RECALL PRACTICE AND LEGISLATION for AUTOMOTIVE PRODUCTS IN TURKEY[1]

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I. KEYWORDS

Automotive, product, product safety, product liability, recall, technical regulation, vehicle, surveillance, consumer protection, manufacturer, defect, defective product, unsafe product

II. SYNOPSIS

1. Turkey is roughly the 15th largest automotive manufacturer in the world and 5th largest in Europe. With more than 1,000 component suppliers supporting the production of OEMs, Turkey is home to many global suppliers. More than three quarters of the production in Turkey is destined for foreign markets, making Turkey the biggest vehicle exporter to European markets with one million units in a normal year.
2. In order to meet the technical requirements globally in general and European in particular, Turkey follows a strict technical legislation in the manufacturing and automotive industries. The secondary legislation is much like identical to the European Union's Acquis Communautaire, which is automatically adopted into local regulations, whereas the primary legislation follows the similar approach and mindset.
3. The manufacturers have the clear burden for product safety, which is practised through voluntary recalls and market surveillance by the authorities. The authorities have the authority to qualify the products as unsafe upon a surveillance inspection, if the manufacturer omits a voluntary recall. In this case, the authorities may give the manufacturer and / or importer time to eliminate the related unreliability, and have the power to take measures such as preventing products from being put in the market, recalling and putting them out of service and /or disqualifying from being introduced to or used in the market. That risk is unlikely to occur in case voluntary recall application is made on time.
4. Throughout the recall process and as a result, it is considered that measures regarding the type approval and conformity certificate within the scope of the technical legislation and the administrative sanctions will not be applied.

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[1] Law No. 4703 on Preparation and Application of Technical Legislation is the main law on product safety. It was enacted on 29th June, 2001, following the European Union regulations in place. On March 12th, 2021, it will be replaced by Law No. 7223 on Product Safety and Technical Regulations, enacted by the parliament on March 5th 2020 and published on the Official Gazette on March 12th, 2020.
The new law on one hand keeps the backbone of Law No. 4703, on the other hand reflects the developments in acquis communautaire introduced until year 2020, which had significant changes in 2010 and 2019. The new law introduces an extension of (i) the manufacturer's, exporter's and distributor's liabilities, (ii) transparency on the conformity of products and (iii) the surveillance and inspection of the market and the products.
This paper reflects the current legislation in force and needs to be updated in the beginning of year 2021 in order to reflect the changes in the regulation and the practice.

5. Voluntary recall serves as an admission that there is a defect in the product in terms of consumer law. Although there is an obligation in the general and automotive-specific surveillance regulations for consumer to actively participate in the recall processes, this issue is open to debate as there is a gap between the product safety and consumer protection legislation.

6. This paper evaluates the product safety regulations in place in Turkey from the automotive industry perspective, with the aspects of technical regulations, consumer protection and criminal liability.

III. TECHNICAL LEGISLATION

1. Production, modification and assembly of motor vehicles and certification of system, components and separate technical units designated for use in these vehicles are regulated within the scope of the Law on Preparation and Application of Technical Legislation No. 4703 and Highway Traffic Law No. 2918.

2. Since the technical issues subject to legal investigation are within the scope of Law No. 4703, this paper will first make an assessment based on this law, followed by our legal evaluation regarding the scope of liability and measures that can be taken from different aspects of customs, administration, consumer and criminal law disciplines.

3. Law No. 4703 regulates the technical legislation, whereas the automotive products, accessories and components used in production of these products are subject to the international conventions and technical regulations prepared under these technical conventions in accordance with articles 4 and 5/1 of the Law. Accordingly, technical legislation subject to review is as follows:

a. "Convention on Conditions for Accepting Joint Technical Directives for Vehicles with Wheels, Accessories and Parts Assembled and/or Used in Vehicles and Mutual Recognition of Certifications Given Based on These Directives" issued by Domestic Transport Committee of United National European Economic Council (UN/EC) and signed in Geneva on 28/03/1958, to which Turkey became party with the Council of Ministers Decision No. 1996/8657 promulgated in the Official Gazette No. 22868 of 05/01/1997.

b. Regulation on Implementation of Technical Legislation for Vehicles with Wheels and Accessories and Components Used and/or Assembled in These Vehicles that has been promulgated in the Official Gazette No. 22874 of 11/01/1997.

c. Regulation on Production, Modification and Assembly of Vehicles ("AITM") that has been promulgated in the Official Gazette No. 29869 of 26/10/2016;

d. Regulation No. 2007/46/AT on Type Approval of Motor Vehicles and Trailers ("MARTOY") that has been promulgated in the Official Gazette No. 27272 of 28/06/2009;

e. Ministry of Industry and Technology, Market Surveillance and Inspection Regulation (hereinafter referred to as "MSI") that has been promulgated in the Official Gazette No. 28429 of 02/10/2012;

f. Regulation on surveillance and Inspection of the Market for Automotive Products (hereinafter referred to as "Automotive MSI") that has been promulgated in the Official Gazette No. 30340 of 22/02/2018;

g. Communique No. SGM-2010 on Procedures and Principles Regarding Implementation of Type Approval Regulations for Vehicles, Parts, Systems and Separate Technical Units Thereof and Technical Regulations that has been promulgated in the Official Gazette No. 27548 of 10/04/2010;

h. Communique on (SGM-2009/1) on Enactment of Technical Regulations of the United Nations, European Economic Council on Vehicles with Wheels and Accessories and Components Assembled and/or Used in These Vehicles and Abrogation of Certain Communiques that has been promulgated in the Official Gazette No. 27140 of 13/02/2009;

i. European Parliament and European Council's Regulation No. 715/2007 of 20 June 2007 on type approvals of Euro 5 and Euro 6 light passenger and commercial cars and access to vehicle repair and maintenance that forms a part of Turkish legislation in accordance with the said Communique and in particular the Geneva Convention;

4. Automotive products that are put in the market in Turkey should meet exhaust emission norms in accordance with the aforementioned legislation. Accordingly, passenger cars and light commercial vehicles (together, "Vehicles") in Euro 6 norm should meet current technical standards for the entire economic life and on the date of putting into the market.

IV. RECALL IN ACCORDANCE WITH TECHNICAL LEGISLATION

1. Voluntary Recall

Voluntary recall is regulated under article 11 of Automotive MSI as a corrective action about products that are in possession of users and put in the market.

Paragraph one of Article 11 of Automotive MSI stipulates:

> *"Manufacturers **may initiate voluntary recall and take corrective action in connection with risky automotive products or those in breach of technical regulation** when they are in possession of users and put into market, **without intervention of the Ministry**. However, this article shall not apply after the date of inspection for products that are inspected and found unsafe by the Ministry."*

Pursuant to provisions of the Regulation, products subject to risk or nonconforming to technical legislation may be recalled without intervention of the Ministry and corrective actions may be taken in connection with these products. It is worth noting that, application should be filed ***before an inspection is made by the Ministry*** in order to benefit from the voluntary recall practice.

The Approval Authority receiving a manufacturer's recommendation on corrective action or recommending corrective action in accordance with Technical Service Report should inform the Ministry of Industry and Technology in case of Turkish Republic, which is one of the approval authorities of countries that are party to Convention. It is of great importance to initiate voluntary recall process before an inspection is initiated by the Ministry in accordance with Article 6 of Automotive MSI Regulation.

Application submitted to the Provincial Directorate of Industry and Technology related to the voluntary recall practice should be made by specifying the time needed to complete the activity along with all the information and documents. In addition, it is necessary to make a notification to the organization that approves the product subject to voluntary recall and forward the documents indicating that this notification has been made. If the information and documents related to the application are missing or incorrect, the application is not evaluated.

Paragraph 3, article 11 of the Regulation stipulates evaluation process for voluntary recall applications. Accordingly, Provincial Directorate of Industry and Technology conducts a risk assessment of the products subject to the application. As a result of the risk assessment, the product can be evaluated in two different ways: high risk or low risk.

The application regarding the product, which is considered to contain low risk, is approved by the Provincial Directorate and published on the Ministry's website, and the process is completed in this way.

For the products determined to contain high risk, the procedure to be followed is described under paragraph (b), article 3 of the Regulation: "High-risk voluntary recall activities are approved by the provincial directorate, a period up to 1 year is granted and process is followed as a result of risk assessment. Information on products subject to high-risk voluntary recall is published in the internet site of the Ministry as well as internet site of the product and the manufacturer if available and also the manufacturer notifies the vehicle owners. Detailed information on nonconformity, corrective action details, contact details for getting information on corrective action are provided in the announcement and notification of the Manufacturer and announcement is made in a manner allowing easy inquiry of the vehicles and products affected from the action, by the user.

Pursuant to paragraph 4, article 11 of the Regulation, additional time may be granted at the discretion of the provincial directorate in case high-risk voluntary corrective actions cannot be completed by reasons not attributable to the Manufacturer.

Vehicle owners are notified in parallel with the voluntary recall. Pursuant to paragraph 8, article 11 of the Regulation, "*Manufacturers may use contact details of vehicle owners for the vehicles subject to registration, or vehicle owners through provincial directorate in case data security and other*

obligations are met in consideration of the Personal Data Protection Law No. 6698 of 24/3/2016 within the scope of voluntary recall activities subject to high risk."

In case the call is not followed by the vehicle owners despite the recall notification, the second notification is sent to the vehicle owner by the manufacturer. There must be at least two months between the two notifications. If the call is not followed after the second notification, it is assumed that the relevant vehicle owners have been reached as a result of the previous notification and announcement made by the manufacturer and that the manufacturer has fulfilled its notification obligation. Manufacturer records the notifications made to reach the vehicle owners and sends them to the provincial directorate with the information regarding the announcement made.

In case the vehicle owners cannot be reached despite all the researches, it is regarded that the vehicle owners are informed as a result of the announcement.

Article 11/10 of the Regulation stipulates that vehicle owners who were sent notification for voluntary recall are obliged to apply to Manufacturer and/or authorized services specified by the Manufacturer.

Article 11/12 of the Regulation stipulates that vehicle owners are obliged to collaborate throughout voluntary recall process.

Administrative sanction under the Law No. 4703 shall not apply to products for which voluntary recall application is made in accordance with the Regulation. In other words, provision on administrative liability shall not apply to voluntary recall.

Section VI of this paper below reviews the liability under the criminal law and investigation of the relevant matters in case nonconformity with technical legislation during production, import or putting in the market constitutes an offence.

Further, Section V of this paper reviews demands arising from liability provisions in case nonconformity subject to voluntary recall process is considered as defected product in accordance with Consumer Protection Law.

In the "Anahtar" (the "*Key*") bulletin, published by Ministry of Industry and Technology, it is stated "***Non-classification of products recalled by manufacturers as "defected product" as described in the Consumer Protection Law No. 4077*** (the previously law in force, TA), ***as a result of corrective actions will ensure elimination of a part of concerns of the manufacturer in implementing voluntary recall activities and it will serve as an encouraging factor***"[2], and it is stated that product within the scope of voluntary recall activities should not be classified as defected product.

Fikri Isik, former Minister of Science, Industry and Technology stated that they reached to an understanding with an automotive OEM saying "***These vehicles will be subject to voluntary recall and technical revisions will be performed***"[3] in connection with exhaust emission values that was brought to the agenda in connection with diesel engines.

Considering these explanations, it is possible to avoid any future administrative, legal and penal sanctions in case of implementing voluntary recall procedure in order eliminate nonconformity in case Vehicles do not conform to technical legislation.

In addition, as clearly stipulated under Article 11 of the Regulation, voluntary recall may be performed only for Vehicles that are in possession of users and put in the market. Therefore, it will be appropriate to remedy defect upon completion of import clearance rather than voluntary recall in connection with products with uncompleted import clearance - vehicles in customs.

[2] Gülbanu Gökçe, Assistant Specialist, General Directorate of Industrial Product Safety and Inspection, Anahtar, November 2013, Issue 299 https://anahtar.sanayi.gov.tr/tr/news/gonullu-geri-cagirma-faaliyetlerinin-guvenli-piyasanin-olusumundaki-ve-ureticilerin-marka-imaji-acisindan-onemi/611

[3] https://www.sabah.com.tr/ekonomi/2015/10/16/turkiyeden-aciklama-volkswagen-ile-anlastik

2. Intervention of the Ministry Before Voluntary Recall

Different from voluntary recall procedures, Articles 9 and 10 of Automotive MSI Regulation stipulates intervention of the Ministry upon detection of legislative noncompliance.

The Ministry may intervene directly to remedy the legislative non-compliance in accordance with Articles 9 and 10 of the Regulation in case voluntary recall is not implemented.

Regulation provides separate stipulations on intervention of the Ministry in connection with safe products nonconforming to technical legislation and unsafe products.

Article 9 of the Regulation describes sanctions in connection with "*Safe products that are not complying with technical regulation as determined by the central organization or provincial directorate of the Ministry*". Accordingly:

> *"A)* ***Manufacturer is obliged to submit a corrective action plan in order to solve the product's non-compliance with technical regulation and solve non-compliance within the period of time specified in the corrective action plan.***
>
> *b) Manufacturers are served a notification, requiring presentation of corrective action plan within 30 days in order to eliminate remediable non-compliances. This period of time may be extended up to 30 days for one time only upon request of the Manufacturer. A Manufacturer failing in submitting corrective action plan within this period of time shall be deemed to have accepted that corrective action will not be taken.*
>
> *c) Corrective action plan submitted by Manufacturer shall be approved by the provincial directorate upon amendment if deemed necessary and Manufacturer is granted correction period up to one year starting from notification to Manufacturer, considering type of non-compliance, product specifications and degree of availability in the market.*
>
> *ç) Time is not granted for non-compliance for a product that was granted time for correction of non-compliance as a result of inspection. However, additional time may be granted up to one year in case it is determined that non-compliance was not solved in the end of the relevant period by reasons not attributable to Manufacturer.*
>
> *d) The provincial directorate is controlled by monitoring the periods given due to non-compliance with the technical regulation and whether the correction activity is carried out.*
>
> *e) Pursuant to subparagraph (a), the Manufacturer who does not submit corrective action plan or remedies the nonconformity at the end of the period given despite the corrective action plan, is imposed administrative fines specified in subparagraph (a), paragraph one, Article 12 of the Law.*
>
> *(2) If it is determined that the conformity mark or the documents given as a result of the conformity assessment procedures do not reflect the truth, they are falsified or imitated, a criminal complaint is filed with the Chief Public Prosecutor's Office. In cases where no sanction is imposed due to the crime, the administrative penalty provided for in paragraph (f), paragraph one, Article 12 of the Law is applied, provided that the case remains within the time limit.*
>
> *(3) If it is determined that the conformity mark and documents are not suitable in terms of the size, visibility, indelibility, place to be attached and similar features stipulated by the relevant technical regulation, the provisions of paragraph one shall apply.*

Article 10 of the Regulation stipulates sanctions of the Ministry **in connection with unsafe products** as follows:

> *"(1)* ***For products that are found unsafe as a result of actions described in Article 6, a decision is made to impose:***
>
> ***a) Ban on putting product into the market,***

b) Recall of products available in the market,

c) Decommissioning of the product,

ç) Disposal when product is not rendered safe by Manufacturer or it is not possible to render it safe,

d) Other actions specified in technical regulation applicable to product,

e) Ban on joining the traffic

in accordance with the principle of proportionality.

(2) Manufacturer and/or distributor is informed with notification in order to take opinions before making preventive action decisions specified in paragraph one. Manufacturer and/ or distributor exercises right to defence within ten days starting from receipt of notification and submits a written response to the General Directorate.

A) ***Expiry of this duration may not be awaited in case of emergencies where public interest protected with the law and human health and safety are at risk. In case a decision is made without giving right to defence, Manufacturer and/or distributor may be given subsequent opportunity to respond.***

b) Measures envisaged or taken by the Ministry in accordance with the first paragraph are reviewed as a result of the response or information and document to be provided by the manufacturer and / or distributor.

(3) In cases where it is possible to render safety of a product for which action is taken in accordance with paragraph one;

a) ***Manufacturer applies to the provincial directorate no later than fifteen days from the notification of the decision to him, along with documents proving that unreliability detected in the product is correctable and a corrective action plan. In cases where this period is not sufficient, the Manufacturer can apply for additional time with a reason and work plan, and this period can be extended up to two months with the approval of the provincial directorate. It is assumed that the manufacturer, who did not apply during this period, will not carry out correction activities.***

b) Provincial directorate approves the corrective action plan offered by the manufacturer by making changes when necessary and gives a correction period for not exceeding six months by evaluating the nature of the insecurity, product characteristics and market prevalence as of the date of notification to the Manufacturer.

c) A product that has been given a time to correct correctable insecurity is not given time again. However, additional time may be granted up to six months in case it is determined that unreliability was not solved in the end of the relevant period by reasons not attributable to Manufacturer.

ç) Provincial Directorate or if deemed necessary, General Directorate may monitor the correction procedures on site and have an observer during the correction procedures, and if necessary, request the test and examination of the product subject to correction by an impartial test or inspection institution. As a result of corrective action, product that is rendered safe but not submitted to evaluation of the provincial directorate or General Directorate shall not be put in the market or put into service.

(4) For the purpose of informing the people at risk about the precautions taken by the Ministry in accordance with paragraph one regarding unsafe products and ensuring the implementation of these decisions;

a) Manufacturer shall, within fifteen days following the receipt of the notification on decision, make announcement containing tradename, make, model, type or other distinct characteristics of the product and photograph of the product, if available as well as

information about risks related with the product, methods recommended to avoid risk or solve the problem, addresses for returning the product and addresses where product may be sent to solve the problem.

b) In case Provincial Directorate finds the announcement providing information required under paragraph (a) in connection risks or the form of announcement made by the Manufacturers ineffective or non-compliant, it ensures that announcement is made via two national televisions and two newspapers to people under risk.

c) The provincial directorate checks whether the announcement has been published in accordance with the aforementioned principles and ensures that people at risk are informed and repeats the announcement in case of deficiency.

ç) Following the announcement, the Ministry announces the information about these products on its website.

(5) As a result of the determination of insecurity, the requirements of the decisions made by the Ministry within the scope of the first paragraph of Article 10 are fulfilled by the Manufacturer within six months from the date of notification of these decisions and it is certified that they are fulfilled. ***The manufacturer is obliged to cover all costs arising from these activities.*** *The manufacturer must provide the necessary environment for the end user to deliver the product on time and easily, without incurring additional costs.*

(6) For the products determined to be unsafe as a result of the procedures specified in Article 6, the administrative penalty specified in the first paragraph (b) of the Article 12 of the Law shall be applied.

(7) Products that cannot be secured or impossible to be secured are disposed of under the supervision of the provincial directorate audit personnel, at the address and method to be determined by the manufacturer, taking into account the provisions of the relevant legislation. The Product Disposal Minutes including the amount of product disposed, how the product was disposed, the place of disposal, the date and the names and surnames of the authorized representatives of parties are prepared by the provincial directorate.

(8) Provincial directorate ensures that the measures described under paragraph one are implemented. Provincial directorate checks whether these decisions have been implemented; operations performed by the manufacturer are submitted to the provincial directorate regularly every two months.

(9) The manufacturer, who does not fulfil the measures specified in this article in the specified form and time, shall meet the costs incurred by the Ministry in order to carry out the activities. The provisions of the Law No. 6183 shall apply for the costs."

Given the provisions of MARTOY, it is thought that the exhaust emission measurements exceeding the limit values can be considered unsafe product regulated in Article 10 of the Automotive MSI Regulation. Because all vehicles that will receive type approval within the framework of 2007/46/EC are required to fully meet the relevant technical legislation, and the product that does not comply with the R-715/2007 EC Regulation regarding exhaust emissions can also be considered unsafe.

Pursuant to article 32 of MARTOY, non-compliance detected in the product by the manufacturer and Technical Service Report in the case of appropriate remedies as suggested solution to the approval authority to the Submission and approval authority by the approval body having made the notification of the Ministry of Turkey in the Ministry ex officio effective corrective has the power to take measures.

In this context, in order to avoid administrative sanctions envisaged in the Automotive MSI Regulation and to be applied by the Ministry, it is of great importance to apply for a voluntary recall procedure before the Ministry's intervention, as mentioned above.

V. EVALUATION IN REGARD TO CONSUMER LAW

In order to talk about the elective rights of the consumer within the framework of the Consumer Protection Law No. the violation of the legislation subject to recall first needs to be described and non-compliance with the legislation on recall should be considered as a defect under the Law.

Defective goods and consumer rights are described under the Consumer Protection Law No. 6502.

Article 8 of the Consumer Protection Law describes "***Defective Product***" as follows:

> *"(1) Defective goods are goods that are contrary to the contract due to the fact that they do not match with the sample or model agreed upon by the parties at the time of delivery to the consumer or because they do not have the features that should be available objectively.*
>
> *(2) Products that do not possess one or more specifications provided in the packaging, label, user and introduction manual, internet portal or advertisements and announcements; those nonconforming with the properties notified by seller or specified in technical regulation; those that fail in meeting intended purpose, possessing material, legal and economic deficiencies reducing or eliminating benefits expected by users are considered as defective products.*

Article 11 of the Law stipulates "**Consumer's Rights of Choice**" in the presence of a defected product:

> *"(1) Where it is understood that the good is defective, the consumer may exercise one of the following rights of choice;*
>
> *a) Reneging on the contract, notifying that the consumer is ready to return the sold good,*
>
> *b) Requesting a deduction from the sale price in proportion to the defect by keeping the sold good,*
>
> *c) Requesting a free repair of the sold good, with all expenses borne by the seller, if it does not require an extensive expense,*
>
> *ç) Requesting a replacement of the defective good with another fungible good free from defect, if possible. The seller shall be liable to fulfil this request chosen by the consumer.*
>
> *(2) The right to free repair or replacement of the good with another fungible good free from defects may be used against the manufacturer or the importer as well.*
>
> *The seller, the manufacturer and the importer shall be severally responsible in performing the rights in this paragraph. In cases where the manufacturer or the importer proves that the defect happened after the good was launched in the market by them, they shall not be deemed responsible."*

Pursuant to Consumer Protection Law, the goods that do not possess one or more specifications provided in the packaging, label, user or its manual, internet portal or advertisements and announcements; those nonconforming with the properties notified by seller or specified in technical regulation; those failing in meeting intended purpose, possessing material, legal and economic deficiencies reducing or eliminating benefits expected by users are considered as defective products.

The aim of voluntary recall activities is to ensure that products and / or components that violate the legislation are collected from the market and end users by the manufacturer or importer companies under the coordination of the MSI authority.

As mentioned above, voluntary recall activity related to a product contrary to the legislation is an institution that avoids the Manufacturer / distributor being subject to administrative sanctions under the Regulation. In other words, the Regulation is a matter affecting the situation between the administration and the Manufacturer / distributor.

However, initiation of voluntary recall activities does not legally prevent consumers from exercising their rights arising from consumer status.

Further, it is worth noting that consumer's rights of choice under Consumer Protection Law include withdrawal from agreement, claiming deduction from sales price in proportion with the defect, free of charge repair or replacement of the sold product with a nondetective product; however, article 11/9 of Automotive MSI Regulation stipulates that consumer is obliged to apply to the Manufacturer and/or authorized services specified by the Manufacturer.

Further, Regulation stipulates that vehicle owners are obliged to collaborate throughout voluntary recall process. Pursuant to these provisions of the Regulation, consumers (vehicle owners) are obliged to procure the performance of corrective actions required within the scope of recall.

This matter regulated in the Regulation involves "right to repair free of charge" among consumer's rights of choice. In other words, it may be argued that, when a recalled vehicle is taken to authorized service by consumer, then it should be regarded that the consumer exercised his elective right to repair free of charge and therefore cannot use other rights of choice.

However, as the Law supersedes the Regulation in the hierarchy of norms, consumers may argue that their rights of choice cannot be restricted with the regulation against the defence of the Manufacturer that the consumer exercised right to repair free of charge in accordance with the Regulation.

As voluntary recall is a remedy stipulated in the regulation that is actively implemented in Turkey, we have reviewed certain legal actions in connection with exhaust emission measurements of certain diesel engine vehicles as an example. The consumer courts have acquired a series of technical expert reports based on consumer claims filed by reason of exhaust emission measurements.

In these reports, Faculty Members from ITU Mechanical Engineering Faculty stated:

- **Vehicle subject to claim is in compliance with the national legislation as no restriction is made in Turkey in connection with emission values;**
- **Increased emission would not increase fuel consumption,**
- **Vehicle therefore does not possess any latent defect.**

Faculty Members from Gazi University Faculty of Technology stated:

- **Exhaust emission values applied in the United States are stricter than the Exhaust Emission Norms in Turkey and the European Union,**
- **The engine type used in the vehicles in dispute did not pass tests performed in the United States but this does not automatically mean failure in meeting emission values applied in Turkey;**
- **High NOx (nitrogen oxide) values of the vehicles does not have a negative effect on fuel consumption, use and value of the vehicle,**
- **The vehicle does not have defect/ latent defect as the vehicle has been driven for more than 110,000 km and no problem was encountered**

Faculty Members from Vocational School of Ege University stated:

- **Exhaust emission limit values applied in the USA are stricter and lower than those applied in Europe,**
- **Type approval certificate of vehicle shows that Euro-5 standard was met;**
- **There is no restriction on NOx gas limit values or obligation in Exhaust Gas Emission Control and Fuel and Diesel Oil Quality Regulation;**
- **High NOx value does not have negative effect on fuel consumption and motor power**

In the aforementioned cases, the courts dismissed the lawsuits, on the ground that there was no defect / hidden defect in the vehicles within the framework of expert reports. These precedent cases and

reports can be used in cases that may be filed within the scope of exhaust emissions and voluntary recall practice.

Exercising of consumer's rights of choice has been subject to a two-year period of limitation in Article 12 of the Law, and it has been determined that time limitation provisions will not apply if the defect is concealed by gross negligence or fraud. In addition, in the event of criminal liability arising from the same grounds, time limitation on penalty shall also apply.

As the recall institution does not eliminate legal responsibility towards consumers within the framework of these expressions, it is legally possible for consumers to file lawsuits against Manufacturers / vendors within the framework of their rights of choice. In this case, experts reports previously summoned during claims filed about recalled products and court decisions may be shown as a precedent to make defence. **Further, it may be argued that consumers' obligation to apply authorized service and collaborate with them as stipulated under articles 11/9 and 12 of Automotive MSI Regulation covers free of charge repairs and thus, they are not legally entitled to exercise other rights of choice.**

In the event that any contradiction to the existing legislation is eliminated in the vehicles that are not yet sold to consumers at the customs area, importer or dealers, consumers will no longer have a legal basis for the defective product.

VI. EVALUATION IN REGARD TO PENAL LIABILITY

1. First of all, it is worth noting that the probability of criminal investigation threat is very remote in connection with vehicles subject to voluntary recalled and incomplete customs clearance and defence arguments are very strong in case an investigation is initiated.

   In addition, modifications on the automotive products after completion of the importation proceedings may create debates about validity of documents submitted in the customs clearance and registration phases.

2. The Environmental Law No 2872 serves as special regulation on this matter. Pursuant to Article 4/2 bis of the Environmental Law, "*Motor vehicle manufacturers are obliged to meet emission standards during production as stipulated in the regulation*" whereas Article 26 "*Judicial Penalties*" in the same Law stipulates: "*Any person who issues and uses inaccurate and misleading documents during implementation of this Law shall be subject to provisions on forgery of documents under Turkish Criminal Law No. 5237 of 26/9/2004*"

   In parallel with the reference in the Environmental Law, offences of "forgery of official documents" described in Article 204 of Turkish Criminal Law No. 5237 ("TCL") and "Misleading statement in issuance of official documents" described in article 206 should be taken into consideration:

   Article 204

   (1) Any person who issues or uses a false document or changes an original document to deceive others is punished with imprisonment from two years to five years.

   (2) If a public officer who is authorized to issue documents counterfeits a document, or changes the original document to deceive others, or prepares false documents or uses false official documents, then he is punished with imprisonment from three years to eight years

   (3) In case of consideration of an official document as valid until it is proved to be false, the punishment to be imposed is increased by one half.

   Article 206

   (1) Any person who conveys untrue declaration to a public officer being authorized to issue official document is punished with imprisonment from three months to two years or imposed punitive fine.

The grounds of protecting a document and punishment of forgery on it, is not the damages that may arise but legal consequences under the judicial order. The Law protects documents with certain legal consequences against all kinds of forgery.[4]

In Article 204/1 of the TCL, the acts that constitute the element of the crime are on an elective basis; (i) forging a document, (ii) changing the document to deceive others, (iii) using fake official document. Article 204/2 regulates forgery for public officials.

In addition to the acts listed in paragraph one, "*issuance of a misleading document*" by a person with official duty is described as an offence.

In the form of forgery, there is an apparently valid document in all its form but it is contrary to the truth in terms of its content.

In case of "offence of misleading statement in an official document" that is described under Article 206, one is punished for his acts or statements that result in creation of an official document that possesses false information. In the offence of forgery in official documents, public official himself issues an official document which is contrary to the truth and here, a person misleads the public official causing issuance of an official document in contrary to the truth.

Exhaust emission measurement values are not specified in the customs declarations submitted during the import of the vehicle. Therefore, we are in the opinion that an offence will not arise in accordance with article 204 of TCL and forgery will not arise in connection with the form of documents submitted to the Customs and Administration. On the other hand, if the manufacturer / importer has provided in the customs declarations or their annexes that include misleading information or documentation that falls contrary to the nature, characteristics or technical standards of the product, then the debate may arise.

As an example, exhaust emission measurement values are included in the certificate of conformity attached to the customs declaration for each vehicle. In this context, risk of initiating an investigation for "***misleading statement in issuance of an official document***" should not be underestimated in accordance with article 206 of TCL during issuance of official documents in case an investigation is initiated by inspectors inspecting Customs or TSI, based on a forced interpretation.

At this point, in case of encountering an investigation on offences related with forgery of documents, it may be discussed under article 4 bis of the Environmental Law whether the importer is the manufacturer of the products in question or not. This is because pursuant to the aforementioned provision, the manufacturer is held responsible for meeting exhaust gas emission standards. In addition, pursuant to article 17 of the Communique No. SGM 2010-01, a defence on non-liability by the importer may not be heard by the investigation authorities.

Further, it can be argued that the information given in the statements are subject to the cross-check of the Administration and the lack of such a sufficient inspection by the Administration eliminates the criminal liability. As precedent for this defence, the Court of Appeals stated the following[5]:

Occurrence of the offence of "misleading statement in issuance of official document" that is called "intellectual forgery" in the doctrine and reasoning of Article 206 of TCL No. 5237 will be possible when the official document issued based on explanations of the individual (suspect) should have power to prove accuracy of this statement. If the officer that took the statement is obliged to investigate accuracy of this statement and issue the official document based on the conclusion reached, in other words, ***if the official document is created based on inspection results of the officer rather than solely relaying on the individual's (suspect) statement, offence described in this article shall not occur."***

3. At this point, additional review should be performed as to whether voluntary recall within the scope of Automotive MSI Regulation will have an effect with respect to penal liability. There is no effective repentance provision in connection with offence of forgery in documents as described in TCL.

[4] Necati MERAN, "Dolandırıcılık, Sahtecilik, Güveni Kötüye Kullanma", 2nd edition, p. 355

[5] Court of Appeal, 11th Criminal Chamber, File No.: 2010/10745, Decision No.: 2012/21513 dated 11/12/2012

However, due to nature of voluntary recall, "voluntary withdrawal" stipulated in Article 36 of TCL should be taken into consideration.

Article 36

(1) If a person voluntarily abandons performance of the acts necessary to commit the crime or avoids accomplishment of the crime with his own efforts, then he may not be punished for this crime; however, where the accomplished part constitutes an offense, punishment is given only for this specific offense.

Pursuant to the aforementioned provisions, we have the opinion that voluntary recall shall not have effect on penal liability in connection with the products already registered as motor vehicles and are in use in the traffic. In case an investigation is conducted for offence of forgery and it is concluded that the offence occurred, voluntary withdrawal after registration shall not affect investigation as the offence is completed.

4. In case an investigation is initiated for the offence of forgery in documents, then it should be evaluated whether the "successive offence" as regulated under article 43 of TCL shall apply or not.

Article 43

1) In case of commission of the same offense against a person more than once at successive intervals, the offender is imposed a punishment. However, this punishment may be increased from one-fourth to three-fourth. The basic elements or characteristics of an offense determining the degree of punishment (heavy or light punishment) are considered to define whether the intended act is the same offense or not. (Additional sentence: 29/6/2005 – Article 5377/6) The provisions of first subsection are applied in case of offences with unknown victim.

2) The provisions of first subsection are applied in case of commission of the same offence against more than one person with a single attempt.

3) The offences such as voluntary manslaughter (felonious homicide), felonious injury, torture, sexual abuse and plunder are not subject to the provisions of this article.

As a rule, prevailing principle in TCL is imposition of separate punishment for each offence, in other words, application actual gathering provisions. Combined offence, successive offence or intellectual gathering rules may apply in case conditions specified in the law are in place.

Conditions of successive offence are specified in the jurisprudence is as follows[6]:

"*For implementation of provisions on successive offences that are regulated under article 43/1 of TCL No. 5237, a-) The same offence should be committed multiple times at various times, b-) Victims of offences should be the same person, c-) These offences should be committed with the decision of committing the same offence. In the present dispute, as there is no doubt that acts that constitute the offence of forgery in official documents were committed at various times and victim of offences is the same person, it should be considered "whether condition on committing the offence with the same decision of committing is in place or not" in order to determine whether successive offence provisions shall apply or not. As detailed in decision no. 384-2 of 14.1.2014, 1475-577 of 3.12.2013, 173-145 of 30.5.2006 and 189-207 of 8.7.2006, committing an offence with the decision of committing the same offence is a subjective bond that connects acts constituting the offence and giving successive offence aspect to the incident. In case suspect commits an offence by taking opportunities or renews the decision of committing an offence, it is not possible to consider this as a decision of committing the same offence; thus, provisions on successive offence shall not apply. Successive offence shall occur when suspect commits the same offence multiple times against the same victim with general intent and decision of committing an offence in the beginning."*

5. In addition, the Anti-Smuggling Law No. 5607 should also be evaluated for the products manufactured overseas and being imported to Turkey:

[6] Court of Appeal, General Assembly of Criminal Chambers, File No.: 2013/9-593, Decision No.: 2014/24

Article 3 of the Law No. 5607:

> *(1) A person who brings an article to the country without customs clearance procedures is punished with imprisonment from one to five years and judicial fine up to ten thousand days. In case an article is brought to the country through ways other than customs gates, punishment is increased by one third to half.*
>
> *(2) A person who brings an article in the country without paying a part or all of customs duties through fraudulent acts and behaviours is punished with imprisonment from two years to five years and judicial fine up to ten thousand days.*
>
> *…*
>
> *(7) A person who brings an article that is banned for import by the law is punished with imprisonment from two years to six years and judicial fine up to twenty thousand days in case the act does not constitute an offence requiring heavier punishment. A person who buys, offers for sale, sells, carries or hides an article banned for import is punished with the same punishment.*

In smuggling crimes described under article 3/1 and 3/2 of the Law, the condition is to bring articles into the country through misleading act and behaviours without customs clearance or paying a part or all of customs duties. In the event that the nonconformity of the articles does not affect the customs duty paid and the special consumption tax applicable, if any, the smuggling allegation cannot be brought forward.

Pursuant to Article 3/7 of the same Law, importation of articles that do not conform with the technical standards for importation can be argued as an offence. However, the article that may be subject to crime is the article whose import is prohibited by *law*. A prohibition enacted by any means other than a law, such as through administrative regulations or orders would not fall under the scope of the Law.

VII. EVALUATION IN REGARD TO ADMINISTRATIVE SANCTIONS

1. Article 20/a of the Environmental Law stipulates that administrative fine shall be imposed to vehicle owners that cause emissions in breach of the standards specified in regulations. In case importer is owner of imported but not sold vehicles, this provision may apply.

   In addition, administrative fines shall not prevent imposition of punishments described in other laws in connection with the same offences in accordance with article 27 of the Law.

   > ***Article 20***
   >
   > *Administrative fines are as described below:*
   >
   > *prohibition indicated in article 8 para one will be fined with 100*
   >
   > *thousand liras; the obligations in para two in spite of the appropriate notification made by the corresponding authorities will be fined with 500 thousand liras*
   >
   > *…*
   >
   > ***Article 27***
   >
   > *The fines in administrative nature to be applied by this Law will not impede the application of penalties for these actions indicated in other laws*

   However, Constitution Court rendered in connection with article 20(a) of the Environmental Law, the phrase ".....to motor vehicle owners...." has been cancelled for motor vehicle owners that comply with the obligation to procure emission measurements. In the reasoning of the award, the court stated[7]:

   > "*In case inspections reveal that emission values are above the standard values, it is possible to make a regulation to grant reasonable period of time to the relevant person, requesting*

[7] Constitutional Court decision No.: 2015/35 / 2015/40

correction of non-compliance and impose administrative sanction or another sanction that would not damage trust of the relevant person to the law in case non-compliance is not remedied within that period of time. However, imposing direct administrative fine to motor vehicle owners is in breach of the legal safety principle and the principle of the state of law in case legal obligation is fulfilled about exhaust gas emission and there is no obligation to procure measurement again within a certain period of time."

Considering the decision of the Constitution Court, in case importer takes voluntary recall action, administrative fine should not be imposed in accordance with the Environmental Law.

2. Penalties on irregularities are described under the Customs Law No. 4458. Inaccurate documents and information submitted to the customs authority may require imposition of administrative fine in accordance with articles 6 and 7 of the Law.

Article 241

1) Without prejudice to the circumstances for which a separate penalty has been assigned, an irregularity fine of sixty TL shall be charged on those who have violated the formats and procedures laid down by the by-laws, regulations, notifications and instructions issued on the basis of this Law and the authorities granted therein.

2) The amount referred to in paragraph 1, shall be increased annually on the revaluation rate determined by the Tax Procedure Law, No. 213 and in such a calculation, the amount up to TL 1.000.000 shall not be taken into consideration.

3) When compared with the amount referred to in paragraph 1, the

irregularity fine shall be doubled where:

(a)Pursuant to Articles 6 and 7, the false presentation by the concerned persons, of the documents and information which form a basis for the decisions taken by the customs administrations;

…

3. Administrative fines stipulated in article 9/(b) of the law may be imposed in case it is concluded that products under investigation are unsafe in accordance with Article 12 of the Law No. 4703. However, these penalties are secondary and these penalties shall not be imposed in case the act constitutes a crime or an offence that requires imposition of a heavier administrative fine.

A decision should not be rendered to impose administrative fine in accordance with the Law No. 4703 in case voluntary recall action is taken about vehicles in question. Otherwise, a legal action may be filed against these fines in the Administrative Court.

Article 5

3) A manufacturer is obliged to put only safe products into the market. Products in compliance with technical regulations are considered safe. In case of absence of technical regulation, safety of product is evaluated in accordance with national or international standards, otherwise, in the absence of the foregoing, best practices in the sector or reasonable expectation of consumer on safety and level of science and technology.

Article 9

In this Law

…

b) Manufacturers acting in breach of paragraph three of article 5 are imposed administrative fine from nineteen thousand Turkish Lira to two hundred and fifty thousand Turkish Lira

…

Administrative fines under this Law shall be imposed in case the same act does not constitute a crime or an offence requiring imposition of a heavier administrative fine.

In case of applying voluntary recall, the precondition for imposing administrative fines arising from technical legislation and environmental legislation shall be eliminated. Further, it is possible to impose irregularity fines described in Article 241 of the Customs Law in connection with vehicles imported based on conformity certificate and type approval that do not contain accurate information on technical standards. Imposition of irregularity fine as a result of investigation may be based on the reasoning that inaccurate information is provided in customs declaration and this inaccuracy is acknowledged through recall.

Further, voluntary recall is related with correction of a defect that is detected subsequently in accordance with the procedure stipulated in regulations on market oversight practices in connection with imported vehicles. Article 241 of Customs Law stipulates administrative fines that may be imposed in case of non-compliance with this Law and ***provisions enacted through secondary regulations made*** based on powers granted in this Law.

In this context, in case irregularity fine is imposed within the scope of the applicable legislation, it is possible to make a defence stating that latent defect was corrected in accordance with MSI regulations and corrective actions were taken within the knowledge and with the approval of the administration and defect in question does not lead to any taxation difference. ⁂