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AMENDMENTS TO THE ELECTRICITY MARKET LICENSING REGULATION

This article provides information regarding the recent amendments to the Electricity Market Licensing Regulation¹ (the “Licensing Regulation”). The amendments were published in the Official Gazette and became effective on 20 June 2009² (the “Amending Regulation”).

I. EXECUTIVE SUMMARY

Below are the most crucial revisions rendered by the Amending Regulation:

- Electricity generation companies, auto producers, retail sellers (other than distribution companies) and private wholesale companies no longer need to obtain the approval of the Energy Market Regulatory Authority (“EMRA”) to assign their receivables to third parties, including to lenders for the financing of projects.
- EMRA’s approval is no longer required for (i) the establishment of a pledge over the shares of a license holder; or (ii) the transfer of dividend right certificates (*intifa senedi*) to third parties, including lenders.
- Prior to the Amending Regulation, a generation or auto production license could be transferred to a company established through a demerger or spin-off of the license holder, or to a company that had the same shareholding structure as the license holder, upon EMRA’s approval, on the condition that the transferee company was a license holder or applicant. The Amending Regulation has removed the condition requiring that the transferee to be a license holder or applicant.

II. ANALYSIS

A. EMRA Approval for Securities

The question of which types of securities provided for the financing of an energy project) are subject to EMRA’s approval has long been a gray area due to uncertainties in the Licensing Regulation prior to the Amending Regulation. EMRA’s approach to this subject has also changed since the issuance of the Licensing Regulation in 2002. In the early years after the implementation of the Licensing Regulation, EMRA’s practice was to require its approval for almost all types of securities such as share pledges, step-in rights, assignment of receivables,

¹ Published in the Official Gazette No. 24836, dated 4 August 2002.

² Published in the Official Gazette No. 27264, dated 20 June 2009.

commercial enterprise pledges, and assignments of insurance proceeds. However, EMRA's practice changed over time. As of early 2009, only two types of securities were subject to EMRA approval, namely, share pledges and the assignment of receivables arising from activities in the electricity market.

The Amending Regulation, by an amendment to Article 5(4) of the Licensing Regulation, has partly removed the EMRA approval requirement for the assignment of receivables. Prior to this amendment, EMRA's approval was required for the assignment of rights under all types of licenses. The Amending Regulation changed this provision so as to only require the license holders whose tariffs are regulated by EMRA (i.e., transmission, distribution, retail sale to non-eligible consumers, and public wholesale activities) to obtain EMRA's approval for the assignment of receivables. Consequently, electricity generation companies, auto producers, retailers (other than distribution companies) and private wholesale companies no longer need to obtain EMRA's approval to assign receivables to third parties, including to the lenders for the financing of their projects.

The Amending Regulation also eliminated the EMRA approval requirement for (i) the establishment of a pledge on the shares of a license holder; and (ii) the transfer of dividend right certificates (*intifa senedi*) by the license holder. Prior to the Amending Regulation, any pledge on or acquisition of a right to vote for 10% or more of the shares of a licensee holder, and the transfer of dividend right certificates were subject to the approval of EMRA.

B. Transfer of Generation Licenses

The Licensing Regulation prohibited the transfer of licenses except for the step-in rights provided in favor of lenders as a security for the financing of projects. By an amendment to the Licensing Regulation dated 1 May 2008, two more exceptions were introduced to this transfer prohibition: generation and auto producer licenses could be transferred (i) to a company established through a demerger or spin-off of the license holder; or (ii) to a company with the same shareholding structure as the license holder. However, such transfers were originally subject to two conditions: (i) EMRA's approval was required; and (ii) the transferee needed to be a license applicant or a license holder.

The Amending Regulation has removed the second condition, that the transferee be a license applicant or a license holder. Consequently, a generation or auto production license can now be transferred to a company established through a demerger or spin-off of the license holder, or a company whose shareholding structure is the same as the license holder, upon EMRA's approval, without the need for the transferee company to be a license holder or an applicant. This change brings a good degree of flexibility for the restructuring of generation companies.

C. Return of Performance Bonds

The Amending Regulation, by amending Articles 10(14) and 11 of the Licensing Regulation, permits the partial return of performance bonds.

Prior to the Amending Regulation, performance bonds submitted by generation companies to EMRA during the license application process would be returned to the company upon temporary acceptance of the power plant. That provision did not envisage the possibility of

returning some portion of the performance bond upon temporary acceptance of a unit of the power plant.

Pursuant to the Amending Regulation, if a unit of the power plant is temporarily accepted (i.e., its construction is completed and commissioning is permitted by the Ministry of Energy and Natural Resources), then the performance bonds submitted by the relevant generation company shall be returned on the condition that such company submits a new performance bond for the portions of the power plant without temporary acceptance.

D. Amendments to Licenses

Prior to the Amending Regulation, certain information stated in the “specific provisions” section of licenses (such as the address of the company and information regarding shareholders) could be amended by the relevant department of EMRA without the approval of the Board of EMRA. The Amending Regulation added new categories of information which can be amended without the Board’s approval. These new categories are (i) the trade name of the company; and (ii) the type of the business entity (such as the joint stock company or limited liability company).

In addition, prior to the Amending Regulation, if a request for a license amendment was rejected by EMRA and the same request was resubmitted at a later date, the original license amendment fee was applicable without any increase. Pursuant to the Amending Regulation, however, the license amendment fee shall be doubled for each such repeated request.

E. Miscellaneous

The Amending Regulation allows wholesale companies to own shares of an electricity generation company. Prior to the Amending Regulation, Article 41(4) of the Licensing Regulation provided that license holders, except for generation companies, could not perform any activity other than activities stemming from the electricity market. The Amending Regulation provides that not only generation companies, but all license holders except for the ones whose tariffs are subject to regulation (*e.g.*, transmission, distribution, and public wholesale companies) can engage in activities outside the electricity market. ⊕