMMUNIQUÉ ON PRINCIPLES REGARDING PUBLIC OFFERINGS OF CAPITAL MARKETS INSTRUMENTS

By: Pelin Baykara

The Capital Markets Board (the “CMB”) has prepared a draft communiqué (the “**Draft Communiqué**”) to update the Communiqué Serial VIII, No. 22 on Principles Regarding Sale Methods of Capital Markets Instruments through Public Offering (the “**Communiqué VIII/22**”). The CMB has published the Draft Communiqué in its website on 29 December 2009 to receive feedbacks until 15 January 2010. With the Draft Communiqué, the CMB aims to harmonize Turkish legislation with the European Union legislation and overcome the problems encountered in practice.

The public offering of the capital markets instruments are performed through an intermediary institution or a consortium consisting of intermediary institutions where at least one of them is appointed as the consortium leader under the intermediary agreement. Accordingly, the Draft Communiqué allows free determination of pricing, sale and distribution principles for initial and secondary public offerings by issuers and consortium leaders, provided that distribution principles and the placement ratios for each investor group shall be specified in the prospectus in details.

Under the Draft Communiqué, the placement ratio for retail investors is decreased to 10%. Consequently, in public offerings, the issuers willing to sell to certain investor groups should sell, save for the additional sale rights, at least 10% of the capital markets instrument offered to public to retail investors. However, it is currently provided under the Communiqué VIII/22 that the issuers willing to sell to certain investor group should sell at least 30% of the instrument offered to the small investor groups in case the sale amount is over TRY 100 million and at least 50% in case the sale amount is below TRY 100 million.

Starting date of the book-building period is shortened in the Draft Communiqué. Accordingly, the book-building period may start at the earliest on the next business day as of the announcement of the circular. The book-building period may be determined as at least two business days and at most thirty days. Nevertheless, according to the Communiqué VIII/22, the book-building period currently starts in at least three and at most business five days following the announcement of the circular.

The Draft Communiqué has determined the principles regarding methods for payment of share prices. Investors willing to purchase the capital markets instruments offered for sale shall deposit (i) in book-building with fixed price method, the price for the amount they are willing to purchase, (ii) in book-building through price bids method, the price calculated in accordance with the price offered for the amount they are willing to purchase, (iii) in book-building by price range method, the price calculated in accordance with the ceiling price, and (iv) in book-building in different price ranges and different amounts method, the price calculated in accordance with the highest amount obtained in price ranges requested by the investor to the bank account stated in the prospectus within the period mentioned in the prospectus. The Draft Communiqué provides that the CMB may give permission to the provision of cash and non-cash incentives in public offerings to certain investor groups, provided that all details and implementation principles shall be fully and accurately set forth in the prospectus and such incentives shall not be used to confer benefits on persons having relation with the issuer, shareholders or intermediary institution.

According to the Draft Communiqué, persons, who may access insider information of the issuer or the intermediary institution, may purchase offered shares in public offerings without any limitation. The list of the directors of the issuers and the intermediary institutions who may access information which may affect the value of shares, the shareholders of the issuers holding 5% or more share and other persons providing services within the scope of the public offering shall be announced in the prospectus. In addition, the information in relation to these persons who are planning to purchase shares in the public offering and the amount of shares they are planning to purchase shall also be specified in the prospectus.

Under the Draft Communiqué, it is sufficient for the issuer and the consortium leader to sign the prospectus and the circular arranged due to sale of capital market instruments and it is no more a requirement for all the intermediary institutions to sign the above-mentioned documents.

TARIFFS SET FREE IN ELECTRONIC COMMUNICATIONS SECTOR

By: Burcu Şener Sözer

The Information and Communication Technologies Authority (the “ICTA”), formerly named as Telecommunications Authority, has recently promulgated the new Regulation on Tariffs on 12 November 2009 (the “**Regulation**”). The Regulation has revoked the previous Tariffs Regulation dated 28 August 2001 (the “**Preceding Regulation**”).

The Regulation determines the principles and procedures relating to regulation, evaluation and supervision of the tariffs in the electronic communications sector, unlike the Preceding Regulation which related to approval and audit of the respective tariffs. That shift alone could be considered as a major change for tariff regulations in the sector. The Regulation comprises the principles and procedures applicable to tariffs applied in the electronic communications services by the operators to the end-users under and in compliance with the Electronic Communications Law No. 5809.

The Regulation has provided certain principles applicable to the implementation thereof, as follows: (i) the practices to enable electronic communications services to end-users at a reasonable price would be promoted; (ii) the tariffs would be fair and transparent and no discrimination would be made among the end-users, who are in similar conditions (save for certain exceptions); (iii) the tariffs would reflect the costs for respective electronic communications service as much as possible; (iv) there would be no cross-subsidization among the service costs; (v) tariffs would not be constructed to prevent, distort or restrict competition; (vi) international practices would be taken into consideration as much as possible; (vii) investments enabling use of new technologies at reasonable prices would be promoted; (viii) benefits of consumers would be protected; (ix) electronic communications service fees charged as basic input by service operators holding dominant market power to other competitor operators would need to be taken into consideration; and (x) unless otherwise required by objective reasons, qualitative and quantitative sustainability and effective and productive use of resources would be considered. The Preceding Regulation also laid down certain principles; particularly to be taken into consideration by the ICTA while approving the tariffs of the operators. As a major difference, under the Preceding Regulation, the tariffs were to be based on the cost for providing services effectively and reflect tariffs that would arise at free market conditions.

The Regulation provides for announcement of tariffs by the operators, and in principle, the tariffs come into effect upon announcement to public. If deemed necessary by the ICTA, a period for announcement prior to entering into effect may be determined. The announcement of tariffs should be made to enable the end-users and consumers to easily comprehend and together with the specifics of the respective service and other conditions on tariffs. The ICTA is authorized to supervise all kinds of tariffs and scope, term and conditions of such tariffs and audit those ex officio or upon complaint. As a result of such supervision and audit, the ICTA may ensure that (a) the tariffs or general conditions of the tariffs are amended; (b) implementation of such tariff is temporarily suspended; or (c) the tariff is revoked.

There are also several liabilities imposed on the operators holding dominant market power. The ICTA is authorized to oblige these operators to be subject to tariff regulations, such as minimum or maximum caps on tariffs or approval of their tariffs by the ICTA on cost-basis or approval of their tariffs by the ICTA in line with price-capping on tariffs. In addition, for such tariffs regulated by the ICTA, it is stated that, in principle, those tariffs should not include excessive prices occurring as a result of the dominant market power of the operator or should not include price reductions which would result in restriction of competition or not result in discrimination among end-users while providing same or similar electronic communications services or should be subject to unbundling, as much as reasonably and technically possible, to enable the end-users choose among service components. The sanctions that may be imposed by the ICTA are also fairly different from the Preceding Regulation. Previously, the ICTA was authorized to implement a fine in the amount of 3% of the operator’s revenue in the preceding calendar year in case of any violation whereas the Regulation defines the sanctions in detail and in the amounts varying from 1% of the net sales of the operator in the preceding calendar year up to 3% thereof. In recurrence of any violation or continuance thereof, the administrative fine not exceeding 3% of net sales in the preceding calendar year may also be imposed.

DRAFT REGULATION ON PROTECTION OF PRIVACY IN ELECTRONIC COMMUNICATION SECTOR

By: Çiğdem Ocak Ünal

Since the year 2003, several pieces of legislation have been put into effect by the Council of Ministers and the Information and Communication Technologies Authority (the “**Authority**”) in the telecommunications sector. In this context, the Law on the Electronic Communications (the “**Law**”) in order to compile all related legislation under an umbrella has been published in the Official Gazette dated 10 November 2008. The Law, among others, aims to define implementation of telecommunication services, operation of telecommunication infrastructure and, generally, regulation of electronic communications sector. Upon the promulgation of the Law, both the Telegraph Law No. 406 and the Wireless Law No. 2813 have been abrogated; therefore the need of drafting secondary legislations which shall be based on the Law has arisen. Recently, the Authority has prepared the Draft Regulation on Personal Data Processing and Protection of Privacy in the Electronics Communication Sector (the “**Draft Regulation**”) and submitted it to the opinion of the telecommunications sector community. The Draft Regulation is going to supersede the Regulation on Personal Information Processing and Protection of Privacy in the Telecommunications Sector (the “**Current Regulation**”) which has been published in the Official Gazette on 6 February 2004.

The purpose and scope of the Draft Regulation is to define the procedures and principles to be obeyed by operators who provides service in electronic communication sector and real person or legal entities who receive service, in order to guarantee personal data processing, keeping data and protection of privacy in the electronic communication sector. The Draft Regulation introduces new definitions and principles which also aim to achieve complete harmonization with the European Union legislation such as (i) principles related to personal data processing; (ii) data categories to be kept; (iii) time period to keep the data; (iv) statistical information to be submitted to the Authority; (v) administrative fine to be applied .

According to the Draft Regulation, personal data shall (i) only be processed in accordance with the law upon approval of the relevant person; (ii) be collected as per the Draft Regulation and shall not be reprocessed against the Draft Regulation; (iii) be relevant with the reason of the processing, adequate and proportional; (iv) be accurate and updated when it is necessary; (v) be kept adequate time needed for the purpose they are recorded or reprocessed. Pursuant to the Current Regulation, operators shall take the approval of the Authority for the technical and structural measures of network security which are aimed at providing the security of their services. The Draft Regulation intends to amend such provision of the Current Regulation and instead of initial approval of the Authority, it sets forth that the Authority is entitled to ask for network securities taken by the operators. Furthermore, Authority is also allowed to require changes on such network securities and the operators shall inform the Authority and the subscribers in case any risk which breaches the network security arises.

Another significant amendment is related to the data categories which shall be kept in accordance with the Draft Regulation. Pursuant to the amendment, keeping data which is concerning the contents of the communication shall not be deemed in scope of the Draft Regulation. Accordingly, data shall be kept for the purpose of (i) tracking communication and definition of the source of communication; (ii) determination of call termination location; (iii) determination of date, time and duration of communication; (iv) definition of class of communication; (v) definition of communication equipment of the users.

The Draft Regulation sets forth one year of time period for the data categories to be kept by the operators as of the date of the related communication. During such period, minimum precautions to be taken by the operators are also launched by the Draft Regulation. In case the operators act in contrary with the Draft Regulation, administrative fine up to 3% of the revenue of the previous year shall be applied.

THE MAXIMUM LIMIT FOR THE NON-COMPETE OBLIGATIONS IN THE DEALERSHIP AGREEMENTS IN THE TURKISH FUEL SECTOR

By Adnan Eren Ürey & Tolga Tulgar

Before the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (the “**Communiqué**”) had been amended on 18 September 2005, an exemption had been granted in respect of the vertical agreements in Turkish fuel sector according to which the fuel companies had been free to impose on their dealers, non-compete obligations with a term up to 10 years. Through the abovementioned amendment, such period had been reduced to 5 years and the Competition Board (the “**Board**”) had rendered several decisions stating that the vertical agreements in the fuel sector executed before the amendment and involving non-compete obligations with a term more than 5 years must be rearranged.

With the intention of preventing any disputes, a transition period for making non-compete provisions laid down in vertical agreements comply with the Communiqué has been stipulated under the Communiqué. Such transition period is started on 18 September 2003 and ended on 18 September 2005 and within this framework, agreements which are concluded before 18 September 2005 with a duration exceeding 5 years shall benefit from the exemption laid down in the Communiqué until 18 September 2010 according to the “reducing to the maximum limit” principle applied by the Board. And after that date the exemption conditions shall be removed. As mentioned below, personal or real rights such as long-term lease agreements or granting long-term usufruct, which are related to the dealer agreement between the parties shall also be removed.

In practice, the fuel companies are supporting their powers arising from the non-compete obligations imposed on the dealers, with the rights *in rem* or rights *in personam* established through loan agreements, equipment agreements, long-term leasing agreements or through long-term usufruct rights. These long-term rights are forcing dealers to extend their dealership agreements and therefore their non-compete obligations with the fuel companies. In other words, such long-term rights are used by the fuel companies to expand, de facto, the term of the non-compete obligation. In order to prevent the circumvention of the limitation, the Board has decided to limit the term of the usufruct rights to be granted to the fuel companies by their dealers and the term of agreements having same effect such as long-term loan agreements, leasing agreements etc.; and made an announcement on 12 March 2009. Finally, the Board has issued a Frequently Asked Questions (the “**FAQ**”) list on 23 December 2009 in order to clarify the fuel sector’s queries.

The FAQ specifies that the exemption period for usufruct rights granted by an agreement which is legally or financially connected to a dealership agreement, is limited to a 5-year period. Non-compete obligation imposed on the purchaser, which is for an indefinite period or of which the duration exceeds 5 years, provided that individual exemption conditions are not met, shall be accepted as prohibited agreement and therefore shall be deemed invalid according to the Law on Protection of the Competition (the “**Law**”). According to Article 56 of the Law, the party, who has fulfilled its obligations stipulated under the dealership agreement, could not pursue the performance of the other party’s obligations.

In case a request is made for reclamation due to the invalidity of agreement, the return obligation of the parties is subject to relevant Articles of the Code of Obligations. Hence parties may expose to compensate each other in terms of the exceeding period. In addition to such compensation liability, parties may expose to administrative fines and sanctions pursuant to the Law.

In the FAQ, the Board has determined the beginning of the 5-year period by reviewing continuous vertical relation between the dealer and the fuel company. As per the Board’s practices, the Board evaluates the beginning of the 5-year period by taking into consideration the primary agreement executed between the parties. Unless dealership agreement bearing non-compete clauses is terminated together with the usufruct rights, lease agreements annotated to the title deed and etc.; the period of the non-compete obligation shall not end solely by terminating such dealership agreement, usufruct rights or other agreements with similar effect.

cont'd.

The Communiqué has legitimized one exception concerning the usufruct and lease agreements annotated to the title deed. According to the Communiqué, the aim of the agreement has major effect on the determination of the enforcement period. If a person grants usufruct right or execute a lease agreement solely without being a part of a dealership relation with suppliers; the enforcement period of the agreement will not be limited to 5-year. In a nutshell, the Board allows usufruct and a lease agreements annotated to the title deed, of which the duration exceed 5 years, to be executed and deem such agreements valid, provided that there are no dealership relation between the parties.

A further vital point with regard to the non-compete obligation is the absence of any de facto situation that prevents, at the end of the 5-year period, dealer from being relieved of the non-compete obligation. The FAQ provides some samples with respect to such de facto situations. One of the samples has draw a distinguish line with respect to the agreements which prevents dealer from being relieved of the non-compete obligation by way of loan agreements. If the supplier has provided a loan to the dealer, the repayment of this loan should not be arranged such that it obstructs the dealer from being relieved of the non-compete obligation at the end of the 5-year period. The supplier should have grant opportunity to the dealer to repay the outstanding debts, if any, after the expiry date of the period as to the 5-year non-compete condition. Similarly, in cases where the supplier has provided certain equipment to the dealer, the dealer should have the possibility to take over such equipment at its market value at the end of the five-year non-compete period. Concisely any agreement obstructing the dealer from being relieved of the non-compete obligation at the end of the five-year period shall be deemed invalid and contradicting with law by the Board.

Through the FAQ, the Board has clarified the ambiguous issues arising out of the past experiences with respect to the non-compete obligations in the fuel sector. From now on, the non-compete obligations in the fuel sector may not exceed directly or indirectly via usufruct right or agreements with similar effects the 5-year period set forth by the Communiqué.

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