

# Turkish Constitutional Court's Ruling on the Electricity Market Law

2 June 2014

The Turkish Constitutional Court recently annulled certain provisions of the Electricity Market Law No. 6446 (the "**Law**"), which was enacted on 14 March 2013 (to read our Client Alert on the Law, [click here](#)).

Although the Court's ruling was announced on its website on 22 May 2014, the reasoned decision has not been published in the Official Gazette yet. Therefore, the reasoning behind the Court's judgment remains to be seen.

## The Court annulled the following provisions of the Law:

- The Court annulled Temporary Article 8 of the Law, which introduced a grace period for compliance with environmental requirements by state-owned power plants, including the power plants to be privatized. Pursuant to this clause, state-owned power plants were granted a grace period until 31 December 2018 to comply with the environmental laws. This grace period was aimed at facilitating the generation sector privatizations, as it provides a temporary exemption for state-owned power plants that usually require substantial investments to comply with environmental requirements. The Court's annulment decision will enter into effect 6 months after publication of the decision in the Official Gazette.
- The Court also declared Temporary Article 14 of the Law unconstitutional. This Article enabled those projects whose licenses were cancelled at the construction stage (other than hydropower projects) to submit an application to the Energy Market Regulatory Authority ("**EMRA**") for a new license, provided that the Ministry of Energy and Natural Resources (the "**Ministry**") determines that construction had reached an irreversible stage and that the project was in the benefit of the public. The Court's annulment decision on this subject will enter into effect on the date of its publication in the Official Gazette.

## The Court rejected the unconstitutionality claims against the following provisions of the Law:

- The Court ruled that the provisions of the Law empowering EMRA to regulate the following issues through secondary legislation are not unconstitutional:
  - Procurement of services (outsourcing) by license holders (Article 22, last sentence): Pursuant to the Labor Law, while auxiliary works can be freely subcontracted, works that fall under the scope of the core business of a company can only be outsourced due to the required expertise for the work, the specific requirements of the workplace, and for technological reasons. All these requirements are sought as a justification of outsourcing of the core business activities to subcontractors. Otherwise, subcontracts may be challenged based on claims of hidden labor. The Law includes a provision stating that license holders may outsource their operation and repair and maintenance works required for the activities performed within the scope of its license. The same provision states that EMRA is authorized to determine the list of activities that can be outsourced. Accordingly, EMRA provided a list of activities that can be outsourced by license holders under the Licensing Regulation. The Constitutional Court ruled that the provision of the Law permitting EMRA to provide such a list of permissible service procurements is not contrary to

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the Constitution. This decision provides additional comfort, especially for distribution and authorized retail sale companies, whose outsourcing activities were found contrary to law in several labor court decisions prior to effectiveness of the Law.

- Mandatory provisions that must be included in the articles of association of the license holders (Article 4(3), last sentence).
  - Out-of-market activities that can be carried out by distribution companies to increase efficiency (Article 9(1), 5th sentence).
  - Import and export of electricity by supply companies (Article 10(3), last sentence).
  - Organizational structure of EPIAŞ (Article 11(3), first sentence).
  - Procurement of services by EMRA (Article 16(6)).
- The Court rejected the unconstitutionality claims against the following provisions of the Law as well:
- Ownership of meters by the distribution companies (Article 9(7), 2nd sentence and Article 9(9)).
  - EMRA's authority to impose sanctions on the authorized supply companies and distribution companies for their failure to comply with the requirements of legal and decision-making unbundling (Article 10(7), last sentence).
  - Service procurement by the Ministry, State Water Affairs (DSİ) and EMRA for audit services provided that the inspections carried out and reports prepared by the service providers will not be binding or will not impose sanctions (Article 15(3)).

Under the Turkish Constitution, a provision of law that has been declared constitutional by the Court cannot be brought before the Court again for a period of ten years. Therefore, the recent decision of the Court confirms the constitutionality of the above-stated provisions of the Law and removes the risk of their annulment by the Court for at least ten years.