LEGAL NEWS BULLETIN TURKEY

YükselKarkınKüçük
Law Firm

2009 / I

An Expression of Today: Bulletin Turkey Mirrors Recent Legal Developments

YükselKarkınKüçük was established with the intention of creating an internationally recognised law firm and expanding in an expeditious manner. Our firm is made up of young and ambitious minds and currently consists of around 40 lawyers. Following our establishment, as a corporate and professional firm, we proudly take place amongst the leading law firms in Turkey. We provide a diverse range of legal services with particular emphasis on M&A, corporate transactions, energy, telecommunications, competition/antitrust, intellectual property, pharmaceuticals, banking & finance, employment, real estate and litigation-arbitration for multinational businesses in cross-border transactions. Our firm's clientele comprises of major international and domestic companies that operate in diverse sectors. We endeavour to build lasting relationships with our clients and we pride ourselves on providing prompt and effective solutions tailored to the specific needs of each client.

We offer our clients more than legal services by following the current situation and demands of the business world. 2008 proved to be an active year in terms of substantial M&As and our firm was instructed in a considerable number of these major transactions. During the past year, we have represented the majority of the international pharmaceutical companies in Turkey as our practice has extensively focused on pharmaceuticals law. In addition, our practice in energy, competition and employment law has evolved with our involvement in a variety of related transactions. It is also worth mentioning that the Energy sector, an area of practice in which we are actively involved, has shown promise since 2007.

Continued on page 3

IN THIS ISSUE

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Legal News Bulletin Turkey

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YükselKarkınKüçük

Adına Yayın Sahibi / Owner

Cüneyt Yüksel

• • •

Editör / Editor

Cüneyt Yüksel

• • •

Sorumlu Müdür / Responsible

Gökhan Gökçe

• • •

Yayın Türü / Type of Publication

Yerel Süreli / Local Periodical

• • •

Baskı / Printing

PINARBAŞ Matbaacılık Ltd. Şti.

Rami Kışla Cad. No: 88 Topçular İstanbul

Tel: (212) 544 58 77

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Intro

Previous page to continue

We believe that the energy sector in Turkey, will gain more significance in spite of the financial crisis. Due to Turkey's experience of financial turmoil in 2001, it was prepared for the financial crisis suffered globally. Furthermore, Turkey's strategic importance in the Europe/Middle East region has been attracting the world's attention as the leaders of the world have developed a positive attitude towards Turkey. By the end of 2008, Turkey had become a temporary member of the United Nations Security Council through a majority vote cast. Today, the municipal elections stand beside the global financial crisis at the top of Turkey's agenda. After the finalisation of the upcoming municipal elections at the end of March 2009, the government's emphasis is expected to shift towards investments such as the privatisation of transport, energy facilities and quite prominently IGDAŞ (Istanbul Natural Gas Distribution Company).

We are excited to introduce our first edition of Bulletin Turkey through which we will present the contemporary legal developments that occur in Turkey and relatively abroad. Bulletin Turkey will not only address our clients but an audience whose interest we seek to capture in the legal universe. Starting with the release of our first edition of 2009, the editions of Bulletin Turkey will be made available to review once every 6 months.

The content of the first 2009 edition of Bulletin Turkey embodies the legal developments that have come into force before the date of its publication and the upcoming editions will keep the readers posted on recent amendments. In this edition, we have included 19 articles concerning a wide array of the fields of law which vary, *inter alia*, from energy to pharmaceuticals, M&As to competition, intellectual property to telecommunications, real estate, bankruptcy and employment. Having scrutinised the world's current financial atmosphere, we have written about the impact of MAC clauses that have recently gained significance in acquisition agreements. Some of the other issues we have included in the this edition of Bulletin Turkey are the recent amendments to real estate and telecommunications law, respectively regulating real estate acquisition by foreigners in Turkey and the introduction of the new amendment called electronic communications law which has extensively amended the scope of the telecommunications law. This edition also includes articles on various aspects of energy legislation including natural gas, petroleum and electricity market and related practices. Based on our firm's commitment to the pharmaceuticals sector, we have included in Bulletin Turkey an article manifesting the new legislation enacted with respect to the clinical trials conducted in Turkey along with another article concerning the anticipated application of 2D barcodes that will enable tracking of the whole sale and distribution process of pharmaceutical products. Another aspect of this edition with regard to labour law reflects the recent enactment of the subcontracting regulation and the latest amendments to social security and general health insurance law and labour law.

As lawyers at YükselKarkınKüçük, we hope that Bulletin Turkey provides our readers with an insight of our firm's legal practice and we endeavour to keep you updated on significant issues. We sincerely hope you enjoy reading Bulletin Turkey and await our next editions with anticipation.

M&A and Competition Law

The New Front Runner in Exit Strategies The MAC Clause

Gizem Göker

One can definitely say without a doubt, that the raging and notorious global economic crisis that the global market is currently struggling with has not been accommodating an M&A friendly environment. The volatile global economic conditions are compelling investors to act more cautiously, tightening the grip on the accelerating M&A boom. Notwithstanding the recognisable overall depreciation in the transaction value and number of especially highly leveraged transactions, the pursuit for exit paths from previously signed acquisition agreements has begun in the world of transactions.

Not only a boilerplate after all, buyers have been recently invoking MAC clauses in order to walk away from deals through various claims alleging that an economically based material adverse change has occurred in the target's business or financial conditions.

One of the leading candidates to become a front runner in exit strategies in M&A transactions is the "MAC" (material adverse change or effect) clause which is actually a typical *boilerplate* clause in acquisition agreements enabling the acquirer to walk away from the deal if the value of the target becomes degraded as a consequence of certain events affecting the target's business.

MAC clauses are generally broad and ambiguous which may lead to wide interpretations that are usually assembled in phrases having similar meaning to the paraphrase: "an event which would reasonably be expected to have a material adverse effect in the course of the target's business, operations, liabilities and conditions (financial or otherwise)". In this sense, a MAC clause may be interpreted in terms of the interest of the buyer and the seller. As the buyer would want to keep the wording of the MAC clause as broad as possible by inserting phrases such as "*would reasonably be expected to have a material adverse effect …*" the seller on the other hand would try to restrict the wording of the clause to avoid any possibility of abortion of the deal.

An event causing financial material adverse effect on a target company is the primary concern in today's global economic circumstances. *In re IBP*[1] can be cited as a famous case regarding MAC clauses, where the Delaware Chancery Court held that the purpose of a MAC clause is to protect the acquirer from long-term impairment of the target's earning performance as the burden of proof lies on the acquirer. If the occurrence of a MAC is raised by an acquirer, it enables the acquirer to either terminate or renegotiate the deal in return of which the seller would either go to court or renegotiate with the acquirer. Not only a *boilerplate* after all, buyers have been recently invoking MAC clauses in order to walk away from deals through various claims alleging that an economically based material adverse change has occurred in the target's business or financial conditions. An affiliate of Apollo Management LP, Hexion Specialty Chemicals' US $6.5 billion acquisition of Huntsman Corporation was shaken after Hexion Specialty Chemicals' breaking effort to abandon the deal by invoking a MAC which was rejected by the Delaware Chancery Court[2] on 29 Septem-

ber 2008. The MAC clause in the Hexion/Huntsman merger agreement defined MAC as "any occurrence that is materially adverse to the financial condition ... of the Company ..." **excluding** shifts in "general economic or financial market conditions or occurrences affect[ing] the chemical industry generally" and Hexion could terminate the agreement upon "any event, change or development that has had or is reasonably expected to have, individually or in the aggregate a material adverse effect". In line with *In re IBP* reasoning, Delaware Chancery Court held that (i) the 3% decrease in Huntsman's 2007 EBITDA and its worst case estimation that the 2008 EBITDA will be below 11% compared to 2007 was insufficient to meet the current market expectations to invoke the MAC clause; (ii) "a 5% increase in net debt from its expectations in valuing the deal, even combined with the reduced earnings" should not excuse Hexion from fulfilling its obligations under the merger agreement; and (iii) rather short-term financial problems of only two Huntsman divisions does not cause a MAC on the whole Huntsman business structure. Nevertheless Delaware Chancery Court did not order Hexion to close as long as it paid the necessary compensation to Huntsman. Pursuant to Vice Chancellor Stephen Lamb's ruling, Huntsman filed a lawsuit[3] without delay against the two banks that were arranged to fund the merger. As a result Texas state court granted temporary injunction restraining the banks from filing a lawsuit until the closing date.

Lenders current position due to limited credit resources is another aspect of the M&A squeeze as the Hexion/Huntsman merger suffered its share of the credit constraint. On 29 October 2008, Hexion commenced another lawsuit in New York State Supreme Court against Credit Suisse and Deutsche Bank seeking specific performance of the banks' obligation to provide funding for the merger. However, presumably Hexion Specialty Chemicals will drop the action against the banks as it has decided to terminate the controversial deal and announced on 19 December 2009, as specified in their commitment letters, Credit Suisse and Deutsche Bank have funded the US $325 million termination fee to its parent company Hexion LLC for the termination of the merger agreement with Huntsman Corporation.

Whereas from the Turkish legislation perspective we are wondering what the Turkish courts' approach will be regarding MAC clauses and whether it will hold a similar judgment with the US courts. The interpretation of a MAC by a Turkish court is unpredictable as there are almost no examples in Turkish litigation history with respect to invoking MAC clauses in M&A transactions with share purchase agreements subject to Turkish law. One should not disregard the probability of certain M&A crises to be based on MACs in the near future of Turkey and under such circumstances the evaluation of a MAC will rely heavily on the Turkish judge's discretion. Despite the lack of court decisions with respect to this matter in terms of M&A transactions, the Turkish judge may rely on the Turkish doctrine's adopted view regarding change in conditions of a contract. Under the Turkish Code of Obligations No. 6762, a contractor agreement may be terminated or renegotiated upon occurrence of an unforeseen event impeding performance of the parties or creating a heavy burden on the parties to perform. Although the law limits application to only contractor agreements, the Turkish doctrine has adopted this approach named the *imprévision theory*, meaning lack of foresight, for all nature of contracts through broad interpretation of the conditions that (i) the balance between the performance of the parties has been substantially impaired, (ii) such unbalance has resulted from unforeseen events such as economic crises, devaluation, war and acts of nature, and (iii) the parties have not yet performed the contractual obligations. Turkish courts have implemented the *imprévision theory* for the purpose of protecting the aggrieved parties in events of inflation, lease agreements, bankruptcy and credit card debts. However the parties of an M&A transaction may not exactly meet such criteria as both parties tend to be economically and commercially powerful.

The current global economic atmosphere is signalling lawyers to give more emphasis to drafting MAC clauses in share purchase agreements. By avoiding generalisation, certain specific criteria such as setting fixed currency and EBITDA rates in the MAC clause would be beneficiary in terms of achieving more efficient results. Despite the fact that MACs are initially designed to protect the acquirer, though the Turkish court remains silent on this matter, the burden of proving a material adverse change has occurred lies with the acquirer. Although an ambiguous MAC clause will relieve the acquirer from closing the transaction, nevertheless lengthy and costly litigation and unforeseen consequences should be expected before going to court.

1 *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001)
2 *Hexion Specialty Chem. Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL (Del. Ch. September 29,2008)
3 *Huntsman Corp. v. Credit Suisse Securities (USA) LLC*, No. 08-09-09258 (Tex. Dist. Ct. Sept. 30, 2008 and Oct. 13, 2008)

Changes in the Approach of the Turkish Competition Board Regarding Non-Compete Provisions in Merger Transactions

Kübra Şıvgın

Agreements and concerted practices which aim to restrict competition in a certain market are forbidden in many of the jurisdictions around the world. Likewise, mergers or acquisitions which create or strengthen a dominant position are also prohibited. Transaction agreements for mergers and acquisitions may comprise restrictive provisions, such as non-compete obligations. These restrictive agreements are generally essential to enable the parties to fully benefit from the transaction. With a non-compete obligation, the acquirer's intention is to prevent the former shareholders of the target to compete within the relevant market with the target for a certain period of time. Such an obligation to be imposed on the shareholders of the target can be deemed as compulsory in order to fully achieve the goals of the transaction.

> The new formulation in the Board's recent decisions literally removes the parties' from the obligation to amend their agreements in order for their transaction to be considered as authorized under merger control rules, although for legal certainty the best approach would of course be to amend the agreements.

In most jurisdictions as well as in Turkey, it is generally accepted that in order for a non-compete clause to be considered as an ancillary restriction, it shall fulfil the principles of being: "*restrictive solely for the parties*", "*proportional*" and "*necessary for and directly relevant to the acquisition*".

In Turkey, the Competition Board ("**Board**") closely scrutinizes non-compete and confidentiality clauses in agreements concluded between the undertakings especially in terms of their scope, extent and duration in order to determine as to whether they comply with the above mentioned conditions or not. In considering whether or not a merger transaction raises competition concerns the Board always examines the ancillary character of these restrictions regardless of whether or not the thresholds for compulsory notification being exceeded.

According to case law, the Board has a tendency to accept non-compete clauses as ancillary restrictions if they are limited to two years when goodwill is involved and to three years when know-how is involved. For longer non-compete periods or confidentiality clauses, the parties have to provide sufficient economic and rational reasons to prove the ancillary character of the clause and its minimal impact on effective competition. For example, in its decision regarding, *Englefield LLP*[1], where know-how was acquired the Board considered a non-compete provision for 4 years as an ancillary restriction to the main transaction. In another decision regarding *Lyondell Chemical-The National Titanium Dioxide Company*[2], where acquisition of know-how was involved, the Board allowed a 5 year non-compete provision.

In the past, the Board used to directly interfere with the ancillary restrictions by requesting the parties to amend their agreements and to submit the amended version in order to authorize the transaction. As a result, the parties had to amend their agreements in line with the Board's require-

ments both in local and global transactions. In other words if the Board decided that a non-compete/non-solicitation or a confidentiality obligation did not comply with the pre-requisites of an ancillary restriction, the parties had to amend such provisions in the agreements in order for the merger/acquisition to be authorized.

However, recently, there have been decisions where there are implications of a change in the Board's approach: rather than directing an amendment in the non-compete clause the Board has approved mergers and stated that without complying with the conditions stated above, a non-compete clause will not be considered as an ancillary restriction. For example in the *Fantuzzi Industries* decision[3], which involved a notification for authorization process for a global transaction, the Board authorized the merger by explicitly stating that "*the transaction is not the kind which leads to the creation or strengthening of a dominant position and does not lead to a substantial lessening of competition and consequently the transaction is authorized*". Notwithstanding the foregoing the Board, in this decision, while explicitly authorizing the transaction as a second point stated that in order to be considered as ancillary, the duration of the non-compete provisions should be reduced to 30 months and limited to the relevant product market. We believe that the new formulation in the Board's recent decisions literally removes the parties' from the obligation to amend their agreements in order for their transaction to be considered as authorized under merger control rules, although for legal certainty the best approach would of course be to amend the agreements.

Not being obliged by the Board to amend the transaction agreements does not mean that the parties are free not to comply with the part of the decision regarding ancillary restrictions. The Board's final assessment with regards to such restrictions should be determined via an investigation process based on the Law No. 4054 on the Protection of Competition if the parties continue the application of the restrictive provisions despite the Board's decision. In such a case the Board would start an investigation against the parties for the restrictive agreement and after would impose severe monetary fines[4] and invalidate the relevant (i.e. non-compete) provision. If the non-compete provision cannot be separated from the whole agreement, then the whole agreement may risk being considered as null and void.

Although there has been a substantial change in the Board's approach towards ancillary restrictions in merger transactions very few undertakings and attorneys are aware of this change. The absence of guidelines creates a legal gap in terms of the results of decisions of the Board. Since the Board does not give any comments or statements to guide the parties in the conclusion part of the decision, the parties are generally confused about the action to be taken. In other words, they do not know as to whether they should amend the relevant provisions or not. Will they be subject to any fines for not complying with the decision of the Board if they do not amend the relevant provisions in their transaction agreements? How will the Board's 'decision' regarding ancillary restraints in merger cases which do not raise any competition concerns affect the destiny of the transactions? Until these concerns are explicitly addressed there will always be a degree of uncertainty which has a negative effect on transactions and the possibility that deals are called off due to the unpredictability. It is obvious that there is a need for the Board to adopt a guideline for merger control rules including the ancillary restrictions.

1 CB Decision No. 07-61/725-256 date 25.07.2007
2 CB Decision No. 07-34/360-137 date 24.04.2007
3 CB Decision No. 08-69/1124-440 date 04.12.2008
4 Fines to be imposed in such a case would be up to 10% of the turnover of the parties generated at the end of the financial year preceding the decision. In such a case fines up to 5% of the penalty imposed on the undertaking concerned may also be imposed on managers or employees who are determined to have a decisive influence in the infringement (Art. 17 of the Law No 4054 on the Protection of Competition).

Impacts of the New Amendments Regarding Fines in Competition Law in Relation to Mergers and Acquisitions

Ayşe Nur Şanlı

The Law Amending Various Laws For Compliance with Basic Penal Laws, dated 8 February 2008, numbered 5728, substantially amended the Law on the Protection of Competition, dated 7 December 1994, numbered 4054 ("Competition Law") in relation to fines to be imposed on undertakings for their acts in violation of the Competition Law. The aim of this article is to focus on the effects of the new amendments in relation to mergers and acquisitions.

A new approach and method in calculating fines was introduced by the new amendments to the Competition Law in relation to mergers and acquisitions where the following has occurred; (i) incorrect or misleading information has been provided to the Competition Board ("Board"), and/or (ii) mergers and acquisitions subject to approval of the Board have been consummated without such approval[1].

A new approach and method in calculating fines was introduced by the new amendments to the Competition Law in relation to mergers and acquisitions

In the past, in the cases described above, the Competition Law set a fixed fine to be imposed dependant on the violation, the fixed fines ranged from USD 1,500 to 2,500 and were revised on an annual basis. The new amendments, in contrast with the old regime, provide that fines are to be calculated based on the annual gross revenue[2] generated in the fiscal year preceding the year of the Board's decision. In cases where there has been a violation as stated above, the Board now imposes fines equal to one-thousandth (1/1000) of the annual gross revenues generated by the undertaking(s) concerned. The Competition Law sets a minimum fine to be imposed which is determined on an annual basis, for 2009, the minimum amount is TL 11,200 (approximately 7,500 USD).

According to the Competition Law, in the event that mergers and acquisitions subject to approval of the Board are consummated without such approval, the fines are applied only to the acquirer in acquisitions and to both parties in mergers. Nonetheless, it is not yet clear as to whether the annual gross revenue will be based on the revenue generated (i) in the relevant product market or (ii) within Turkey.

In *ACT 4 Gayrımenkul/Corio N.V.* (Case No: 08-43/588-221), dated 3 July 2008, the Board ruled that Corio N.V., the acquirer will pay the fine amounting to one thousandth (1/1000) of the whole turnover of the Cario Group generated in Turkey, the fine was imposed due to the delay in notifying the Board of the acquisition consummated by the parties. In reaching this decision, the Board did not just consider the relevant product market but took into account the whole turnover of the acquirer.

In contrast to the decision in *ACT 4 Gayrımenkul/Corio N.V*, in *Fina Holding/Turkon Konteynır* (Case No: 09-02/19-12), dated 14 January 2009, the Board decided that Fina Holding A.Ş. will pay a fine amounting to one thousandth (1/1000) of the turnover generated in the relevant product market from the joint venture. As the

reasoned decision has not yet been published, we are not in a position to verify the reasoning of the Board's decision, however it may be due to the fact that the parties are shareholders to a joint-venture and the transfer of shares took place between those shareholders.

Even though in *Fina Holding/Turkon Konteynır* and *ACT 4 Gayrımenkul/Corio N.V.*, the reasoned decisions have not yet been published, it is apparent that the Board applied a different approach in calculating the fines.

Although with the new amendments the calculation of fines has become more sophisticated it has without a doubt provided more efficient enforcement. In order to assure legal security and consistency the practice would welcome the introduction of secondary legislation, from the Competition Authority, explaining the calculation of the fines in relation to mergers and acquisitions. We hope consistency and a more uniform approach will be achieved with the introduction of secondary legislation and development of precedents.

1 According to the Competition Law, mergers and acquisitions are subject to the approval of the Board to be duly effective if: a) the total market share of the undertakings concerned for any one of the relevant product markets exceeds 25% or if the market share threshold is not exceeded; b) the total turnover of the undertakings concerned exceeds twenty-five million TL in any one of the relevant product markets.

2 There is no definition of "annual gross revenue" in the Competition Law or in secondary legislation applicable to mergers and acquisitions, nevertheless, the Board took the turnover of the undertakings into account in calculating fines. Recently, the Regulation on Fines to be Imposed in Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position entered into force on 15 February 2009. In this regulation, "annual gross revenue" is defined as "net sales in the uniform chart of accounts or if calculation of this is not possible revenues closest to the net sales to be determined by the Board" which reflects the interpretation of "annual gross revenue" by the Board.

Pharmaceuticals Law

The New Regulation on Clinical Trials

Sinem Teoman

The enactment of the Regulation on Clinical Trials (the "**New Regulation**") has been long awaited and was finally published in the Official Gazette on 23 December 2008 and entered into force on 1 January 2009. In this article, a summary review of the New Regulation is made by making a comparison with the Regulation on Pharmaceuticals Trials (the "**Former Regulation**").

The objective of the New Regulation is to set forth the principles and procedures regarding design, conduct, record keeping, reporting, validity, volunteer rights and other aspects of clinical trials to be conducted within the framework of EU standards and Good Clinical Practice. The New Regulation has been prepared in parallel with the EU Directives 2001/20/EC and 2005/20/EC for the purpose of harmonisation in pharmaceutical clinical trials.

One of the most important amendments which the New Regulation introduces is qualitative expansion of the scope of the sites where clinical trials can be conducted.

Scope

While the Former Regulation only covered clinical pharmaceutical trials to be conducted on human subjects, the New Regulation includes non-pharmaceutical clinical trials, trials conducted related to medical devices, clinical trials to be conducted by using new surgical methods, bioavailability and bioequivalence studies, therapeutic trials as well. Nonetheless, observational studies, compassionate use programs for humanitarian purposes to obtain access to pharmaceuticals and non-pharmaceutical standard therapeutic applications remain outside of the New Regulation's scope.

Protection of Volunteers

Protection of volunteer subjects was limited in the Former Regulation. The New Regulation stipulates various aspects in detail, such as informed consent of volunteers, specific conditions of certain groups' participation such as children, pregnant, confined, breastfeeding women, handicapped or legally limited persons, etc. The New Regulation states that, with the exception of insurance coverage, Sponsors can not propose any incentives or monetary inducements for participation or continued attendance of volunteers in clinical trials.

Sites

One of the most important amendments which the New Regulation introduces is qualitative expansion of the scope of the sites where clinical trials can be conducted. Formerly, clinical trials could only be conducted in general training hospitals and this meant that only public hospitals were eligible. With entry of the New Regulation, it is now possible to perform clinical trials at hospitals which have sufficient staff, equipment and laboratory facilities to provide safety to volunteers and enable conduct and follow-up of the trial in a sound manner. Therefore, if a private hospital provides such conditions, it will be able to be involved in a clinical trial.

Investigators

Under the New Regulation qualification requirements for investigators have become less stringent. The Former Regulation stipulated that medical doctors who have at least five years experience in their specialised field could conduct clinical trials. Pursuant to the New Regulation, dependant on nature of clinical trials, clinician medical doctors or dentists and responsible (principal) investigators conducting trials should have completed their specialisation or doctorate training. Therefore, the condition of at least 5 years experience in the specialised field has been abolished by the New Regulation.

CROs

In practice, Contract Research Organisations (CROs) are actively involved in the implementation of clinical trials. However, the Former Regulation did not even mention CROs. The New Regulation stipulates that Sponsors can delegate some of their tasks to CROs by obtaining permission from the Ministry of Health provided that civil and criminal liabilities remain on their own shoulders. With this new provision, it will be much easier for sponsors, institutions and investigators to position the involvement of CROs as a legal framework has been established.

Under the New Regulation qualification requirements for investigators have become less stringent.

Permits and Ethics Committees

Pursuant to the New Regulation, Sponsors are required to apply for permission to initiate a clinical trial. However, as the definition of Sponsor is quite broad, i.e. not only pharmaceutical companies but also trial coordinators in multi-center trials and responsible investigators in single-center trials are included, in each trial it should be determined whether a pharmaceutical company or investigator shall apply for the permission.

However, pursuant to the New Regulation, the structure of ethics committees and qualifications of their members have been amended, ethics committees shall be formed in regions to be determined by the Ministry of Health and shall comprise of 11 to 15 members, including pediatric clinician doctors, pharmacologists, biochemists, and law faculty graduates. The New Regulation stipulates that a person cannot be a member of more than one ethics committee and only one person per family can be a member of an ethics committee. Furthermore, persons who are involved in the implementation of a clinical trial cannot attend the discussions of the ethics committee that evaluates such trial. These amendments indicate that the Ministry of Health places importance on the provision of impartiality of the Ethics Committees' and encouragement of the inclusion of various experts'.

Adverse Effects

Under the New Regulation there are detailed provisions on adverse effects reporting. Pursuant to the Former Regulation, investigators or sponsors were required to inform the Ministry of Health, through local ethics committees, once every 6 months of findings, results and in particular adverse effects. In the event of an occurrence of a serious adverse effect and death of a volunteer, there was a requirement to immediately cease the trial and notify the Ministry of Health verbally or in writing.

Pursuant to the New Regulation, all serious adverse events shall be urgently reported, at the latest within 7 days of becoming aware, to the relevant ethics committee and the Ministry of Health. The new wording of the Regulation sets forth that even if there is a death the trial may continue and does not need to be ceased immediately however there will be an evaluation. Additionally, the frequency of ordinary reporting of adverse affects has been decreased from twice to once a year.

Upon receiving the view of the relevant ethics committee, Sponsors shall submit to the relevant General Directorate, once a year, a full list of observed serious suspected adverse effects, in a manner so as to encompass information relating to volunteer safety, along with the intermediary report form annexed to the Good Clinical Practice Guidelines,. In multi-center trials, an intermediary report and final report shall be prepared, using the forms included in the Good Clinical Practice Guidelines as a base, in a manner to encompass the results relating to all centers involved in the trial.

Inspection and Sanctions

Pursuant to the Former Regulation legal and financial liabilities regarding clinical trials were subject to general provisions. The only administrative sanction that was stipulated as a general precaution was that the Ministry of Health could cease a trial by obtaining the view of the relevant ethics committee.

The New Regulation contains detailed provisions on inspection by the Ministry of Health and the applicable administrative and legal sanctions.

It has been explicitly stipulated that the Ministry of Health is entitled to inspect clinical trials conducted both in Turkey and abroad, trial sites, Sponsor and CRO's facilities, places where study products are manufactured etc.. Accordingly, the Ministry of Health has authority to cease the clinical trials in light of the findings from such inspections.

Another new feature introduced by the New Regulation is that the person or institution that carries out the trial, the Sponsor and the CRO are responsible for all legal and financial liabilities regarding clinical trials.

Another new feature introduced by the New Regulation is that the person or institution that carries out the trial, the Sponsor and the CRO are responsible for all legal and financial liabilities regarding clinical trials.

In terms of administrative and criminal liability, if a Sponsor, investigator or principal investigator is found to be liable and in breach of the legislation, he/she can be barred from clinical trials for a certain period of time or indefinitely.

Conclusion

With its huge population, well-trained investigators and large number of facilities, Turkey's involvement in clinical trials is increasing day by day and it seems the New Regulation will have a positive impact on this acceleration. Although there are certain difficulties to be overcome such as the unwillingness of public institutions to enter into clinical trial agreements with Sponsors, both the Ministry of Health's regulations and the Sponsors' and investigators' enthusiasm to get involved in these studies make Turkey one of the promising lands of clinical trials.

The 2D Barcode A New System for Tracing Pharmaceuticals

İbrahim Yamakoğlu - Seteney Nur Öner

The principal problems within the pharmaceutical sector are fake medicines and fake price labels which cause non-traceability. The Ministry of Health (the "**MoH**"), within the scope of its activities, has established a system called Pharmaceuticals Track and Trace System ("**ITS**") which aims to effectively trace pharmaceuticals and accordingly combat counterfeit products, labels and packaging by introducing a data-matrix type two-dimensional barcode. This system, was established after examining several pilot projects and in accordance with the principles discussed and admitted at the "GS1 Healthcare Conference" in London, on 29 October 2007, Turkey is one of the first countries in the world to adopt ITS.

In light of ITS, the Regulation Regarding the Packaging and Labelling Medicinal Products for Human Use (the "**Regulation**") was amended by three regulations announced by the MoH published in the Official Gazettes No.26775 dated 2 February 2008, No.26923 dated 1 July 2008, and No.27076 dated 6 December 2008. In the ongoing development of legislation, two guides were issued: Pharmaceuticals Barcoding Guide and the ITS Operating Guide.

The ITS operates with the help of a second identifier data-matrix type two-dimensional barcode along with the formerly used primary identifier barcode which are both defined in the Regulation and the Pharmaceuticals Barcoding Guide.

The data matrix shall be inserted on the immediate and outer packaging of the pharmaceuticals. Additionally, amended Article 16 regulates marketing holders and states that they must use transportation packaging during the shipment of more than one product so as to ensure product safety, and further states that on the packaging

there should be an identifier containing the information defining the transportation packaging or an identifier containing all the data matrix information of the products inside the transportation packaging.

As per Article 16 amended on 6 December 2008, in cases where applying data matrix on product packaging causes problems, due to characteristic of the product, if these are a single product sold in multiple quantities the data matrix may be inserted on the transportation packaging of the products. In such a case, the prices of these products will be designated upon multiplying the prices determined for unit products with the quantity. The prices with the transportation packaging of this type of product shall be separately published with unit prices on the price list published by the MoH. However, according to Temporary Article 4, implementation of these conditions is not mandatory until 1 June 2010.

As explained in the Pharmaceuticals Barcoding Guide, information in the data matrix which is to be used to identify the products will be composed of a Global Trade Item Number ("**GTIN**"), Serial Number, Expiration Date, Batch/Lot Number which is not mandatory but must be inserted on packaging and Group Separator ("**FNC1**").

The Ministry of Health (the "MoH"), within the scope of its activities, has established a system called Pharmaceuticals Track and Trace System ("ITS") which aims to effectively trace pharmaceuticals and accordingly combat counterfeit products, labels and packaging by introducing data-matrix type two-dimensional barcode. This system, was established after examining several pilot projects and in accordance with the principles discussed and admitted at the "GS1 Healthcare Conference" in London, on 29 October 2007, Turkey is one of the first countries in the world to adopt ITS.

Certain information such as the GTIN and expiry date in the data matrix ("**Legible Information**") shall also be inserted on the packaging in a legible manner. Further, it is stipulated in amended Article 5/j that the name and address of the marketing holder shall be included on the product's packaging. If desired a logo of the original company and the name and/or logo of the authorized company marketing the product may also be included on the packaging of all products registered in Turkey.

Pursuant to amended Article 5/r, the data matrix must be applied on "*prescription and non-prescription drugs, borderline products subject to reimbursement and medical nutritional products subject to reimbursement, including those which have hospital packaging*." It should be noted that with the Amending Regulation dated 1 July 2008, representative samples of pharmaceuticals are removed from the list which should carry the data matrix. This is explicitly stipulated in Article 11 of the Regulation setting forth that no barcode or data matrix shall be placed on the packaging of sample pharmaceuticals.

It also deserves to be noted that, as stated in Article 5/r, the data matrix may not be placed on products which are supplied by tender by the MoH but those that are not subject to reimbursement by the MoH. Furthermore, serums (except for peritoneal dialysis solutions, formula for medical purposes and enteral nutritional products), radiopharmaceuticals and cold chain products required to be preserved in environments colder than zero degrees shall be excluded from the scope of the data matrix implementation until 1 January 2011.

According to amended Article 5/ş, it is not mandatory to insert price information on the product packaging; however as per the first version of the Regulation, the price label should have been inserted on the outer packaging.

The deadline to adopt the ITS has been changed twice since the publication of the Regulation. According to the latest amendment made on 6 December 2008, data matrixes shall be included on pharmaceutical packaging by 1 June 2009 beginning from the date of publication of the Regulation. It shall be mandatory for all products to have a data matrix after this date, and the sale of products which do not carry data matrixes before this date and currently available in the market (products already circulated) will be permitted until 31 December 2009. It should be noted that the Regulation stipulates for those products already circulated that if there is a data matrix together with price label, the price label should be cancelled by crossing out with print or a similar method so that it can never be used again. Affixing the data matrix over the price label is also accepted as cancellation, however the existing price label is cancelled.

It is also worthwhile to note that it was sufficient for the marketing authorisation holders to submit an application for outer packaging of registered products that needed to be renewed by 1 January 2009 and any other approval was not required for adapting to ITS.

Labour Law

The Latest Amendments in the Labour Law and Subcontracting Relationship within the Scope of Secondary Legislation

Ahu Pamukkale

The Law Amending the Labour Law and Various Laws numbered 5763 dated 15 May 2008 (the "**Law No. 5763**") has made fundamental amendments in various laws concerning working life as well as the Labour Law, and by virtue of the Law numbered 5763, various secondary legislation has been promulgated.

The most significant amendments are as follows;

(1) By the amendments made to the **Labour Law** by Law No. 5763**,** and the recently enacted Regulation on Subcontracting Relations (the "Regulation"), subcontractors are required to notify the regional labour directorate within one month of the principal employer-subcontractor relationship. The subcontractor must submit the written subcontracting contract executed with the principal employer and other necessary documents for registration of this newly established workplace within the sphere of the principal employer. Upon application to the regional labour directorate, the workplace of the subcontractor will be registered and a registration number will be provided. Thus, any kind of a subcontracting relationship in a workplace is deemed as an establishment of a new workplace.

As per the Regulation, a subcontracting contract shall be executed in writing between the principal employer and the subcontractor, and technical conditions that justify the use of subcontractor labour in a section of a main activity are required to be explicitly stated therein.

With a view to prevent abuse and tackle the question of subcontracting, the Labour Law and Regulation have imposed certain restraints on the use of subcontractor labour. Accordingly, an employer may assign a subcontractor *any specified section of the main activity for operational requirements and for reasons of technological expertise.* In such case, the employer shall together with the subcontractor, be jointly liable for employees of the subcontractor, who are employed exclusively and on a continuous basis for the main or auxiliary work of the employer to be performed under the subcontracting contract. Thus, the employer who subcontracts the works, as being the principal employer shall be jointly liable with the subcontractors for the obligations arising from the labour and social security laws, or employment contracts of subcontractors' employees. Joint liability means that in seeking redress for his claims, the aggrieved employee of the subcontractor can have recourse either to the subcontractor (his own employer) or to the principal employer. According to mandatory provisions of the relevant labour law, this joint liability cannot be contractually revoked, altered or transferred. Any contractual provision mitigating or transferring the joint liability will not be valid before the labour authorities or the employee. Nevertheless, any limits on the liability of the principal employer in this respect within the scope of the subcontracting contracts would be binding between the parties to the contract.

The provisions of the above stated legislation, further requires that principal employer's employees are not employed at the same time, in the section of the main activity which has been assigned to a subcontractor due to operational requirements and for reasons of technological expertise.

However, neither the Labour Law nor the Regulation, have introduced restraints for use of subcontractor labour in auxiliary works which do not belong to the domain of the entity's essential operations (e.g. cafeteria services, cleaning, transportation of employees, security, etc.).

As per the Regulation, a subcontracting contract shall be executed in writing between the principal employer and the subcontractor, and technical conditions that justify the use of subcontractor labour in a section of a main activity are required to be explicitly stated therein.

With the recent amendments, although they are accepted as controversial provisions, the labour inspectors are authorised to examine the documents of workplaces registered with regional labour directorates in order to determine whether there is a simulated subcontracting relationship. If a simulated subcontracting relationship is determined an inspector report shall be served to the employers and the employers shall have right to raise an objection to the report in the competent labour court within six business days of the date of service. Decisions of the labour courts relating to the objections are final. If no objection is raised against the report within six business days or the court agrees there is a simulated subcontracting relationship, the registration will be cancelled and the employees of the subcontractor will be deemed employees of the principal employer from the beginning of the employment relationship.

The percentage of disabled employees to be employed by private sector employers is 3% whereas the obligation to employ ex-convicts and victims of terror has been removed.

As per the Regulation, simulated subcontracting generally occurs when; (i) any part of the work relating to the production of goods and services which does not require proficiency (expertise) is assigned to any subcontractor; (ii) a subcontracting relationship is established with an employee having previously worked in that workplace; (iii) employees of the principal employer are recruited as the employees of the subcontractor with their rights being restricted; and (iv) an agreement is executed by the employer for the purpose of disguising his actual intention such as avoiding public liabilities or restricting or eliminating rights of the employees arising from their employment contracts, collective labour agreements or labour legislation.

If a subcontractor fails to comply with the obligation of notification of a workplace, a TL 100 fine is to be solely imposed on the subcontractor, and if the work performed in the subcontractor's workplace is heavy and hazardous, the fine is TL 1,000. However, in the event that a simulated subcontracting relationship is determined, a fine of TL 10,000 will be severally imposed on the principal employer and subcontractor or their representatives.

(2) The ratios for the statutory employment obligation of private sector employers with fifty or more employees have been changed. The percentage of disabled employees to be employed by private sector employers is 3% whereas the obligation to employ ex-convicts and victims of terror has been removed. As for public employers, the obligation to employ disabled employees and ex-convicts remained unchanged at 4% and 2%, respectively. However, the rate of victims of terror to be employed public employers has been increased to 1%. With the enactment of such provisions in favour of employers, they will not be punished by reason of their inconsistent acts breaching the previous law and pending cases will be dismissed on non- incompliance with ex-convict and victims of terror employment. Due to changes, in case of failure to comply with the obligation to employ disabled employees fines will be imposed directly by the Provincial Director of Turkish Labour Institution and collected in respect of general principals.

(3) Entities employing fifty or more employees, the employers may comply with the obligation of constituting units for health and safety by getting such services from commonly shared health and safety units established by third parties, or by employing such health and safety personnel with the required qualifications in the workplace. However, providing health and safety services outside the workplace will not relieve the employer of any obligations in this respect. The principles regarding employing health and safety personnel in the entity or getting health and safety services outside the entity will be governed by a regulation to be adopted.

(4) Due to changes in the Unemployment Insurance Law, all sort of notifications regarding the unemployment insurance and procedures to be pursued before the Turkish Employment Agency may be made electronically.

It has been further stipulated that the first

unemployment compensation payment will be made within a month of the date that unemployment compensation status was granted, and the daily unemployment compensation shall be calculated over gross daily earnings in lieu of net earnings. In this sense, the daily unemployment compensation has been determined as forty percent of the average daily gross earnings not to exceed eighty percent of the minimum gross wage applied for the employees over the age of sixteen.

The provision states, in the event that the employer is unable to effect payments to the employees due to his insolvency, the employees' unpaid wage claims for the last three months accrued under the employment relationship shall be met from a separate Wage Guarantee Fund which shall be established within the Unemployment Insurance Fund, has been abolished with the aim of ensuring usage of unemployment insurance resources according to its main objective set forth under the relevant laws.

By another amendment, the Turkish Employment Agency is empowered to evaluate the applicability of provisions in respect of short time work upon request of employers, in the event that the employer reduces the working hours at the workplace to a considerable extent temporarily or completely; or ceases the performance of work for a provisional period partially by reason of general economic crises or compulsory reasons.

(5) In order to encourage foreign origin companies to establish private employment agencies in Turkey, the Law on Turkish Employment Agency, with the recent amendments, abolishes the pre-requisite condition of being a Turkish citizen to represent and bind the offices of private employment agencies.

(6) Various administrative fines imposed in case of acting contrary to the provisions of occupational health and safety and workplace notification obligations have been increased. The authority who is responsible for fining has changed, and the regional directorate of the Ministry of Employment and security has been empowered except for cases relating to violations disabled employment and search and selection services.

Employer's Social Insurance Contributions and Social Insurance Rights of Foreign Personnel

Katharina Cihan Akyürek

The Social Security and General Health Insurance Law dated 16 June 2006 and numbered 5510 ("**Law No. 5510"**) introduced general health insurance, and further grouped prevailing insurance risks under short-term and long-term insurances. Although there is no change in the total rate of contributions for employers and employees, by virtue of application of certain incentives provided for by the Law amending the Labour Law and Various Laws, numbered 5763 ("**Law No. 5763**"), certain deductions can be applied to employers contributions.

General health insurance is a new insurance branch established by Law No. 5510, and all Turkish citizens and all persons residing in Turkey (including refugees and stateless persons) can benefit from this insurance system.

Law No. 5510 classifies insurance against work accidents and occupational diseases, together with sickness and maternity insurances under short term insurances, which were previ-

ously dealt with as separate insurance branches. The social insurance contribution for short term insurances varies between the ranges of 1-6.5% and covers all these insurance branches defined as short term insurances. The contribution for short term insurance changes according to the danger risk of the work performed at the facility.

The Social Security and General Health Insurance Law introduced general health insurance, and further grouped prevailing insurance risks under short-term and long-term insurances. Although there is no change in the total rate of contributions for employers and employees, by virtue of application of certain incentives certain deductions can be applied to employers contributions.

Disability, old age and death insurances are defined as long-term insurance under Law No. 5510 and the premium rate continues to be 9% for employee contributions and 11% for the employers contributions. An additional premium increase of 1-1.5% may be also applicable in the event that the work falls under a certain category of industry branch. However, Law No. 5763 stipulates a deduction of 5% for employers contributions on the condition that the employer owes no monies to the Social Security Institution including fines. The existence of any debts due will be determined on the basis of each workplace of the employer.

Law No. 5763 further encourages the employment of young employees between the ages 18-29 and female employees. For that purpose, a certain amount of premium, which shall be paid by employers, will be progressively discounted during a five-year period. The employers can not simultaneously benefit from separate incentives set out under the law.

As per the old law an employee who is entitled to retirement while drawing a pension, may continue to work provided that he pays social security support contribution attached to his earnings, under the new system, pension payments of a retiree who wants to continue working, will be stopped, even if he pays the social security support of which the amount and rate has increased.

The contributions rates are indicated within the table below:

(Please see table)

The provision of Law No. 5510 regarding earnings taken as a basis for premium payment is reformulated by Law No. 5754. Accordingly, the gross total amount of wages of the employee; any bonuses, gratuities or other similar payments made to the employee; proportion of contributions paid to private health insurance and individual pension systems (for the month in ques-

Insurance Branches	Employer's contribution	Insured's contribution	Government's contribution	Total
Short-term Insurance	1-6.5%	-	-	1-6.5%
Long-term Insurance	11%*	9%	¼ of the collection	20%
General Health Insurance	7.5%	5%	¼ of the collection	12.5%
Unemployment Insurance	2%	1%	1%	4%
TOTAL	21.5 – 27**	15		
	36,5 – 42			
Social Security Support Contribution	23.5% - 29%	7.5%	-	

* Deduction of 5% from employer's part for disability, old age and death will be applied.

** Progressive deduction will be applied for 5 years over employer's part for persons between the age 18-29, female employees and for the disabled.

tion) which exceeds 30% of the minimum wage and payments made to the employee according to the decisions rendered by the administrative or judicial authorities in the course of the month in question shall be taken as a basis for the calculation of the contributions payable by the employee and employer. The total amount of monthly and daily earnings of employees working for several employers shall be taken into consideration separately and contributions shall be calculated accordingly.

However, allowances in kind and death; delivery and marriage benefits; travel allowances; severance and notice payments; cash indemnities; assignment allowances; lump sum payments in the character of termination indemnities or severance payments; investigation charges; food, child and family support payments of which the amounts are to be defined annually by Social Security Organisation, are not considered as earnings taken as a basis for contributions. Allowances in kind which are excluded in the calculation of premium contribution, are defined as allowances made in order to meet social or personal requirements which are expressed concretely (e.g. clothes, shoes, books and stationery equipment for children of the employee distributed by the employer). Nonetheless, according to the new legislation, allowances in kind that are effectuated in cash will be taken into account in premium calculation.

By virtue of Law No. 4958 as of 6 August 2003, foreign personnel working in Turkey under an employment contract are compulsorily covered by all insurances.

However, the status of employment of foreign personnel sent to Turkey by an enterprise or establishment with headquarters in a foreign country, in order to work for and on behalf of this enterprise or establishment, is defined as temporary employment, and those employees who declare that they are covered by social security schemes in their home countries, will not be subject to insurance branches under Law No. 5510. Additionally, if it is evident that the employee is covered by social security schemes in his home country, he is not required to make a declaration to avoid being considered as insured under Law No. 5510.

The provisions of the social insurance law of the country where the employee is working will be applied in the event that the temporary nature of the work changes and becomes constant. To consider whether employment is temporary or not reference can be made to bilateral social security treaties and Court of Appeal interpretations. Jurisprudence takes into consideration particularities of each case and nature of the service which shall be fulfilled by the employee amongst other considerations, while assessing whether the job performed temporary or not.

Energy Law

Current Status of HEPP Projects Developed by Private Investors

Fatih Yiğit

Although over the last 50 years the demand for electricity has been steadily growing, production has been left far behind. Thus, increasing electricity generating capacity continues to be a top priority for Turkey. In an effort to close the gap, on 26 June 2003, Turkey allowed private investors access to the development and management of the hydro electric power plants. In order to attract investors, Turkish government provides a *purchase guarantee* for electricity produced from hydro electric power plants ("**HEPP**") commencing their operations before the end of 2011. The purchase guarantee has been successfully attracting investors to this market, currently there are over 850 HEPP projects (around 350 licensed and over 500 pending) that have been submitted by Turkish developers. However, due to the project owners' lack of capital, only very few of these projects have actually started to be constructed. These projects are considered attractive investments by well capitalised investors and as a result we have witnessed many acquisitions and joint ventures between project owners and investors.

> The Turkish electricity market will witness many acquisitions and joint ventures between Turkish license applicants and foreign investors as Turkish license applicants would like to develop their HEPP with foreign investors who would like to invest in such projects and enter into Turkish electricity market through HEPP.

Investors planning to acquire HEPP projects shall take into consideration the following important stages required to be completed for each HEPP project. During the evaluation period, in addition to technical due diligence, each project must be evaluated thoroughly with respect to their capability of completing the following stages.

(i) Government Water Agency ("DSI") water use agreement.
DSI evaluates the project with respect to its impact on DSI's existing projects, the project's hydrology, and its economical feasibility. If DSI approves the project, a water use agreement will be executed between DSI and the project owner. Currently, DSI evaluations take 6 to 12 months.

(ii) Energy Marketing Regulatory Authority ("EPDK") Electricity production license.
After the DSI agreement, project owners shall submit corporate documents, project documents and DSI agreement to EPDK. EPDK evaluates the applicant's corporate status, capitalisation, shareholder structure, and location of the project. The license applicant should also submit to EPDK a letter of guarantee in the amount determined by EPDK.

(iii) Environmental Impact Assessment ("EIA") approval report.
After the production license is approved by EPDK, the project holder must obtain either an "EIA not required" report or an "EIA positive" report. As most projects are to be constructed on green fields, EIA reports are

very important stages for the HEPP projects. Courts recognise that the issue regarding EIA reports prepared for green fields are a sensitive issue and they are willing to revoke the EIA positive reports if they are not drafted properly.

(iv) Construction

After completing all the stages above and effectuating the necessary expropriations, a final project shall be designed and then, the construction permit shall be obtained from the municipal authorities to commence the construction of plants.

Acquisition of HEPP Project

The applicable laws regulating the renewable energy projects including HEPPs prohibit selling the approved or pending licenses to third parties. In practice, instead of purchasing the license from the project owner, investors acquire license holder companies. When a pending license holder company is acquired by an investor, the regulations require informing EPDK for the change in ownership. However, when an already approved license holder company is acquired, the acquisition can be effectuated only after the approval of EPDK for such share transfers. In transfer applications, EPDK evaluates only the financial and criminal history of the new owners.

In order to benefit from the *purchase guarantee*, the construction of the HEPP shall be completed before the end of 2011. Therefore, even if all the licensing stages explained above are properly completed, delays in the construction may have crucial effect on the value of the project. The license granted to the HEPP can be cancelled if the construction of the relevant HEPP is not completed within the completion period stipulated in the license. To avoid such risks, the investors should be very cautious in selection of the contractors, and in drafting engineering, construction or EPC agreements.

It is also important to examine the legal status of the lands on which the HEPP will be established. If the land on which an HEPP will be installed is totally or partially subject to private property, expropriation of the land may be requested by the licensee from EPDK. If such request is deemed appropriate, the relevant land will be expropriated. All costs and expenses arising from the expropriation shall be born by the licensee. Upon the expropriation, the ownership of such land belongs to the Treasury and an easement right on the expropriated land will be established in favor of the licensee. Such easement right is valid during the term of the relevant license. If the land on which a HEPP installed is totally or partially subject to public property, the licensee may request from EPDK to be granted an easement right or usage right on the relevant land or lease of such land. In addition, if the HPP will be established in a forestry area, a permit should be granted by the Ministry of Environment and Forestry.

In Turkey, the energy market is a highly regulated market; thus, each process requires diligent supervision in order to avoid any delay in the process. Hence, it is advisable that professional help is sought at all stages of the projects to avoid any kind of inconvenience.

In light of the foregoing, it seems that Turkish electricity market will witness many acquisitions and joint ventures between Turkish license applicants and foreign investors as Turkish license applicants would like to develop their HEPP with foreign investors who would like to invest in such projects and enter into Turkish electricity market through HEPP.

Amendments in Electricity Market Legislation

Selen Sümer

Various changes in regulations governing Turkish Electricity Market have been adopted and enacted in November and December 2008. Some key points of importance regarding the recent changes in the Turkish Electricity Market legislation are explained in this article.

Definition of the "Control" under the Electricity Market Licensing Regulation (**"EMLR"**) has been extended. As per the previous regulation, the Control was the direct or indirect domination over the capital, assets or voting rights of a legal entity or the ability to appoint more than half of the members of executive, supervisory or representative organs of a legal entity. The indication of such domination was the ability to dominate more than half of the capital, assets or voting rights of a legal entity. Pursuant to the recent change, the Control is briefly described as the rights, agreements or other instruments enabling to exercise a decisive influence over a legal entity. This is a very broad definition of the Control as compared to the previous provision in this regard. Definition of the Control is of major importance under the EMLR as the market shares are restricted in respect of generation and wholesale licenses and Control is a decisive criteria in order to determine the market shares. The total market share that can be held by a generation or wholesale licensee was calculated over the market shares of such licensee and its affiliates whereas it will be calculated over the market shares of such licensee and the companies controlled by such licensee as per the recent change.

> Turkish Electricity Market legislation is subject to a rapid development pursuant to which more concrete provisions are adopted and enacted.

Under the previous regulation, if the investment facilities subject to generation and autogeneration licenses are not completed within the required period, the related license may be cancelled by the Energy Market Regulatory Board (**"Board"**). Non completion of the investment facilities was not an absolute reason for cancellation. After the recent amendments, it is clearly stated in the EMLR that licenses of investment facilities which are not completed within the required period shall be cancelled. The period of times which will be referred to for the calculation of completion periods is determined by the Board and announced on the official web site of the Energy Market Regulatory Authority (**"Authority"**).

Persons having directly or indirectly 10% or more shares (5% or more in publicly held companies) in a company of which the license has been cancelled were not allowed to have directly or indirectly 10% or more shares (5% or more in publicly held companies) in a company applying for a license. As per the recent change, the aforementioned persons are not authorized to have shares exceeding 10% in a company applying for a licence within 3 years as of the cancellation date of the license if only their responsibility is ascertained based on the investigation conducted by the Authority. Namely, such persons are allowed to have shares exceeding 10% in a license applicant if the Authority does not decide on their responsibility regarding the cancellation of the license. Furthermore, such restriction in respect of being a shareholder in a company applying for a license is limited with a timeframe which is stipulated as 3 years under the EMLR. In addition, pursuant to the recent change, the members of board of directors of the company of which a license has been cancelled are also included into such restrictions as being a shareholder in a company applying for a licence. As per the recent change, the aforementioned persons that are subject to restrictions can not have shares exceeding 10% not only in a company applying for a licence but also in a licensee company.

Pursuant to the change in the EMLR, a license

application shall be rejected if the connection point, which is alternatively suggested, or the company applying for a license does not prefer to establish a private direct line.

The recent changes in the EMLR sets the criteria for the selection of generation license applications when there is more than one license application for the same location. If one of the license applicants intends to use a local natural resource, the priority is given to this license applicant. In other cases, the provisions of the communiqué to be issued are applied.

There is a draft amendment announced on the official web site of the Authority. Under this draft amendment, it aims to amend the provisions in the EMLR regarding the return of the letter of guarantees submitted by the company applying for a license to the Board.

In light of the aforementioned amendments, Turkish Electricity Market legislation is subject to rapid development pursuant to which more concrete provisions are adopted and enacted. Based on the said draft amendment, it is predicted that the Board will continue to adopt amendments. It seems that Turkish Electricity Market legislation will become a consistent and harmonised integrity and the ambiguity governing the Turkish Electricity Market legislation will come to an end gradually.

Recent Developments in Petroleum and Natural Gas Market License Regulations

Mustafa Yiğit Örnek - Esra Niğde

Natural gas and petroleum markets in Turkey (the "**Market")** offer a competitive environment for national and international investors. The Market becomes more attractive to the investors since recent changes in the Natural Gas Market License Regulation (the "**NGMLR**") and the Petroleum Market License Regulation (the "**PMLR**") (together referred to as "**License Regulations**") further liberalized the legislative environment and facilitated trade in the Market. Within this scope, during 2008, new major investments took place in the Market such as privatization of IZGAZ, a natural gas company owned by Kocaeli Municipality acquired by Gaz de France and acquisition of AKPET, one of the largest oil and gas companies in Turkey, by Lukoil.

Considering the importance of natural resources and due to various technical complexities, the Market is separately regulated by specific laws and implementing regulations. In order to provide independent supervision and control mechanisms, an independent authority namely the Energy Market Regulatory Authority ("**EMRA**") has been established.

Investors willing to carry out activities in the Market should obtain a license from EMRA. License Regulations among others set forth principles and procedures applicable to issuance, renewal, termination of licenses and rights and obligations of the license holders. This Article discusses recent developments in License Regulations throughout 2008 in light of the abovementioned legal framework.

Licenses granted by EMRA

EMRA is authorized to grant and cancel licenses, extend license terms, monitor compliance with license terms and conditions and determine fees for licenses to be issued under the License Regulations. EMRA also has the responsibility to carry out pre-inspection and inspection activities and impose penalties against violations or breaches of law and license conditions in order to

ensure compliance in the market.

Types of natural gas market licenses granted by EMRA are categorized as import, export, transmission, storage, wholesale, distribution and compressed natural gas ("**CNG**") licenses. Whereas types of petroleum market licenses are categorized as refinery, distributor, dealer, transportation, processing, storage, transmission, lubricant, and bunker licenses.

Amendments in the NGMLR

Amendment of the NGMLR clarified the situation in relation to having interest in different natural gas companies. The amended form clearly states that

(i) natural gas companies are neither allowed to establish companies which operate in the same field nor to hold participations in a company operating in the same field of activity;

The Market becomes more attractive to the investors since recent changes in the Natural Gas Market License Regulation and Petroleum Market License Regulation further liberalized the legislative environment and facilitated trade in the Market.

(ii) natural gas companies are not allowed to establish companies which operate in an other field of activity;

(iii) natural gas companies may have only one participation in a company which operates in a different field of activity;

(iv) the scope of participation in only one company operating in another field is limited; such participation may not, directly or indirectly lead to owning the majority of the capital or commercial assets, or the right to use the majority of voting rights of such company.

Apart from the clarification stated above, the amendment provides an exemption to BOTAŞ (Petroleum Transport via Pipelines Company, *Boru Hatları ile Petrol Taşıma A.Ş*); accordingly the aforesaid restriction does not apply to BOTAŞ regarding its existing rights future participations and establishment of companies for international projects.

New amendments bring an extended aspect for certain definitions. The definition of CNG sale, transmission and distribution has been extended in a way that natural gas to be sold in compressed form can also be purchased at the wellhead. Further, the definition of supplier has also been extended to cover production companies which sell natural gas to CNG transmission and distribution companies provided that such sale is realized at the wellhead. The market environment of production companies has been extended and a production company is authorized to market gas to CNG sale/transmission and distribution companies provided that the sale is realized at the wellhead.

CNG licenses can now also be obtained for activities of sale of natural gas in compressed form for natural gas to be purchased at the wellhead. Moreover, the amendment introduced a license requirement for import of spot liquefied natural gas **("Spot LNG")** and there is no need to obtain separate licenses for each separate import connection.

Amendments in the PMLR

The developments in the PMLR specifically amend the scope of transportation activities and transportation licenses. In this respect, there is no longer a requirement to obtain a transportation license for transportation of petroleum via highways. The amendment also abolished relevant provisions of the PMLR which required license for transportation via highways.

The amendments stipulate that holders of dealer license, who are operating without a station, may not engage in sale activities of pastoral diesel oil along with types of fuel, diesel oil and auto bio diesel.

As of 31 March 2009; under a lubricant license, it is no longer possible to import lubricants and a separate import license is required for such activity. Further, as of 31 March 2009, export of petroleum and import of fuel products may be freely carried out. The import of crude oil and fuel oil may be freely carried out by persons authorized with a license, whereas in the former version of the PMLR, only export of petroleum could be freely carried out.

Common Changes in the License Regulations

With the new amendments, the places subject to the storage licenses application under the NGMLR and storage and refinery licenses applications under the PMLR, shall be announced in the web site of the EMRA and if there is another license application in the same place in relation to the said activities, such application shall be evaluated in accordance with certain criteria such as contribution to the economy, maximal employment, compliance of relevant facility with environment etc. Under the PMLR, if there are refinery and storage licenses applications in the same place, the refinery license application shall take precedence.

Intellectual Property Law

Trademark License

Derya Taşdemir

As there is an increase in legal relations that establish trademark rights, such as agreements on sale, transfer, licensing etc., intellectual property rights, in particular trademark rights are gaining importance in the agenda of commercial life. In this article trademark license agreements are reviewed in light of Turkish legislation and precedents of the Court of Appeal.

Under Turkish Law, trademark rights are regulated by the Trademark Decree No. 556 (the "**Decree**") and the Regulation on Implementation of the Decree (the "**Regulation**"). Article 20 of the Decree sets forth the pre-requisite conditions of establishing a trademark license and stipulates the documents required by the Turkish Patent Institute ("**TPE**") for the registration and announcement of a trademark license agreement. Article 21 of the Decree provides protection for licensees against infringers; furthermore, Article 73 of the Decree stipulates the rights of licensees to initiate legal proceedings against trademark infringers.

> The licensor should take the necessary precautions and measures in order to maintain protection and preserve use of his/her trademark.

A trademark license agreement can be briefly described as "an agreement in which the trademark owner (the "**licensor**") grants permission to another person (the "**licensee**") to use his/her trademark". Article 20 of the Decree stipulates that the right to use a registered trademark can be subject of a license agreement for all or some of the goods or services for which the trademark is registered. To avoid confusion, it should be noted that license agreements can be formed for registered trademarks and trademarks that are in the application phase.

Like all other transactions involving trademarks, license agreements must be in writing and signed by the parties, the Electronic Signature Law No. 5070 permits use of a secure electronic signature.

In trademark license agreements, while licensees undertake to use the trademark within the scope granted and pursuant to the financial and legal conditions agreed between the parties, licensors are responsible for the maintenance, protection and registration of the trademark.

Pursuant to Article 46 of the Decree, if a license is registered, the licensor cannot renounce his/her trademark rights unless the licensee provides written consent. Therefore, if a licensor grants a license for his/her trademarks, he/she should make his trademark available to the licensee and must not prevent or obstruct the licensee's rights under the license agreement. In the same respect, the trademark owner should make extension payments on time in order to maintain protection and registration of his/her trademark.

Furthermore, the licensor should take the necessary precautions and measures in order to maintain protection and preserve use of his/her trademark. For this purpose, the licensor should provide information and instructions on use of the trademark and control the nature and quality of all goods and services with which licensee uses the trademark. In non-exclusive licenses the same applies and the licensor must ensure the same

conditions are provided for all licensees, including sub-licensees. If the licensee does not meet the quality standards of the trademark, the licensor is entitled to demand that manufacture and/or distribution cease until such standards are met. Therefore, the licensor is entitled to inspect and monitor goods or services provided in connection with trademarks and may request the licensee to provide documents and information deemed reasonably necessary.

Parties to a trademark license agreement have the freedom to determine the scope of a license agreement and how the licensed trademark is to be used by the licensee. However, it is accepted[1] that unless a trademark is transferred, thus only a license is granted, the licensor remains the sole owner and retains control of the trademark; therefore he/she can suspend or terminate the license provided that certain conditions that had been agreed between the parties are not fulfilled.

Trademark licenses can be granted either on exclusive or non-exclusive basis. In exclusive trademark licenses, the licensor cannot grant a further license to a third person and unless he/she has explicitly reserved his/her own right, can not use the trademark. Pursuant to Article 21 of the Decree, unless the contrary is stated in the agreement, a trademark license is non-exclusive. However, unless explicitly stated in the agreement, licensees cannot transfer their license rights to third persons or grant sub-licenses.

> Registration is required in order to establish good faith and the right to license the trademark to third persons.

Registration of a trademark license agreement before the TPE is not obligatory; however, registration is required in order to establish good faith and the right to license the trademark to third persons. Pursuant to Article 20 of the Regulation, in order to register a trademark license agreement the following is required; (i) a demand petition that contains the name and the registration number of the trademark, (ii) a license agreement that contains signatures and the declarations of the licensor and the licensee, the name and the registration number of the trademark, goods/services subject to license, license fee, license term etc., (iii) documentation confirming that the registration fee has been paid, and, (iv) a power of attorney, if the registration request is made by a trademark attorney, rather than the owner.

Another important aspect of a trademark license is the rights and obligations of parties against trademark infringers. In non-exclusive licenses, in principle, licensees do not have to take legal action as the right belongs to the licensor. However, the licensee can request the licensor initiate legal proceedings by sending a notification via a public notary. In the Court of Appeal precedents, it has been stated that such notification should not be considered obligatory but a requirement in terms of proof.[2] If the licensor declines the request or does not initiate legal proceedings within 3 months of the notification, the licensee can initiate legal proceedings on his/her behalf and if there is a risk of serious damage may apply for an injunction from the Court. A licensee, in an exclusive trademark license agreement has the right to directly initiate legal proceedings on their own without the obligation of informing licensor.

In light of the above, in practice a trademark license agreement should contain provisions on the following items:

(1) Identification of the trademark or trademarks that are the subject of the agreement.
(2) Names of licensor and licensee(s).
(3) Clarity on whether the agreement is exclusive or non-exclusive and whether or not the trademark owner will be entitled to use the trademark once he/she has signed the agreement.
(4) How and in which geographic territory the license trademark will be used.
(5) The nature and quality of the goods and/or services with which the licensee can use the trademark (quality provisions).
(6) The duration, termination and renewal of license.
(7) Royalty (license fee).
(8) Protection (responsibilities of parties on initiating legal proceedings in relation to infringement).
(9) Registration of license agreement before TPE.

[1] Court of Appeal, 11th Civil Chamber, 03.05.2001, 2001/752 E., 2001/3930 K.
[2] Court of Appeal, 11th Civil Chamber, 25.04.2003, 2003/3854 E., 2003/3992 K

Combating Counterfeiting Under Turkish Law

Tolgahan Karkın - Alize Dikmen

The manufacturer of commercial goods makes crucial investments whilst in creating such goods. Thus, no manufacturer would be happy if the product in which s/he invests in and intends to gain profits from counterfeited or imitated goods. Once a product is counterfeited, both the state and consumers suffer alongside the manufacturer. Following a violation of the product's liability and counterfeit products are introduced to the market apart from the obvious damage to reputation and loss of income of the manufacturer, the state also endures tax losses. Additionally, many health and security risks arise once consumers purchase counterfeit products.

There are plenty of regulations under Turkish law that battle counterfeiting which disfavor commercial goods. In this respect, provisions of the Turkish Trade Law (the **"TTL"**) relating to unfair competition are the most fundamental and general rules applied to counterfeiting as well as the Decree Law No. 556 on Protection of Trademarks (the **"Decree Law"**) and Customs Law No. 4458, which stipulates specific provisions for protection of registered trademarks.

Provisions of the TTL regarding unfair competition are general rules which are mostly applied in protection of unregistered trademarks. Article 56 of the TTL defines unfair competition and provides that all kinds of abuse of commercial competition due to deceptive behavior or actions in breach of good will rules constitutes unfair competition. Within the scope of this general definition, Article 57 sets forth the actions which constitute unfair competition including but not limited to the examples provided thereunder. Article 57/5 explicitly specifies that actions which infringe unregistered trademark rights are also to be considered within the meaning of Article 56, as actions subjected to unfair competition and against good will rules. Under the TTL, both civil and criminal sanctions are imposed on actions causing unfair competition in violation of the original product. Accordingly, the owner of the original product is entitled to demand (i) the factual consequences of unfair competition are removed; (ii) compensation for his/her loss should fault be established, and (iii) compensation for damages for loss and suffering. In addition to these legal sanctions, the relevant court may also impose fines and/or imprisonment as the said action is also a crime.

Provisions of the Decree Law have more specific characteristics. Hence, in matters relating to infringements of registered trademarks, the Decree Law, as a special regulation, will be applied in lieu of the TTL provisions on unfair competition, which are more general. Further to the latest amendments on the Decree Law, dated 28 January 2009, the following occasions will constitute infringement of a trademark right:

- Using a mark identical or similar to a trademark without permission of the trademark right holder;
- Selling, distributing or otherwise using in commercial practice products bearing the counterfeit trademark;
- Subjecting the product bearing the counterfeit trademark to a transaction or usage approved by customs;
- Introducing the good bearing the counterfeit trademark to the market or stockpiling for the same purpose; and,
- Using any kinds of signs which might damage the registered trademark's reputation or harm the registered trademark's distinctive feature.

These actions are heavily sanctioned under the Decree Law. In addition to the liabilities, one who damages a trademark right may be imprisoned up to 1-3 years and a legal monetary fine may be imposed (in consideration of 20,000 days). However, a trademark should be registered in Turkey in order to benefit from this protection under the Decree Law. Special protective measures

underline the importance of trademark registration.

In Turkey, a trademark right holder also enjoys protection under customs legislation which provides effective protection. According to customs regulations, during imports and exports, customs administration may seize goods with counterfeit and imitated trademarks as injunctive measures upon the right owner's request. In this way, import and transit passage of imitated goods are prevented. Notwithstanding import and transit passage of goods with counterfeit and imitated trademarks may be prevented as explained above, such circumstances may also be subjected to judicial and criminal proceedings to be initiated at specialist courts. In the presence of evidence proving that the said good bears a counterfeit trademark or is imitated, customs administrations may *sua sponte* stop custom transactions of the concerned good without prior request of the trademark holder. Thus, captured goods with counterfeit and imitated trademarks may be seized by customs administrations and they are prevented from being introduced to the market, consequently, unfair competition is prevented.

No manufacturer would be happy if the product in which s/he invests in and intends to gain profits from counterfeited or imitated goods. Once a product is counterfeited, both the state and consumers suffer alongside the manufacturer. Following a violation of the product's liability and counterfeit products are introduced to the market apart from the obvious damage to reputation and loss of income of the manufacturer, the state also endures tax losses.

In addition to the trademark protection procured by the Decree Law, the Turkish Criminal Code (the **"TCC"**) also brings criminal sanctions against manufacturing of certain goods. In fact, public health and safety is threatened as a result of manufacturing counterfeit goods and goods with imitated trademarks which might be consumed by the public, particularly medicines and food stuff. In such cases, protection of public health and safety will have a priority over protection of a personal right and therefore, criminal sanctions may be applied without prior request of the right holder. As an example, the TCC stipulates manufacturing or selling medicines in a way to threaten public life and health as a special crime and heavy sanctions are imposed with respect thereto.

The presence of administrative and legal authorities with adequate technical knowledge is mandatory in order to effectively implement the legislation mentioned hereinabove, which, in essence, contains efficient civil and criminal protective measures. Special units of customs administration and police successfully work in partnership against counterfeiting to prevent infringement of right holders' rights. Moreover, specific prosecutors are being assigned to look after these issues and specialist courts are prevalent as well as general courts. Hence, it is possible to say that a specialist practice is developing in respect hereof. As a matter of fact, while unfair competition cases are under the competency of commercial courts, cases concerning infringement of trademark rights, within the scope of the Decree Law, are under the competencies of Civil or Criminal Intellectual Property Rights Courts, which are specialist courts. These courts work effectively and grant decisions within reasonable times.

Consequently, there is sufficient legislation under Turkish law, providing effective protection in combating counterfeiting. Additionally, in practice, both administrative and judicial authorities provide effective enforcement against infringement of trademark rights, especially for right holders whose trademarks are registered in Turkey. Therefore, right holders should register their trademarks in Turkey in order to benefit from this protection and is particularly important in the combat against counterfeiting.

Telecommunications Law

Electronic Communications Law and its Effects on the Current Telecommunication Regime

Oya Uğur - Ferhan Karadeniz

The draft law on electronic communications has been under consideration since 2005. After a lengthy adoption process, the Electronic Communications Law No. 5809 (the **"Law"**) was published in the Official Gazette on 10 November, 2008 and entered into force save for Articles 8, 9, 10, 11 and 12 dealing with the authorisation which will be in force as of 10 May, 2009. The Law introduced significant changes to the electronic communications sector which we will examine below. The Law replaced the majority of provisions in the Telegram and Telephone Law No. 406 and the Wireless Law No. 2813 ("**Previous Laws**") with the exception of certain provisions which will remain in effect for a transitional period; it provided for a new system of authorisation in relation to the provision of electronic communications services and unified the electronic communications services and infrastructures under one main legislative umbrella by providing the integrity of terminology in the telecommunications sector. The aim of the Law is "providing effective competitive environment, protecting consumer rights, extending services countrywide, using national sources efficiently and encouraging technological development and new investments in the fields of communications infrastructures, networks and services in the electronic communications sector." While implementing regulations of the Law are yet to be introduced, in the meantime, the existing set of secondary legislation enacted prior to the Law will remain in place.

The Law replaced the majority of provisions in the Telegram and Telephone Law No. 406 and the Wireless Law No. 2813 ("Previous Laws") with the exception of certain provisions which will remain in effect for a transitional period; it provided for a new system of authorisation in relation to the provision of electronic communications services and unified the electronic communications services and infrastructures under one main legislative umbrella by providing the integrity of terminology in the telecommunications sector.

The amendments made by the Law also intend to bring the legislation in line with the 2003 package of electronic communications directives issued by the European Union Electronic Communications Framework. Although the Law does not incorporate all aspects of the European Union regime, it reflects harmonisation efforts.

Information Technologies and Communications Authority (ITCA)

With the enactment of the Law the "Telecommunications Authority" has become the ITCA. Prior to the enactment of the Law, powers and duties of the ITCA were stipulated separately under different laws and regulations whereas now they are listed together under the Law. The Law has not introduced any major change regarding the powers and duties of the ITCA.

New Authorisation Regime

The most significant amendment introduced by the Law relates to the authorisation regime. While telecommunication services can only be provided by means of authorisation agreement,

concession agreement, telecommunication licenses or general authorisation under Previous Laws, the authorisation regime has been simplified with the enactment of the Law. As for the new regime, before performing its activities, a company willing to provide electronic communications service or to establish and operate electronic communications networks or infrastructures shall notify the ITCA. As per the Law, if companies do not need an allocation of source such as number, frequency, satellite position for the provision of their electronic communications service or for the operation of their networks or infrastructures, a notification made to the ITCA will be sufficient to perform such activities. Procedures of such notification will be adopted by the ITCA. If companies need an allocation of source, obtaining a right to use authorisation is a condition precedent for providing such services.

Please note as per temporary Article 2 of the Law, operators authorised with telecommunication license or general authorisation prior to the effective date of this Law shall be deemed as granted right to use limited to the period in their authorisation provided that they make notification to the ITCA. Also, concession agreements and authorisation agreements of operators which were concluded before the effective date of the Law will be in effect until they expire.

> The most significant amendment introduced by the Law relates to the authorisation regime.

The authorisation for establishing and using all kinds of wireless communication systems is also regulated under this Law.

Also, as per the Law, upon application, the ITCA may grant a trial license to natural persons or legal entities to provide electronic communications services.

Fees and Tariffs

As per the Law, "authorisation fee" is composed of an "administrative fee" and "usage fee". Prior to the enactment of the Law, fees related to authorisation were stipulated as "authorisation fee" determined *via tender* or by the ITCA and "contribution fee" determined by the ITCA as 0,35 % of the operators' annual net sales. With the enactment of the Law, fees related to authorisation in Previous Laws have been unified under the name of "administrative fee" which will be determined by the ITCA in a way not to exceed 0,5 % of the operators' annual net sales within the previous year. "Usage fee", an extra financial liability, is collected from the operators in return for their right to use. The fee amount will be determined by the Council of Ministers upon both the ITCA's and Ministry of Communications' proposal. Since fees related to authorisation are no longer under the ITCA's discretion, the ITCA's authority to determine the fees has been restricted with the enactment of the Law.

As for the tariffs, operators will determine the tariffs freely and submit the same for approval of the ITCA as per the Law. The ITCA may determine both upper and lower limits of the tariffs. The ITCA will be entitled to determine the procedures and methods regarding approval, monitoring and controlling of the tariffs of the operators having dominant market power in the relevant market. Since a regulation on the same has yet to be issued by the ITCA, provisions of the Ordinance on Tariffs issued based on Previous Laws which are compatible with the Law are still in force. According to this ordinance, tariffs are approved by the ITCA in accordance with either by price cap method or on the basis of costs of efficient service provision.

Obligation for Access, Number Portability and National Numbering Plan

Before the enactment of the Law, these issues were dealt with through regulations in accordance with Previous Laws. With the enactment of the Law, the provisions of such regulations are stipulated under the Law.

Processing of the Personal Data and Protection of Personal Data Privacy

The Law entitles the ITCA to determine the procedures and principles related to processing of personal data and protection of personal data privacy of the subscribers and users. However, since the ITCA has not issued any regulation on the subject yet, relevant provisions of the Regulation regarding Personal Information Processing and Protection of Privacy in the Telecommunications Sector issued based on Previous Laws are still applicable. Another issue to point out is that the draft Law on Protection of Personal Information which has been under discussion for a long time should be enacted as soon as possible in order to assure the compliance of future regulations to be passed by the ITCA with such law.

Sanctions

The ITCA is entitled to impose fines on the persons in violation of the Law. The amount of fines compared to Previous Laws is higher whereas periods of imprisonment have been diminished.

Litigation

The Adjournment of Bankruptcy and Effects of the Decision

Levent Belli - Dilek Demirel

In Turkish law, the insolvency of equity companies and cooperatives is set forth as a "bankruptcy cause" under art. 324/2, 546 of the Turkish Commercial Code (the "**TCC**"), and under Art. 179 of the Enforcement and Bankruptcy Law (the **"EBL"**), insolvency is defined as inadequacy of the company's assets to discharge its debts or when liabilities of an equity company exceed its assets.

Postponement of bankruptcy of companies is based on the possibility that a company's financial state may recover. Its principal purpose is to decrease the destructive impact of financial crisis, in this respect immediately after the 2001 financial crisis, company rescue procedures and reconstruction of debts became regulated by the "Istanbul Approach" which was inspired by the "London approach". The "Istanbul Approach" provides an opportunity for companies to survive bankruptcy by reconstructing their debts. After this temporary regulation, in order to fill the legal gap, proceedings such as the adjournment of bankruptcy, the liquidation of debts by reconciliation and the cessionary bankrupt have been introduced by the EBL.

An adjournment of bankruptcy, by ceasing the enforcement proceedings against debtor companies, aims to enable companies to maintain and continue their commercial activities for as long as possible.

An adjournment of bankruptcy, by ceasing the enforcement proceedings against debtor companies, aims to enable companies to maintain and continue their commercial activities for as long as possible. In this regard, although the adjournment of bankruptcy was introduced by the TCC, owing to the fact that upon an adjournment of bankruptcy decision there were no procedures to stop enforcement proceedings against debtor companies, the desired result was not achieved. Therefore, adjournment of bankruptcy is now regulated by the EBL with amendments of 2003 and 2004. This has been more successful and its application more practical as it enables the suspension of enforcement proceedings against debtor companies.

According to Art. 179 of the EBL, amended by Law numbered 4949 and dated 17 June 2003, if insolvency is established by authorised representatives and directors of the company, or by official liquidators in case of liquidation, or by a creditor, or by the Court, bankruptcy is ordered notwithstanding a prior enforcement proceeding. The authorised representatives and directors or one of the creditors may demand the adjournment of bankruptcy by submitting an improvement project on the possibility to improve the company's financial state.

Relevant information and documents are required to present concrete parameters in order to evaluate the persuasiveness and rate of achievement of an improvement project. Provided the court finds the project persuasive and serious, the adjournment of bankruptcy is announced. The adjournment of bankruptcy is filed by authorised representatives and directors of the company or by a creditor before the Commercial Court. The

Court may adjourn a bankruptcy of a company for "one year", and may extend this duration up to four years at its own discretion, provided that it appraises the applied improvement project as useful to rescue the company.

Certain material and procedural conditions are required to acquire an adjournment of Bankruptcy decision. The material conditions can be listed as; insolvency, balance sheets establishing insolvency, persuasive and serious improvement projects and protection of interests of creditors. The insolvency of the company is required to be established by interim or annual balance sheets.

As previously mentioned, in order to grant an adjournment, the company is required to be insolvent. Companies whose assets exceed their liabilities can not enjoy the right to adjournment; in this regard creditors' interests are also preserved. In order to defeat the simulated transactions intending to present the company as insolvent, third persons may plead their objections to the insolvency. In this regard, the creditors can intervene to the legal process.

Under Art. 179 of the EBL, there is a requirement to prepare a project for improvement of financial state of the company. The Court shall announce the adjournment of Bankruptcy provided that it evaluates the project as persuasive and serious. Finally, a decision for the adjournment of bankruptcy would not violate a creditor's interest as their position is preserved can not be worse than it is on the bankruptcy's opening date.

Procedural conditions are mainly notification of the insolvency and existence of a claim regarding the adjournment of bankruptcy. Insolvency of the company shall be notified by the authorised representatives and directors of the company or by a creditor of the Court. The Court may not consider the adjournment of bankruptcy claim ex officio. The adjournment of bankruptcy shall be filed by the authorized representatives and directors of the company or by a creditor.

Upon the decision of an adjournment of bankruptcy, all pending enforcement proceedings, which have already started, cease and no further enforcement proceedings can be initiated. In accordance with Art. 179/b of the EBL, not only the enforcement proceedings but also proceedings based on the Act on Public Claims such as tax claims cannot be executed once there is an adjournment of bankruptcy decision.

Although none of the enforcement proceedings can continue upon the adjournment of bankruptcy decision, the enforcement proceedings of privileged creditors such as alimony, labour wages or those listed in Art. 206 of the EBL may proceed. The enforcement proceedings of the foreclosure may also proceed; however, the pledged assets cannot be liquidated. The adjournment of bankruptcy decision can be appealed, but it is executable and takes effect when it is granted. If the Court of Appeal reverses the decision, its effects cease *ex tunc*.

During the lawsuit, until the adjournment of a bankruptcy is announced by the Court, the current or possible enforcement proceedings may be blocked before the final decision by acquiring a temporary injunction. The application for an injunction may be submitted with the adjournment of bankruptcy claim. The Court, who has granted the adjournment of bankruptcy, may take all necessary measures in order to maintain the company's assets by taking into consideration creditor's interests.

Therefore, the adjournment of bankruptcy, under the TCC, is regulated by the EBL, thus the cessation of enforcement proceedings is stipulated upon the adjournment of bankruptcy decision. Nowadays, most companies enjoy the right to the adjournment of bankruptcy; herewith the aim is to save companies from bankruptcy. In this respect, it should be underlined that since all enforcement proceedings may not cease due to the nature and securities of the credits, pursuit of legal proceedings is a vital necessity for creditors of companies obtaining an adjournment of bankruptcy. Thus, it is advisable that creditors intervene to the legal process in order to protect their interests.

Enforcement of Foreign Arbitral Awards in Turkey

Seda Eren - Gözde Erdoğan

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (the "**Convention**") is the principal source of authority for the enforcement of foreign arbitral awards in the Republic of Turkey. Article 90 of the Turkish Constitution, ascribes international treaties the force of law within the hierarchy of norms, and therefore the Convention is treated as an internal law. The Convention takes precedence over other internal laws currently in force in Turkey as the Convention has been adapted after this legislation (*lex posterior*) and specifically regulates the enforcement of arbitral awards (*lex specialis*).

Turkey applies the Convention to only (i) recognition and enforcement of awards made in the territory of another contracting State of the Convention (foreigner arbitral awards) and/or (ii) differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law. Hence, arbitral awards adopted within Turkey (local arbitral awards) and relating to non-commercial matters are not governed by the Convention.

In view of the foregoing, the basic assessment to establish the Convention's scope of application rests on the determination as to which award may be deemed a foreign arbitral award. Thus, awards adopted outside of Turkey, irrespective of whether the arbitration was resolved in accordance with Turkish laws or not, fall within the scope of the Convention as these awards are deemed foreign arbitral awards. On the other hand, the arbitral awards of arbitration proceedings held within Turkey are not governed by the Convention as these awards are not considered foreign arbitral awards even where the arbitration is subject to foreign *ad hoc* arbitration rules, i.e. ICC Arbitration Rules, or foreign laws.

Law No. 5718 on International Civil and Procedural Law (the "**ICPL**") also governs the enforcement of foreign arbitral awards, it was adopted on 11 November 2007 and replaced the International Civil and Procedural Law dated 1982. The ICPL was recently enacted and has been drafted in accordance with the Convention; hence, a mechanism parallel to the Convention has been established. Article 1 of the ICPL explicitly states the ICPL shall be implemented without prejudice to the international treaties in force, therefore the ICPL may be applied where a party to the arbitration is not a contracting state of the Convention, or is not a party to any of the international treaties, bilateral or multilateral, ratified by Turkey. The ICPL may also be implemented where the Convention is inapplicable due to the reservations of Turkey to the Convention, which are listed herein above.

Whether subject to the ICPL or the Convention, the request for recognition of a foreign arbitral award for enforcement in Turkey (the "**Request**") should be filed before the competent Commercial Court of First Instance. Where there is no competent Commercial Court of First Instance at the relevant judicial district of filing, the parties may agree on the competent court provided that the agreement is in writing and explicitly states that the designated court will have jurisdiction over the enforcement proceedings.

The parties to the arbitration/arbitration agreement are entitled to file the Request which should be made by a petition to the competent or agreed court. The Request should be accompanied with (i) the arbitration agreement, (ii) a duly certified copy of arbitral award and (iii) the certi-

fied translations of these documents. There is no status of limitation on filing the application as the parties to the arbitration are primarily expected to obey the award voluntarily.

The arbitral award subject to the Request shall be final, enforceable or binding. The criterion of being final, enforceable or binding is a requirement of the Convention and has been adopted by the ICPL with recent amendments. Hence, a Request in relation to awards which do not finally settle the dispute may be denied by the court.

The Request may not be adjudicated in a way to examine the merits of the dispute settled with the award and substantive laws should not be applied to the award (the "**Revision au Fond Principle**"). The competency of the courts is limited to determining whether the award meets the conditions for enforcement as stipulated under the ICPL or the Convention, where applicable. The Supreme Court of Turkey enforces the applicability of Revision au Fond Principle in respect of arbitral awards with reference to the ICPL and the Convention. According to the common practice, if local courts, adjudicating a Request for enforcement, make a determination on or in relation to the merits of the case[1], then the decision would be ultra vires and the Supreme Court may over rule the decision. As an exception to the general rule if the foreign arbitral award violates the public rules of Turkey, the Revision au Fond Principle may not be applied.

The competency of the courts is limited to determining whether the award meets the conditions for enforcement as stipulated under the ICPL or the Convention, where applicable. The Supreme Court of Turkey enforces the applicability of Revision au Fond Principle in respect of arbitral awards with reference to the ICPL and the Convention.

If the opposing party of the arbitration is a contracting state to the Convention, or is a party to a treaty, bilateral or multilateral, ratified by Turkey[2], the requirement to meet reciprocity is not a pre-condition of filing a Request before Turkish courts.

The decision to be rendered upon examination of the Request may be (i) denial of the demand, (ii) partial acceptance of the award or (iii) full acceptance of the award; meaning, the court may deny the Request and therefore the award may become unenforceable in Turkey; or, the court may decide on enforcement of only certain parts of the award; or, may recognise the award in its entirety for enforcement. The decision of the court concerning the enforcement of the foreign arbitral award may be appealed before the Supreme Court in accordance with the general provisions of Turkish laws; there is no unique procedure for the appeal of such decisions. If appealed, the enforcement of the award should be suspended until the finalisation of the appeal process.

After the decision on the recognition for enforcement is finalised, the foreign arbitral shall be treated as a final court decision under Turkish law. The final decision is recorded on the arbitral award to be enforced and delivered to the requesting party. The requesting party may thereafter pursue the execution of the award in accordance with Turkish laws and procedures.

1 The decision no. 2003/5759 K., file no. 2002/13265 E. dated June 2, 2003 of 11th Division of the Supreme Court; The decision no. 2000/7171 K., file no. 2000/7602 E. dated November 9, 2000 of 19th Division of the Supreme Court;

2 There are several bilateral treaties between states and Turkey concerning enforcement of foreign arbitral awards and decisions. Among such states, only Macedonia is not a contracting state to the Convention.

Real Estate and Foreign Trade

Immovable Property Acquisition by Companies with Foreign Capital in Turkey

Gülşah Sözeri - Mine Alten

Recent amendments have been made to Article 36 of the Title Deed Law which removed restrictions regarding immovable property acquisitions by companies with foreign shareholding ("**Company**"). The Regulation regarding Acquisition of Immovable Property by Companies with Foreign Capital, published in the Official Gazette dated 12 November 2008 and numbered 27052, (the "**Regulation**") was enacted in line with Article 36 of the Title Deed Law, which covers the acquisition of right of property or a right *in rem* on immovable properties in Turkey by the Companies. The Regulation defines a Company as an incorporation in Turkey established or participated in by foreign investors. The Regulation does not draw a distinction according to the percentage of shares of the Companies owned by the foreign shareholders.

The Regulation regarding Acquisition of Immovable Property by Companies with Foreign Capital, published in the Official Gazette dated 12 November 2008 and numbered 27052, was enacted in line with Article 36 of the Title Deed Law, which covers the acquisition of right of property or a right in rem on immovable properties in Turkey by the Companies.

Application

The Company aiming to acquire a right of property or a right *in rem*, must apply to the Province Planning and Coordination Directorate of the Governorship *("Valilik İl Planlama ve Koordinasyon Müdürlüğü")* where the immovable property is situated with the necessary documents stated in the Regulation. While obtaining a right *in rem*, the scope for requested documents is narrower than those requested for acquiring an immovable property.

Once the application to the Governorship is made by the Company, the assessment process of the Governorship differs according to the right to be acquired.

Acquiring a Property Right

If the Company wants to acquire an immovable property (a property right), the Governorship makes its assessment in light of the information sent by Provincial Directorate of Industry and Trade (the "**Directorate**"), Turkish General Staff or any command post authorized by the General Staff (the "**General Staff**") and General Directorate of Security Affairs. The requested information from these institutions has to be provided within certain periods. The information sent by the Directorate is to decipher whether acquiring immovable property falls within the scope of the Company's main activities described in its Articles of Association. The General Staff determines whether the immovable property is in a military forbidden zone, military security zone or strategic zone, and decides whether it is appropriate to make an acquisition if the immovable property is in one of these zones. The General Directorate of Security Affairs determines whether the immov-

able property is in a private security zone.

If it is determined through the information provided by the General Staff and the General Directorate of Security Affairs that the immovable property, which the Company wants to acquire, is outside the military forbidden zone, military security zone, strategic zone and private security zone, the request of the Company is assessed by the Governorship in line with the information sent by the Directorate. In the event that the assessment of the Governorship in light of the information sent by these three institutions is positive, the outcome is notified to the Company and respective Title Deeds Registry Office; if the assessment is negative, the outcome is only notified to the Company.

In the event that immovable property is in the military forbidden zone, military security zone and strategic zone the General Staff informs the Governorship of its opinion. In cases where the opinion of the General Staff is positive, the Governorship responds to the request according to the information sent by the Directorate. In cases where the immovable property is in the private security zone, the assessment is made by the Commission. The Commission consists of the authorized representatives of Cadastre Directorate, Financial Office, Provincial Directorate Industry and Trade, Provincial Directorate of Security Affairs, Garrison Command. The chairman of the Commission is the Governor or the Deputy Governor. The Commission must decide unanimously regarding the acquisition of immovable property. The Commission, while making its assessment, takes into consideration the opinion of the General Staff and the information sent by the Directorate regarding state security and the main activities of the Company described in its Articles of Association.

Acquiring a Right *in rem*

A Company that wants to acquire a right *in rem* duly applies to the Governorship with the necessary documents, the Governorship makes its assessment regarding the Company's request in the light of the information sent by the Directorate regarding whether acquiring a right *in rem* is within the scope of the Company's main activities described in its Articles of Association. If the assessment of the Governorship is positive, the outcome is notified to the Company and Title Deeds Registry Office; if the assessment is negative, the outcome is notified only to the Company.

Change in the Capital and in the Shareholding Structure of the Company

The Undersecretariat of Treasury informs General Directorate of Land Registry and Cadastre regarding the companies with national shareholding which become foreign shareholding either in whole or in part and the participation of a new foreign shareholder to company with existing foreign shareholding on a monthly basis. The General Directorate of Land Registry and Cadastre informs the Governorships regarding these companies' immovable properties. Subsequently, the Governorship renders a decision in accordance with the above explained procedures which slightly differs for the aforesaid situations.

Compliance with the Regulation

The Commission makes an assessment as to whether the immovable properties and *rights in rem* are utilized by the Company in conformity with the Articles of Association. This assessment is initiated either on an *ex officio* basis or upon request of real persons and legal entities. If the Commission determines that the Company utilizes its acquirement contrary to the main activities described in the Articles of Association, the Commission may allow the Company to change the utilization in conformity with the Articles of Association.

If the Governorship determines that immovable property is utilized contrary to the Title Deed Law by the Company, the Governorship informs the Ministry of Treasury. Ministry of Treasury notifies the Company to liquidate the immovable property or a right *in rem* within six months. This period may be extended for one time only for another six months if there are reasonable grounds for such extension.

Amendments in the Free Zones Law

Ayşegül Önol

The application of free zones was introduced in Turkey with the Free Zones Law dated 6 June 1985 and numbered 3218 (the **"Law"**). This legislation permitted foreign capital entry into Turkey, encouraged the increase of foreign investments and enabled Turkey to profit more from international trade. However, on 6 February 2004 a law (Law No. 5084) amending the material provisions of the Free Zones Law came into force. The amendments made by the above mentioned law infringed the vested rights of investors by removing important tax incentives, which was the main reason foreign investors came to Free Zones in Turkey. Due to the material adverse effects of the Law No. 5084, after 2004 Free Zones regressed and lost their intended purpose. For more than 4 years, the Law and its provisions were heavily criticised. Finally, in order to address these issues, the Law regarding the amendments in the Free Zones Law and Custom Law dated 12 November 2008 and numbered 5810 (the **"Amending Law"**) was passed.

Temporary Article 3 of the Law added by Law No. 5084, stipulated that if tax-payers obtained their operating certificates before 6 February 2004, the earnings arising from their activities in the free zones would be exempt from income or corporate tax until the end of the certificate period and the income tax exemption for personnel employed in the Free Zones would last until 31 December 2008. It followed that the vested rights of users who obtained their operating certificates before the enactment of Law No. 5804 have been infringed, and the Free Zones which were advantageous due to tax exemptions have lost their attraction.

For more than 4 years, the Law and its provisions were heavily criticised. Finally, the Law regarding the amendments in the Free Zones Law and Custom Law dated 12 November 2008 and numbered 5810 was passed.

Since a great advantage provided to producers would be removed by the exclusion of these exemptions, the Amending Law included a provision which came into force on 1 January 2009, to the same article stating that until the end of the fiscal year when the full membership of Turkey to European Union is realised, the earnings of taxpayers arising from sales of the products produced in the Free Zones are exempt from income and corporate tax and employed personnel of the producing firms in the Free Zones shall be exempt from income tax if at least 85% of the FOB cost of the produced goods is exported. This determined percentage may be regarded as very high for foreign investors wishing to operate in the Free Zones, but the Council of Ministers is authorised to decrease the ratio to 50%.

As explained above, the income and corporate tax exemptions have been re-introduced only for taxpayers that carry out production activities. If tax payers in the Free Zones who obtained their operating certificates before 6 February 2004 are not involved in production, the income and corporate tax exemption of such users shall last until the end of their certificate period, and not until the date of the full membership of Turkey to European Union.

Pursuant to a new section which came into force on 1 January 2009, added to the same article as stated above, transactions realised and papers arranged with respect to the activities performed in these zones are exempt from stamp duties and charges until the end of the fiscal year when the full membership of Turkey to European Union is realised.

With the amendment made by Article 3 of the Amending Law, it is now possible to establish a right of easement on, or to lease the buildings and lands owned by the Treasury for a period of 49 years, whereas before the enactment of the Amending Law, the lease agreements made with the Treasury were for a period of 30 years for producers constructing the buildings and facilities on their own, on the land leased from the Treasury and for a period of 20 years for investors perform-

ing activities other than production.

In accordance with the amendment described above, the new temporary Article 5 of the Law gives the opportunity to the users to request from The Undersecretariat of Foreign Trade to extend the lease and certificate terms up to 49 years for the lands and buildings owned by the Treasury leased and certificated before the enforcement date of the Amending Law. For land and buildings under the possession of the State, usage permission may be obtained for the same period.

Besides the amendments discussed above, other significant amendments to the Law are as follows:

(i) With the amendments to Article 4 of the Law, the commission which approves the activities in the Free Zones has been changed from The Supreme Coordination Council of Economic Affairs to the Supreme Planning Council.

(ii) In Article 5 of the Law, the institution which grants the certificates has been changed from The State Planning Organization to The Undersecretariat of Foreign Trade.

(iii) Pursuant to the new version of Article 4 of the Law, a Free Zones Coordination Board has been established for the development of these regions and the determination of the strategies regarding the resolution of the relevant problems.

(iv) Temporary Article 6 which is included to the Law with the Amending Law, states that the Free Zones shall be deemed outside of Customs Territory of Turkey in terms of customs regime but, inside the Customs Territory of Turkey in terms of origin. This provision is added in order to ensure the conformity of the Free Zones Law with Customs Law. As with Temporary Article 6, the definition of "free zones" in Article 6 is also amended to ensure conformity with Customs Law.

(v) Pursuant to the old version of the Article 8, if the value of the goods of Turkish origin did not surpass US$500, these goods could optionally be exempted from export procedures. With the amendment in the Amending law, the upper limit of US$500 was increased to US$5000 in order to facilitate the entrance of the daily needs and materials to the zones.

In light of the above, the Amending Law aims to bring back the advantages of the old version of the Law in order to provide foreign investors with more favourable opportunities and to compensate the investors' losses incurred due to the negative impacts of the old amendments.

Turkey's Legislation and Practice against Dumping and Circumvention

Seda Eren - Seteney Nur Öner

The legal framework against dumping and circumvention has been amended upon ratification by Turkey of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the WTO Agreement on Subsidies and Countervailing Measures[1] (the "**Agreements**"), which in fact has the force of an internal law in accordance with Article 90 of the Turkish Constitution.

Pursuant to Law No. 3577 on the Prevention of Unfair Competition in Imports (**"Law"**), an anti dumping ("**AD**") investigation can be initiated and AD duties can be imposed on exports if (i) there is a finding of dumping in relation to the exports and (ii) there is a finding of injury, threat of injury or material retardation of the establishment of an industry. Determination of injury should be based on positive evidence indicating, without limitation, any of the following facts:

(i) There has been a significant increase in dumped or subsidized imports, either in absolute terms or relative to production or consumption; or

(ii) The prices of such imports have undercut those of the like product, and thereupon have depressed or suppressed the price of the like product; and there has been actual or potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; or

(iii) There has been an actual or potential adverse effect on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. There should be a causal link between dumped imports and the injury to the domestic industry.

Unlike AD investigations, an anti-circumvention investigation can be initiated in the absence of injury or material retardation of the establishment of an industry if there is a finding indicating that there is a change in the trading of a certain product following the application of a measure, which cannot be justified by any reason other than the circumvention of the applicable measures. Pursuant to Article 38 of Regulation on the Prevention of Unfair Competition in Imports ("**Regulation**"), domestic producers and the Directorate General have the right to pursue an anti-circumvention investigation provided that there is sufficient *prima facie* evidence that antidumping measures in force are being eliminated by means of changing the pattern of certain products' imported to Turkey.

According to this definition of circumvention under Article 2/(i) of the Decree on the Prevention of Unfair Competition in Imports ("**Decree**"), circumvention may occur through (i) a change in the pattern of trade that has been no justification other than to avoid existing remedies against dumping or (ii) a decrease in export prices in proportion with the anti-dumping duty applied - even though there is no change in the pattern of trade - to circumvent the intended purpose of the anti-dumping duty which is to remedy the injurious effects of the dumping (i.e. this is called "absorption" in the EU's AD practice where by the exporter lowers the export price and thereby absorbs the cost of the anti-dumping duty).

The expression "change in the pattern of trade" has not been defined under the Turkish AD legislation regarding the prevention of unfair competition in imports. However, Turkish circumvention practice demonstrates that Turkish AD Authorities primarily investigate whether or not there is a decrease in exports to Turkey from the country whose products are already subject to AD duties and a corresponding increase in the exports of the product from another country. The Turkish AD authorities also consider the status of the manufacturing operation under the Turkish non preferential rules of origin.

Turkish AD authorities closely investigate the extent and nature of the manufacturing process in the country subject to the circumvention investigation to assess whether any such change in the trading pattern can be justified. During this assessment normal business conditions including the structure and capacity of the company whose exports increased and prevailing market conditions in the country of manufacture or Turkey itself are considered. Unlike the EC, the Turkish legal provisions do not stipulate and the Turkish implementation practice has no thresholds for specific parts value or value added in the manufacturing process to avoid a finding of circumvention. The assessment by the Turkish Authorities is *ad hoc*, based on the facts and sector characteristics that they find in each case by taking into account what they consider to be normal business practice. As in the EC, Turkish law sets forth a list of processes that does not cover origin as they are too simple to confer any real change in nature of the products (e.g. labeling, storage, minor assembly).

> Unlike AD investigations, an anti-circumvention investigation can be initiated in the absence of injury or material retardation of the establishment of an industry if there is a finding indicating that there is a change in the trading of a certain product following the application of a measure, which cannot be justified by any reason other than the circumvention of the applicable measures.

In the event that the AD Authorities find circumvention, they determine a measure, i.e anti-dumping duty or countervailing duty, against the circumvention. Such measures may be attained to be enforced on (i) only certain manufacturers/exporters or (ii) only certain country or countries (iii) both one or more than one country and manufacture/exporter over varying rates of duty. Pursuant to Article 11 of the Decree as amended on 27 December 2005, anti-dumping duties and countervailing duties imposed may be extended as to cover like products or parts thereof and imports of such product from third countries.

Process of Anti-Dumping and Anti-Circumvention Investigations

AD and Anti-Circumvention investigations are carried out by the Department of Anti-Dumping and Subsidy Investigations (operating under the Directorate General of Imports of Republic of Turkey Prime Ministry Undersecretariat for Foreign Trade wheareas the Board chaired either by the Director General of Imports or by the Deputy Director General is authorised to initiate and terminate dumping or subsidy investigations carried out by the Department, and to decide on the duties to be imposed on exporting companies/countries with the approval of the Minister to whom the Undersecretariat is attached.

Investigations are initiated upon complaint or *ex officio*. However, the Undersecretariat informs that the *ex officio* has not been used so far. Pursuant to Article 21 of the Regulation, questionnaires shall be sent to the known importers and exporters of the product concerned following the initiation of the proceedings. Questionnaires shall be deemed to have been received one week from the date on which they were posted and parties shall be given 30 days to reply. The main expectation of the AD Authorities in sending a questionnaire is to establish the cooperation of the relevant parties as well as gather as much information as possible to make the correct assessment following an on-site verification. Therefore, the companies that receive a questionnaire have an interest in trying to reply the questions raised to avoid findings based on best available facts.

The Directorate General may also request additional information and documents from the parties at any stage of the investigation. In order to verify information provided or to obtain further details, verification visits may be carried out at the premises of the parties.

Statistics

Turkey has initiated 256 anti-dumping and 10 anti-circumvention investigations so far. As of 26 December 2008, Turkey has applied 95 anti-dumping measures, of which 4 are provisional and 6 are anti-circumvention measures. The investigations have been initiated against various

sectors; however the most investigated sectors are textile and chemical substances. 41% of the investigations between 2000 and 2008 were against the trade from the People Republic of China. Chinese Taipei follows the total of investigations initiated against Indonesia, South Korea and Malaysia which is 13% with 8%. The percentage of the investigations initiated against India and Thailand are 7% for each. 34 anti-dumping investigations were initiated in 2008, 23% of those investigations were initiated against the People Republic of China. Indonesia is ranked second amongst the investigated companies with 11%, India, Malaysia and Thailand follow with 9% for each. The investigated products were mainly substances of textile and chemistry.

On the other hand, the number of anti-circumvention investigations initiated between the years 2000-2008 are 8, two of which were against People Republic of China.

1 Both agreements were approved by the Council of Ministers Decree No.95/6526 dated 3 February 1995

Environmental Law

The Kyoto Protocol

Ayşegül Önol

The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change (the "**Convention**") which is an international environmental treaty. The Kyoto Protocol which is ratified by more than 180 countries, entered into force on 16 February 2005. Turkey has been a party to the Convention since 24 May 2004 but postponed the signing of the protocol for over a decade due to concerns about financial costs. On 5 February 2009, the Turkish Assembly ratified the Kyoto Protocol. Hence, Turkey has finally taken a major step in ratifying the Kyoto Protocol which signifies compliance with European Union standards and demonstrates that Turkey will be joining the European Union's battle against global climate change.

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The objective of the Kyoto Protocol is to lower the overall emissions of six (GHG) greenhouse gases[1] in the atmosphere in order to prevent and end the dangerous effects of these emissions on the climate. In order to achieve this goal, the Kyoto Protocol imposes certain global rules on its parties.

As per the mechanism established by the Kyoto Protocol, countries are categorised into two groups that are assigned different responsibilities. The countries listed in Annex 1 (Annex 1 Countries) of the Kyoto Protocol are developed countries. Since these developed countries with their industrial activities are the main contributors to the GHG emission in the world, and they are mainly held responsible for reducing the GHG gas emission.

Between 2008 and 2012, the Annex 1 Countries must reduce their collective emissions of GHG by 5.2% compared to emissions in 1990. Accordingly, if an Annex 1 Country's emission ratio exceeds the limit, then that country will have to purchase GHG emission reduction credits from others in order to comply with the GHG emission limit. The purchase of GHG reduction credits are realised through financial exchanges. If an Annex 1 Country does not comply with the emission restrictions, then such country will be liable for compensating the difference plus an additional 30%.

The countries that are not listed in Annex 1 (Non-Annex 1 Countries) are developing countries which are not deemed to be mainly responsible for the current environmental and climatic conditions the earth is suffering. Accordingly, Non-Annex 1 Countries are not subject to emission limits or the need to purchase GHG emission reduction credits but share a common responsibility of reducing the emissions. Contrary to Annex 1 countries, the emission reduction is not a burden but an incentive for Non-Annex 1 countries as they receive "carbon credits" which they can sell to Annex 1 countries.

As Turkey is not an Annex 1 Country, it is not

subject to emission limits until 2012. However, since the Kyoto Protocol is valid until 2012, another protocol will be signed in Copenhagen on December 2009 which will bring new responsibilities and liabilities to the member countries. Within this framework, the expected trends to be adopted by Turkey under the Kyoto Protocol are; reduction of GHG emissions, modernisation of refuse and waste system, renewal of the legislation related to the reduction of GHG emission arising from heating and industrial and motor vehicles, increase of solar energy use, use of environment friendly fuels such as bio-fuels, charge of additional taxes unless the consumed fuel ratio exceeds the produced carbon ratio, renewal of the infrastructure of industrial plants in order to reduce carbon dioxide emission, and establishment of new technologies which will enable less carbon emission in energy generation. In terms of transportation, railways and vehicles that operate with bio diesel and electrical energy will be developed further.

In light of the above, though the ratification of the Kyoto Protocol does not create specific responsibilities for Turkey until 2012, however in the long run Turkey will have to make essential changes in order to protect the environment. Despite the fact that Turkey's responsibilities will not begin until 2012, the government should begin preparations by raising public awareness and guiding the industry in light of the future environmental regime.

Within the scope of the Kyoto Protocol the Turkish government will encourage projects in the private sector that aim to reduce GHG emissions, which will result in contribution to the local economy and improve the quality of life. Respectively, the Turkish government's positive attitude towards renewable energy resources along with raising public awareness will be highly anticipated by the organisational groups and the related energy industry in the near future.

1 Carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydofluorocarbons and perfluorocarbons

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