

UPDATE ON PRIVATIZATION

On 10 May 2012, Law on Amendment to Certain Laws and Statutory Decree on Establishment and Duties of Public Monitoring, Accounting and Auditing Standards Institution (the “**Law**”) has been published in the Official Gazette and has entered into force accordingly. Pursuant to Article 10 of the Law, an additional article has been added to the Law on Implementation of Privatization (the “**Privatization Law**”) stipulating that “...following the completion of procedures relating to the sale and transfer of institutions as a result of privatization transactions by way of executing the final sale agreements, if there occurs any irremediable situation as a result of an actual impossibility due to completion of all legal, commercial and financial transactions related to production, investment, modernization and employment activities of the acquirer of the said institutions, the Council of Minister shall be entitled to adopt decisions regarding the acts and transactions to be carried out with respect to the implementation of the court decision adopted in relation thereto.”

The meaning and the intention of the article seems quite unclear; however, it may be concluded that the said provision basically legalizes a practice which was applied several times by the Council of Ministers and Privatization Administration Authority in the past¹. The said article explicitly sets forth the entitlement of the Council of Minister to disregard any court decision cancelling the privatization transaction, if the acts and procedures carried out within the framework of a privatization transaction reach a *point of no return* and if the implementation of the court decision with respect to such acts and procedures is considered as impossible. This mostly happens where the relevant judicial authority (in particular, the Council of State) does not resolve on stay of execution with respect to a claim raised against a privatization transaction; however, intervenes at a later stage and decides to cancel the transaction where the actual transfer of such privatized entity and several related transactions have already been completed.

The Council of Ministers has recently exercised its power on 12 June 2012 in relation to five privatization transactions, namely;

1. Privatization of Eti Alüminyum A.Ş. through sale of 100% of its shares,
2. Privatization of Kuşadası Port through transfer of operational rights,
3. Privatization of Çeşme Port through transfer of operational rights,
4. Privatization of Balıkesir Operation of SEKA through sale of assets,
5. Privatization of Türkiye Petrol Rafinerileri A.Ş. (Turkey Oil Refinery JSC) through sale of 14,76% of its shares in Istanbul Stock Exchange.

As a result, it is resolved that no action will be taken in relation to the court decisions cancelling the said privatization transactions (either retroactively or prospectively) and that all the acts and transactions carried out by the Privatization Administration Authority in that regard be carried on and finalized in order to complete and to give effect to such privatization transactions.

To conclude, this regulation may serve as a better protection for the investors and more importantly, it may result in acceleration of court proceedings in respect of privatization transactions.

¹ The privatization of Uçak Servisi A.Ş. and Türkiye Çimento ve Toprak Sanayi A.Ş. in 1989 and sale of certain assets of Sümer Holding A.Ş. and Türkiye Denizcilik İşletmeleri A.Ş. together with privatization of Havaalanı Yer Hizmetleri A.Ş. (HAVAŞ) and PETLAS Lastik San. ve Tic. A.Ş. in 1997.