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Headnotes:

Parliament has the power to determine which investments and services carried out by the State, State Economic Enterprises and other public corporate bodies are to be delegated to and performed by real or corporate bodies through private law contracts. A provision of Turkish law which defined those production activities of public bodies which could be described as "concessions" was constitutional.

Summary:

I. Law no. 4006 regulates privatisation and makes amendment to various laws. Article 15/2 of the Law indicates those public sector activities which are to be recognised as concessions. This definition includes the production of goods and services under a monopoly by those administrations which fall within the general and subsidiary budget and by revolving funds linked to those administrations, as well as the production of goods and services under the auspices and within the aims of Public Economic Institutions. Other activities will not be regarded as concessions. Agreements and contracts fulfilled under Article 15/2 relating to the activities described above will be regarded as concession agreements and contracts. The article does not affect specific provision in other legislation for these issues.

The Tenth Chamber of the Council of State asked the Constitutional Court to rule upon the conformity with the Constitution of Article 15/2. The Chamber pointed out that the production of goods and services by Public Economic Institutions are regarded as concessions under the contested provision while production by Economic State Institutions is not. Public Economic Institutions in Turkey are defined as those institutions whose entire capital belongs to the State. By contrast, the entire capital of Economic State Institutions belongs to the State, but they operate according to the rules of commerce. The Chamber argued that Article 15/2 creates inequality between Public Economic Institutions and Economic State Institutions, which is against the Constitution.

II. The Court in its judgment indicated that a State governed by the principle of the rule of law, under Article 2 of the Constitution, is one which respects human rights and strengthens those rights and freedoms. Its acts and actions must be open to judicial review and the legislator must be aware that there are fundamental principles governing the laws and those principles have to be respected. Nonetheless, under Article 47/4 (as amended by Law no. 4446) investments and services carried out by the State, State Economic Enterprises and other public corporate bodies which could be performed by or delegated to real or corporate bodies through private law contracts shall be determined by law. This means that it is within the State's powers that investments and services carried out by the State, State Economic Enterprises and other public corporate bodies are delegated or performed by real or corporate

bodies through private law contracts. Article 15 of the Law no. 4046 envisages that some goods and services are to be regarded as concessions. It is within parliament's discretion not to accept that the production of other goods and services is excluded from concession.

The contested provision was not found to be in breach of Articles 2 and 47 of the Constitution. Justice Kantarcioglu put forward a dissenting opinion on the reasoning of the judgment. The Court also ruled that the contested provision was not related to Article 10 of the Constitution.