

Liberalization of Turkish Railway Sector

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The Law regarding the Liberalization of Railway Transportation in Turkey No. 6461 (the "Law No. 6461") replacing the state monopoly in the rail network and train operation with a competitive and transparent market environment has entered into force as of 1 May 2013¹. The long-awaited liberalization initiative paves the way for the legal harmonization of railway transport in Turkey with the European legislation which is relentlessly striving for greater competitiveness in the rail network and train operation services reiterated via the Fourth Rail Package proposed by the European Commission in January 2013.

Although the Law No. 6461 is supposed to be the cornerstone of the liberalized railway transport policies of the Turkish government, it is not the first step taken to achieve such goal in the railway sector. Enactment of the Law No. 6461 has already been recalled by adoption of the Governmental Decree concerning the Organization and Duties of the Ministry of Transport, Maritime Affairs and Communication No. 655² ("Decree No. 655").

I. Establishment of the railway regulation directorate

The Decree No. 655 established a special service department named as General Directorate of Railway Transport Regulation (the "**Railway Regulation Directorate**"), that is attached to the Ministry of Transport, Maritime Affairs and Communication (the "**Ministry**"), vested with special regulatory powers such as:

- Specifying operation and service principles as well as financial and professional requirements applicable to service providers and issuing licenses for operators wishing to take part in the railway transport business;
- Keeping a registry of all and any kind of rail vehicles;
- Specifying minimum safety requirements for all operators and granting the relevant safety certificates to those complying with these requirements;
- Specifying the rules and principles in connection with the public service obligations;
- Settling disputes that may arise between the market players relating to the right of access to the railway infrastructure, allocation conditions and charges required;
- Conducting technical and safety inspections; and
- Fixing minimum and maximum fees for provision of transport services including use of infrastructure.

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2 Published in the Official Gazette No. 28102 (Repeated) dated 1 November 2011

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In addition to the foregoing authorities listed in Article 8 of the Decree No. 655, the Railway Regulation Directorate is authorized to issue-when required- other secondary legislation pursuant to Article 28 of the Decree Law No. 655 in order to further elaborate on issues like price, duration, scope and form of the licenses. Likewise, the Railway Regulation Directorate is also entitled to impose administrative sanctions including the administrative fines.

Nonetheless, Temporary Article 8 of the Decree Law No. 655 announced that the powers attributed to the Railway Regulation Authority relating to liberalization of the rail sector shall not gain legal effect unless the State monopoly in the railway sector is removed. In this respect, eagerly-awaited enactment of the Law No. 6461 will mark the turning-point as it enshrines the mentioned removal.

II. Main features of the Law No. 6461

1. Scope and effectiveness of the Law No. 6461

The scope of the Law No. 6461 is limited to railways at the national level. Therefore, metros, trams and light rail systems along with rail networks within mining and industrial facilities do not fall within the scope of the Law No. 6461.

Apparently, the Law No. 6461 has entered into force upon its publication in the Official Gazette. The proper implementation of the railway market restructuring cannot, however, be entirely ensured unless the relevant secondary legislation is issued. According to Article 6 of the Law No. 6461, it is envisaged that a regulation setting the conditions for qualifying as a public or private operator entitled to perform services in the relevant markets (*i.e.*, network operator or train operator) will be issued.

2. New market activities

For the purpose of liberalization and restructuring of the Turkish rail market, the Law No. 6461 identifies three types of market activities to be performed by public or private companies:

- (i) Construction of the railways which will be under their disposal,
- (ii) Operation of the railway network which will be under their and/or third parties' disposal,
- (iii) Operation of the trains by using the national railway network (*i.e.*, carriage of goods/passengers)

Public corporations and any kind of commercial enterprises are entitled to carry out those activities if and to the extent that they comply with the technical and safety requirements, and are granted the license by the Ministry

The network operators are obliged to determine the fees, which are required to be paid by the train operators in an equal and non-discretionary manner considering the right to access to the network.

3. Spin-off of the General Directorate of State Railways ("TCDD")

By virtue of the Law No. 6461, TCDD which used to perform all infrastructure construction, maintenance and operation as well as train operation related activities in a monopolistic way will enter into an unbundling process of its railway operation activities and train operation activities.

More precisely, the Law No. 6461 discharges TCDD from its train operation related duties. It provides that a new affiliate company of TCDD to be incorporated as a joint stock company under the trade name of TCDD Taşımacılık A.Ş. will assume such duties and powers from now on. Upon completion of its registration, TCDD Taşımacılık A.Ş. will gain its legal entity and will be subject to the provisions of the Decree Regarding State Economic Enterprises No. 233 since it is entirely owned by the TCDD.

As a requirement of the unbundling process, TCDD Taşımacılık A.Ş. will possess its own financial, legal and human resources allocated to the smooth functioning of the train operation business. According to Temporary Article 1 of the Law No. 6461, certain assets of TCDD will be transferred to TCDD Taşımacılık A.Ş. through a spin-off process which concerns all the relevant vehicles and trains along with the personnel employed in the train operation service unit. Among properties necessary for providing train operation services, movables will be transferred to TCDD Taşımacılık A.Ş. whereas the immovable will be allocated for utilization by TCDD Taşımacılık A.Ş. for ten-year period. Besides, lawsuits and execution proceedings relating to disputes arising from train operation related activities of TCDD will be followed up by TCDD Taşımacılık A.Ş.

All relevant transfers are required to be completed within one-year time subsequent to the incorporation date of TCDD Taşımacılık A.Ş. Meanwhile, TCDD will continue to offer train operation services. According to the new structure established by the Law No. 6461, the authority and duty to regulate the railway traffic along the lines owned by TCDD and the lines to be constructed by other railway operators will remain within the competence of TCDD. In other words, TCDD will be the only authority in charge of directing the railway traffic flow in exchange of the fees levied on the operating companies. Further, operating trains will fall within the sphere of TCDD Taşımacılık A.Ş. or other train operating companies once certified by the Ministry.

Finally, TCDD and TCDD Taşımacılık A.Ş. will still be subject to the Public Procurement Law No. 4734; however, procurement of goods and services by TCDD and TCDD Taşımacılık A.Ş. from other affiliates of TCDD are exempt from the Public Procurement Law No. 4734.

4. Bolstering public and private infrastructure investments

The Law No. 6461 seeks to rapidly improve and expand the railway network by giving the lead to both private and public investors in infrastructure projects. In the forthcoming structure, TCDD will acquire title to all immovable properties that have been allocated to its services and will be able to undertake construction of new railway lines in its own capacity. However, since infrastructure investments demand excessively high funding, the Law No. 6461 acknowledges that there will be allocations deriving from the Ministry budget. Such state-funding may finance programed projects including construction of the high-speed train lines as well as conversion of the existing lines into double-track or multiple-track lines, their repair and maintenance works along with construction of other complementary facilities for signalization, electrification and communication services.

The Law No. 6461 facilitates private sector involvement in infrastructure investment by allowing expropriation of the necessary property for realization of the project by the Ministry on the condition that the private investor accepts to pay for the expropriation costs. In such case, the private company will be entitled to an easement right over the expropriated lands for a period up-to forty-nine years and will be authorized to operate the relevant lines during this period. When operation period elapses, the Ministry regains full property of the relevant lands and facilities constructed on them.

It must be noted that the private or public investors can either prefer to operate the railway network personally or prefer to delegate such operation rights to a third party operator. This possibility applies to both existing lines and to those that will be further constructed by private or public companies.

5. Public service obligations

Passenger transportation by train to ensure the freedom of movement remains as one of the exceptions to competitive market policies. In this respect, it is essential to make sure that everyone has access to a railway transportation service at affordable prices. The Law No. 6461 allows the Ministry to delegate such liabilities within the framework of bilateral agreements to be entered into with public or private train operators. Article 8 of the Law No. 6461 sets the compulsory content of such agreements. Accordingly, the following provisions will, among others, take place in the agreements:

- term of the agreement;
- line along which the transportation will be realized;
- transport fee for line passengers;
- minimum frequency of circulation; and
- methods applicable for fee payment

As expected, the Law No. 6461 recognizes that performance of such public service liabilities may prove to be economically unsustainable and thus necessitate allocation of compensation from the central Ministry budget. With the aim of minimizing the uncompetitive impacts of public service compensations and prevention of cross-subsidizing, it is required that the train operator companies or public entities shall keep income and expenditure accounts and accounting records separately in relation to each of the following activity areas; carriage of goods, carriage of passengers and performance of public service obligations.

The Council of Ministers is normally entitled to determine the lines within the scope of public service obligations and relevant train operators which will perform public service obligations. Nevertheless, pursuant to Article 4 of the Law No. 6461, TCDD Taşımacılık A.Ş. will be responsible for public service obligations for the first five-year term upon entry into force of the Law No. 6461.

6. Transition period: State Aid to TCDD and TCDD Taşımacılık A.Ş.

The Law No. 6461 defines a transition period of 5 (five) years starting from the effectiveness date of the Law No. 6461 during which activities of TCDD and TCDD Taşımacılık A.Ş. including public service obligations will be financially supported with allocations from the central budget. The state-funding aims to help TCDD maintain its budget balance while the market growth and transaction volume are insufficient to afford its expenditures with its main income source namely, infrastructure utilization fees. While TCDD receives direct financial support, budget deficit arising from activities of TCDD Taşımacılık A.Ş. will be eliminated via allocations received from TCDD to be added to paid capital of TCDD Taşımacılık A.Ş.

Conclusion

Involvement of private sector in the railway network operation and transportation services will pioneer the liberalization of Turkish railway sector that ultimately needs large scale investments. Tough the licensing regime applicable to the private companies will be governed by the regulation to be issued by the Ministry; the Law No. 6461 clearly lays down the principle in this regard. Given the then monopolistic structure of TCDD, unbundling of the network operation and train operation activities of TCDD and establishment of TCDD Taşımacılık A.Ş. as the state-owned transportation company are of material importance. However, it should also be borne in mind that the regulation of public service obligations and long term control of state aids to TCDD and TCDD Taşımacılık A.Ş. are also vital for the achievement of liberalization and smooth-operating market.