# Cumulative Impact Assessments in the Environmental Impact Assessment Process

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## Introduction

The Environmental Impact Assessment Regulation[1] (the "**2013 Regulation**") introduced a new concept, namely the cumulative impact assessment (the "**CIA**"), which is required to be taken into account during the environmental impact assessment (the "**EIA**") process.

The CIA basically requires that not only the environmental impact of a single project but also the environmental impacts of several projects, which are under either development or operation and located in the same region, should be examined by the project owners and the Ministry of Environment and Urbanization. In other words, the CIA aims at identifying whether or not interface risks exist.

Prior to the 2013 Regulation, Turkish environmental legislation included no provision concerning the CIA. In fact, the CIA concept was, to our knowledge, first introduced by administrative court decisions released before the 2013 Regulation, as explained below.

### I. Court Decisions Favouring the CIA

Certain non-governmental organizations and environmental activists filed challenges before the Turkish High Administrative Court (Danıştay) regarding several electricity generation licenses issued by the Energy Market Regulatory Authority ("**EMRA**") to investors who intend to construct thermal power plants in the East Mediterranean region of Turkey. The claimants' main argument was that EMRA and the Ministry failed to examine multiple negative impacts of those planned thermal power plants during the EIA process. The 13th Chamber of the High Administrative Court (the "**13th Chamber**") rejected the claimants' injunction relief request, and the claimants then challenged this rejection before the Grand Chamber of Administrative Litigation of Turkish High Administrative Court (the "**Grand Chamber**").

The Grand Chamber overruled the rejection decision of the 13th Chamber[2] and implied that the CIA must have been taken into account by EMRA and the Ministry. As can be seen, the Grand Chamber's decision favouring the CIA was released long before the 2013 Regulation which expressly governs the CIA issue for the first time. To be more precise, notwithstanding the lack of an express legal obligation requiring the CIA in the EIA process, the Grand Chamber rather made a catch-all interpretation based on general provisions governing the protection of the environment.

In practice, we have then observed that local administrative courts started to follow such principle established by the Grand Chamber and to suspend, in particular, energy, mining and infrastructure projects due to lack of the CIA no matter the legislation is silent on this concept prior to the 2013 Regulation.[3]

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1. Published in the Official Gazette No.28784, dated 3 October 2013.
2. Grand Chamber, Decision No. 2012/222, dated 21 January 2013.
3. Injunction decision of the Çanakkale Administrative Court No. 2012/718 dated 20 November 2013 and cancellation decision of the Çanakkale Administrative Court No. 2014/267 dated 18 March 2014 (unpublished).

### II. Evaluation of the Court Decisions

Under Turkish administrative law, each administrative act can only be reviewed in accordance with the rules and legislation that are in force and applicable at the time of the issuance of the said administrative act. Further, review by an administrative court is limited to a legal review. As per Article 125 of the Constitution of the Republic of Turkey and Article 2(2) of the Law No. 2577 on Administrative Trial Procedure Administrative courts cannot question or direct a policy of the administrative authorities.

At the time when the challenged administrative acts (i.e., EIA decisions of the Ministry and electricity generation licenses) referred to above were executed, Turkish environmental law included no provision requiring a CIA. Therefore, the Ministry was not expected to conduct a specific CIA, and failure to do so could not normally be considered an omission of the decision makers. However, we understand that administrative courts rather preferred to make a broad interpretation during the judicial review.

Although we believe that the court decisions requiring the CIA, even for those EIA decisions released before the 2013 Regulation, are contrary to law under the well-established principles of Turkish administrative law, the EIA reports that will be prepared by investors subsequent to the 2013 Regulation must now include the CIA, and the Ministry must supervise the adequacy of the CIA before furnishing its permission.

### III. The Position of CIA Under the Current Legislation

The 2013 Regulation only makes a reference to the CIA; however, the definition and scope of this concept has not been elaborated. Moreover, how such concept would be implemented both by investors and the Ministry is still a question mark.

The CIA needs detailed efforts, works and surveys by project owners, investors and the Ministry as the decision maker. In order to discover the cumulative impacts of the projects in the same region or basin, project owners must reasonably ask for the technicalities and statistical details of other projects and so forth. During this process, the sharing of information in a transparent manner is of material importance but commercial secrets must also be protected.

Given the above, without clarifying the mechanics of the CIA, we do not think that a mere reference to the CIA, as it is now, will serve the expected purpose. Additionally, investors may still encounter different troubles after receipt of the EIA decisions as it is very likely that those decisions would again be challenged, and the inadequacy of the CIA would eventually be raised this time.

Therefore, the Ministry should soon prepare a comprehensive regulation regarding the CIA that would give comfort not only to the investors but also to judicial authorities and society as a whole. The Ministry can benefit from international experience and practices of the European Union and other relevant organizations[4] to achieve a satisfactory result.

Otherwise, the realization of many energy, mining and infrastructure projects may be delayed or hindered due to these uncertainties. Considering the development model that is being followed by Turkey, delays or failures in such kind of projects may adversely affect the economical dynamics of our country.

## Conclusion

It is fair to mention that environmental reflex of Turkish society has started soaring in recent years. Consequently, such reflex triggers new regulations and protectionist judicial precedents. To the extent principles of sustainable development and sustainable environment are observed in line with international standards, we do believe that those new regulations and judicial precedents may serve a public benefit. Nevertheless, it is also obvious that Turkey has a well-defined civil and administrative law system, and administrative courts are not empowered to conduct a review of expediency while hearing court cases.

Therefore, we believe that administrative court decisions favouring the CIA before the 2013 Regulation are not in line with the law. However, now that the CIA is now settled by the 2013 Regulation, project owners and the Ministry must indeed take into account the CIA during the EIA process that would be conducted after the 2013 Regulation. In any case, we recommend that a new detailed regulation governing the CIA process should be issued by the Ministry to avoid different troubles and interpretation problems in practice, as the current language of the 2013 Regulation seems to be quite insufficient.

Taking this opportunity, it would also be fair to regulate the position of energy, mining and infrastructure projects which are now stopped as a result of court decisions merely based on the lack of a CIA even in the EIA reports prepared long before the issuance of the 2013 Regulation. This is because those investors are imposed extra-legal burden in an unfair manner that they could never foresee at the very beginning of their ventures. We believe that such a new regulation, which may somehow remit those projects, is a requirement of the rule of law and confidence in the government. In fact, those projects will ultimately be required to obtain other regulatory permits and licenses in order to operate notwithstanding the resolution of the EIA issue.

4. e.g., International Finance Corporation (IFC), Good Practice Handbook on Cumulative Impact Assessment and Management: Guidance for the Private Sector in Emerging Markets, August 2013. http://www.ifc.org/wps/wcm/connect/3aebf50041c11f8383ba8700caa2aa08/IFC_GoodPracticeHandbook_CumulativeImpactAssessment.pdf?MOD=AJPERES