PRIVATIZATION IN TURKEY

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Privatization, in basic terms, means assignment of properties or management of economic production units of states to private sectors. Privatization is a procedure which aims to minimize state involvement in industrial and commercial activities in the economy and it is a general result of liberal economic policies adopted by states.

This brief note aims to provide a general understanding on the following headlines: (i) introduction (providing general information regarding to privatization implementations by numbers), (ii) applicable legal regulations, (iii) privatization procedures and methods, (iv) approach of jurisdiction to privatization implementations and finally (v) conclusion.

1. Introduction

The major economic changes in the 80's created a new era for the world economy, where privatization has become one of the most essential and indispensable financial reforms on the economic agendas of many nations. Similarly, privatization has also become part of Turkey's agenda since 1984.

As reflected in the "Report of Privatization Constitution" of Privatization Administration and Turkish Grand National Assembly, since 1985, privatization in Turkey has developed and became important increasingly. Pursuant to the report, from 1986 until 2010, the State's shares in 270 companies, 104 establishments, 22 incomplete plants, 8 toll motorways, 2 bridges on Bosporus, 1 service unit, 788 real estates and 6 ports have been taken into the privatization portfolio. The total income of the State from privatization transactions is recorded as USD 41.9 billion since 1985. More than 50% of the State shares in tourism, iron and steel, textile, sea freight and meat processing sectors were privatized. In addition to those, the State also withdrew completely from cement, animal feed production, milk-dairy products, forest products and catering services and partly from ports and petroleum refinery sectors.

It is obvious that privatization has economic advantages for the State such as increasing the efficiency of services, establishing competition in the market and decreasing the expenses of national budget, it has certain undeniable disadvantages such as unemployment. Due to the privatization transactions between 1986 and 2006, 22.000 people became unemployed.

2. Applicable Legal Regulations

Since 1984, there have been numerous amendments to the laws on privatization. As of today, Implementation of Privatization Law, numbered 4046 and dated November 24, 1994 ("IPL") is the main regulation that governs privatization.

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Directorate of Privatization Administration ("DPA") with its two main organs, is the administrative body responsible from privatization transactions and the application of IPL. These two main organs are Privatization High Council ("PHC") and Privatization Administration ("PA"), both of which are constituted by the law.

In respect of Article 3 of IPL, the major duties of PHC includes: (i) maintaining the privatization portfolio, (ii) deciding the methodology and time of the privatization procedures, (iii) approving the final decisions of tenders awarded by the bidding committee, (iv) deciding the termination of state-owned economic enterprises' activities in privatization portfolio.

PA's main responsibilities are regulated under Article 4 of IPL some of which are as follows: (i) execution of PHC's decisions, (ii) advising the PHC in matters related to the transfer of State Economic Enterprises ("SEE") in or out of privatization portfolio, (iii) management of privatization fund, (iv) lending to state-owned economic enterprises in privatization portfolio and setting the interest rates and conditions of financing.

3. Procedures and Methods of Privatization

In order to achieve best results from the transactions, IPL stipulates several methods for privatization and tendering which are as follows:

3.1. Preparation to Privatization Implementations

In general, privatization process first initiates with the suggestion of PA an enterprise to PHC for its approval for the inclusion of the enterprise in the privatization portfolio as stated in Article 1 of IPL. In case the inclusion of the enterprise in the privatization portfolio is approved by PHC, the method of privatization and value assessment are determined respectively by PHC and Value Assessment Commission ("VAC") before each tender pursuant to the provision in IPL. Thereafter, a Tender Commission ("TC") is established and is responsible to carry out all bidding process and tender methods.

Pursuant to the Article 3 (c) of IPL, the method of privatization is decided individually for each tender by PHC. The main methods of privatization pursuant to Article 18 (a) of IPL are (i) sale, (ii) lease, (iii) transfer of management rights, (iv) establishment of rights other than ownership, and lastly (v) income sharing model. Sale method can be implemented as an asset sale or the sale of shares. It is possible to accomplish the sale of shares through a block sale, sale to employees, sale to securities investment funds and or securities investment partnership or any combination of these.

After the privatization method is decided, the tender method is determined by TC. Tender may be carried out by closed bidding, bargaining and public auction. Pursuant to the Article 18 (c) of IPL, in case the privatization is carried out through a block sale, the tender method shall be bargaining.

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Following the above, a tender specifications document which includes the tender value, conditions for the bid bond, finalization of bidding and other relevant matters is prepared. Thereafter, a tender notice is published stating the deadline for the application and other matters related to the procedure.

3.2. Participation in the Tender and Awarding

A bidder must meet the qualifications set forth in the tender specification and must provide domicile in Turkey for notices. If these conditions are met, the bidder shall provide a bid bond at the value determined by PA, no less than 3% of the amount of tender value pursuant to the Article 19 of The Privatization Administration Tender Regulation ("TR"). After the bids are presented by the deadline, tender is carried out according to the method determined in the tender specification.

Following the award of the tender, except otherwise provided, the winner is requested to give a performance bond which shall be valued at least 6% of the tender value. After the presentation of the performance bond, if all conditions are met, a contract between DPA and the winner of the tender is signed and executed. The bid bond is only returned to the winner after the execution of the contract. Pursuant to the Article 42/2 of TR, DPA is entitled to keep the bid bond of the winner as a revenue, without any notification, in case of the failure in providing the performance bond by the winner. However, the bid bonds provided by the other bidders are returned following the award of the contract.

Pursuant to the Article 20 of TR, bid bonds and performance bonds shall be issued in the form of a letter of guarantee unlimited in time and in Turkish Lira in circulation, by the banks or the government.

In case the winner does not fulfill his obligations arise from the contract and tender specifications, DPA may send a notification requesting the winner to remedy any breach. If the breach of the contract or the tender specifications are not remedied despite of the notification, DPA is entitled to unilaterally terminate the contract and keep the performance bond as revenue, without any further notification.

Bid bonds and performance bonds are provided as a security and to assure the fulfillment of all obligations arise from tender transactions. Failing to provide these results in forfeiture of the rights of the winner or the bidders. In tenders for electricity distribution in six different geographical areas, the winners of the five of these areas failed to complete the bonds (around USD 1888 million for five geographical areas in total) until the additional time provided and their bid bonds valued at USD 75 million were registered as revenue as a result.

3.3. Courts' Approach to Privatization Transactions

One of the main lawsuits filed against privatization transactions is the nullity suit. These lawsuits are administrative lawsuits in nature and therefore subject to Administrative Procedure Law ("APL"). Between 1997 and 2008, the numbers of the nullity suits have increased significantly as article 2/1 of APL

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stipulates that any person whose rights are affected negatively from an administrative transaction or decision may file a nullity suit. Even though there has been an amendment in the article 2/1 of APL to limit the persons who may file a nullity suit, Constitutional Court has rescinded this amendment by its decision numbered 1994/2507.

With regard to nullity suits, Council of State's decisions are not clear as well. In one of its decisions regarding the privatization of Sümerbank, Council of State has interpreted the "negative effect in a person's right" in a strict way, stating that a person must have participated in the privatization process in order to file a nullity suit. Nevertheless, in its many other decisions (i.e. transfer of electricity distribution to Aktaş Corporation), it has decided that the employees of the privatized enterprise, any citizen or unions may file a nullity lawsuit. In those decisions, Council of State emphasized that allowing only the persons to file a nullity suits against privatization transactions would limit and exclude the judicial control on such transaction substantially.

In general, there are four main reasons for the annulment of privatization transactions: (i) lack of Council of State's control on concession agreement (as mentioned in the case of ENKA), (ii) lack of a competitive environment (as mentioned in the case of TUPRAS), (iii) use of wrong valuation methods (as mentioned in the case of SEKA) and finally (iv) lack of investment goal or commitment (as mentioned in the case of İSKENDERUN PORT). The last reason is considered as the most controversial as there are no consistent court decisions and precedents regarding this issue. For example, Council of State has decided that the lack of investment goal in a tender process cannot be considered as a cause for annulment of the tender in its TUPRAS decision whereas it has decided in a exactly opposite way in its İskenderun Port and Seydişehir Eti Aliminium decisions. Due to this discrepancy in Council of State's decisions, it is not clear whether an investment goal before the tender should be determinedor not. However, in its decisions, Council of State considers whether the rules of market economy would be applicable to the investments following the privatization transactions.

4. Conclusion

The privatization in Turkey has been developed significantly in the last decade even though the privatization has been in Turkey's agenda only since 1984. The incentives such as renewed legal frameworks and governmental promotions helped considerably in this development.

As there are discrepant decisions of the Council of State regarding the annulment of tenders for the reasons of lack of public ware, public services or investment goal, the courts' approach to the privatization transactions is the most controversial topic.

We believe that consistent court decisions which may provide more detailed justifications and specify the main terms such as investment goals, would help in development of privatization in Turkey.

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This guide is intended to provide general information regarding the subject matter and cannot be considered as a complete and binding legal advice. Please seek professional advice for your specific conditions.

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