

Energy Disputes

Contributing editors

William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado
and Ayaz Ibrahimov



2018

GETTING THE
DEAL THROUGH

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Lauren W Varnado and Ayaz Ibrahimov
Norton Rose Fulbright

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This article was first published in February 2018

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Published by
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No photocopying without a CLA licence.
First published 2016
Third edition
ISBN 978-1-912377-43-5

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Energy Disputes 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Energy Disputes*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
January 2018

Turkey

Mesut Çakmak, Ayşe Eda Biçer and Erdem Başgöl

Çakmak Avukatlık Ortaklığı

General

1 Describe the areas of energy development in the country.

Turkey has experienced rapidly and steadily growing demand in the energy sector. Import coal and natural gas (nearly all of which is also imported due to the negligible domestic gas production) fired power plants accounted for respectively 17.52 per cent and 32.16 per cent of the country's electricity generation (Electricity Market 2016 Development Report, Energy Market Regulatory Authority). Turkey has been trying to reduce this high level of dependency by promoting the use of indigenous sources such as lignite and renewable energy sources and nuclear energy.

Turkey has a large potential for renewable energy and aims to generate 30 per cent of its electricity need from renewables by 2023. A recent major development on this front is the legislation concerning the renewable energy resource areas (RERA), which came into force on 9 October 2016. RERA is an investment package comprising the construction and operation of a major-scale renewable power plant and a domestic component production plant, as well as conducting research and development activities. In 2017, the Ministry of Energy and Natural Resources (the MENR) has tendered two 1,000-MW RERA projects – one wind power project and one solar power project – based on the RERA model.

Turkey also aims to establish its own nuclear power capacity in order to diversify the electricity mix of the country. While Akkuyu Nuclear Power Plant is currently under construction, preparations regarding two further power plants located in Sinop and İğneada are ongoing. Turkey's goal is to establish a nuclear capacity with the two nuclear power plant projects in Mersin/Akkuyu and Sinop that would account for 10 per cent of the country's electricity supply by 2023.

In addition, the government has made the following efforts to incentivise domestic coal:

- on 4 June 2016 the Electricity Market Law No. 6446 (the Electricity Market Law) was amended to empower TETAŞ, the state-owned electricity wholesale company, to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ, and with a further amendment made in December 2017, the amount of electricity to be purchased has been fixed with a formula for the next seven years, and the scope of implementation of the purchase has been extended so as to cover power plants operating based on a mixture of domestic and imported coal as well;
- a Council of Ministers Decree dated 19 September 2016, introduced, with the exception of certain countries, an additional financial obligation to pay at least US\$70 per ton of imported coal irrespective of its actual price; and
- lastly, Energy Minister Berat Albayrak noted in late November 2017 that MENR will provide an incentive starting as of 2018 to the existing imported coal-fired thermal power plants on the condition that they convert to local coal.

2 Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

Pursuant to article 168 of the Constitution of the Republic of Turkey, the state is the owner of all energy resources and has the right to explore, exploit, research and operate all such sources. The state may transfer those rights to private individuals and entities for a temporary period through licences or agreements.

There are certain laws regarding the transfer of the exploration, exploitation, research and operation rights for oil, gas and other hydrocarbons and renewable energy sources and, in practice, the government issues various types of licences and signs agreements for the transfer of these rights.

State-owned companies play an important role in the development of energy resources in Turkey. The Turkish Petroleum Corporation (TPAO) has a dominant role in onshore and offshore exploration and exploitation activities. In 2016, 17.885 million barrels of crude oil and 235.06 million cubic metres of natural gas were produced. TPAO dominates both of the production activities (Crude Oil and Natural Gas Sector Report, May 2017, TPAO; Turkish Natural Gas Market Report 2016, EMRA).

Commercial/civil law – substantive

3 Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

Form agreements are generally used in making contracts with public entities having regulatory duties or powers. Prominent examples of such agreements in the electricity market are as follows:

- EPIAŞ (the electricity market operator): market participation agreement, intraday and day ahead market participation agreements (note that the agreements related to assignment of the EPIAŞ receivables are also made based on a standard form agreement);
- TEİAŞ (the state-owned transmission operator): connection agreement, system usage agreement; and
- Takasbank (the central settlement bank): participation agreement.

In addition, some state entities use form agreements in their affairs. For instance, BOTAŞ, the state-owned natural gas utility, uses a form interruptible gas supply contract in some cases.

It should be noted that the government does not use form agreements for the transfer of energy resource exploration or operation rights. The transfer of such rights is usually carried out through licensing, concession agreements, privatisation or private law agreements depending on the type of resources and the right to be transferred.

4 What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

Contractual interpretation rules are generally regulated under article 19 of the Turkish Code of Obligations No. 6098 (Turkish Code of Obligations), which provides that the contracts must be interpreted according to the real and mutual intention of the parties. In addition, several contractual interpretation rules have been developed by legal literature and court precedents such as the following:

- interpretation to the advantage of the party undertaking an obligation should be preferred;
- interpretation to the disadvantage of the party who prepared the contract should be preferred;
- wishes and intentions of the parties at the time of the contract should be considered;
- the relevant provision should be examined alongside the rest of the provisions in the contract;
- provisions excluding rights should be interpreted strictly;
- the contract should be interpreted according to the meaning that a reasonable and honest person would give to it in the circumstances; and
- interpretation that does not comply with a provision of a law, as a substitute legal source, should not be favoured.

These rules apply in both administrative law and private law contracts, including those signed within the energy sectors.

5 Describe any commonly recognised industry standards for establishing liability.

Article 18 of the Turkish Commercial Code No. 6102 defines the principles of prudent merchant in general, according to which every merchant is required to act as a prudent businessperson in all of its commercial activities. This is an objective standard (ie, every merchant is expected to show the care that would be expected from any cautious and visionary merchant operating in the same field of business). Note particularly that electricity and natural gas market legislation specifically stipulate that such market players have a duty to act as a reasonable and prudent operator in their respective activities.

In addition, article 2 of the Turkish Civil Code No. 4721 (the Turkish Civil Code) sets forth the rule on the (objective) good faith principle. Although this article does not provide a definition of the principle, it sets out the boundaries surrounding the exercise and performance of all rights and obligations by stipulating that every person is bound to exercise his or her rights and fulfil his or her obligations according to this good faith principle. Therefore, rights and obligations must be exercised or performed in a way that an honest, trustworthy and reasonable person, who acts in accordance with the trust of the other party, would have exercised or performed such rights or obligations under similar circumstances. In this regard, good faith constitutes a set of rules that is generally recognised and expected from every person, as it is presumed that such rules satisfy the needs of social and business life. In addition, the good faith principle forbids manifest abuse of rights. Although rights contain interests that are protected and can be enforced by law, if exercise of a right amounts to a manifest abuse of such right, the right holder cannot be entitled to the benefit that it expected to achieve by way of exercise of its right in a manner that is contrary to the good faith principle. Legal scholars and judicial precedents acknowledge certain exercises of rights as manifest abuse of a right including but not limited to where such exercise will result in illegitimate benefits or hindrance of other parties' interests.

Finally, article 115 of the Turkish Code of Obligations provides that any agreement made in advance purporting to exclude or limit liability for fraud, wilful misconduct or gross negligence is void. See question 8 for details of this provision.

6 Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility, recognised in your jurisdiction?

In the Turkish legal framework, '*pacta sunt servanda*' or the rule of 'obligations shall be honoured' constitutes the main principle of Turkish contract law, pursuant to article 2 of the Turkish Code of Obligations. However, the concept of '*rebus sic stantibus*' acts as the exception to this principle. If the terms of the contract do no longer align with the parties' will, because of unexpected circumstances, the *imprévision* theory comes into force. This principle has found itself a formal scope of application in Turkish law, as the concept was introduced in article 138 of the Turkish Code of Obligations. The principle can be explained as the 'collapse of the underlying basis of the transaction', which leads to either adaptation of the contract by the court - to the extent of the parties' will - or eventually termination of the contract. This principle is applicable to contracts signed in the energy sectors as well.

The concept of force majeure is also recognised under Turkish law, but is not clearly defined in legislation in general. However, as an exception, energy legislation defines force majeure events. According to licensing regulations of electricity, natural gas and petrol markets, for an event to be acknowledged as force majeure, such event must impede the affected party's performance of its obligations under the relevant legislation and be unavoidable, inevitable and unforeseeable even if the affected party has exercised due care and diligence and has taken all precautions.

The Electricity Market Licensing Regulation provides certain examples of force majeure events which include natural disaster, epidemic, war, public uprising, acts of terrorism, sabotage, strike and lockout. Upon the licence holder's application in writing to EMRA indicating the starting date and extent of the force majeure event, its effects to its obligations under the legislation, and if possible, its cure period, EMRA may decide the postponement or suspension of the licence holder's obligations to the extent they are affected from the force majeure event. Further, where it is foreseen that performance of such obligations is not possible, other than transmission and distribution activities in natural gas and electricity markets, EMRA may decide that such obligations will not be applicable to such licence holder.

7 What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

Under Turkish law, third parties with a legitimate interest can make nuisance and negligence claims mainly through filing compensation lawsuits before civil courts or filing cancellation lawsuits against relevant administrative acts (such as permits or licences) before administrative courts. The initiation of a lawsuit alone does not provide a justification to prevent the development of an energy project. In order for a lawsuit to adversely affect a project, the court must have either rendered an injunction relief decision suspending the implementation of the relevant administrative act, or cancelled it; and the relevant administrative act must be one of the critical acts in the absence of which the project cannot continue.

8 How may parties limit remedies by agreement?

In accordance with articles 26 and 27 of the Turkish Code of Obligations, parties may limit remedies by agreement in light of the freedom of contract principle, provided that such limitation does not violate compulsory provisions of law, ethics, public policy and personal rights. However, it should also be noted that any agreement made in advance purporting to exclude or limit liability for fraud or gross negligence is void according to article 115 of the Turkish Code of Obligations. Pursuant to articles 115 and 116, services that are performed under authorisation from a relevant authority and requiring special skills, limitation of liability arising from either slight or gross negligence or intentional misconduct on the part of the party itself or its agents shall be null and void. Additionally, any limitation of liability arising from the operation of dangerous businesses (as set forth in article 71 of the Turkish Code of Obligations) may not be enforceable.

9 Is strict liability applicable for damage resulting from any activities in the energy sector?

There are two main strict liabilities under Turkish law that may be applicable in the energy sector: the employer's strict liability, which is regulated under article 66 of the Turkish Code of Obligations, and the strict liability of the construction owner, which is regulated under article 69 of the Turkish Code of Obligations. The employer can avoid liability by proving that he or she showed due care in the employment decision, inspection of the work, selection of the tools and organisation of the work, according to objective standards. The construction owner's strict liability cannot be eliminated; but the construction owner can seek recourse to the person who caused the damage. In addition, pursuant to article 71 of the Turkish Code of Obligations, both the owner and operator are severally responsible for liabilities arising from dangerous businesses, including certain energy projects.

Turkey is a party to the Paris Convention on Third Party Liability in the Field of Nuclear Energy dated 29 July 1960, and therefore its provisions would be applicable regarding the liability of nuclear power plant operators in Turkey.

Commercial/civil law – procedural**10 How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?**

In certain project documents, as we see in major energy projects in practice, such competing clauses are governed pursuant to the 'coordination of disputes protocols' whereby the parties clarify the application of competing clauses such as choice of forum, choice of law or mode of dispute resolution. This protocol includes, among others, provisions in the form of guidance to the parties as to how to coordinate initiation of disputes resolution mechanisms that may relate to multiple parties and contracts. Here, the relevant judge or arbitrator is expected to determine his or her own jurisdiction in respect of the relevant project agreement before him or her (and thus the limits of his or her jurisdiction regarding the other project agreements) on the basis of the rules set out in such 'coordination of disputes protocol'. To the best of our knowledge, the validity and enforceability of such protocols have not yet been tested before the Turkish courts.

In the absence of such protocol, the specific provisions provided in each of the agreements would be separately applicable for disputes arising out of each relevant agreement or document. In such a case, the expectation would be that the judge should look at the project agreements other than the project agreement before him or her to ascertain his or her limits of jurisdiction in respect of the other relevant project agreements. Although it may be more time consuming, this should mainly achieve the same result that is aimed at by way of a 'coordination of disputes protocol'.

11 Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Stepped dispute clauses are permissible under Turkish law and common in practice in the Turkish energy market. Although there is no specific provision in the legislation dealing with such clauses, the parties can provide a stepped dispute clause in their contracts based on the freedom of contract principle of Turkish law. Stepped clauses are commonly used in the contracts to allow a claim to be resolved in the fastest and most cost-effective way. Typically, stepped clauses involve an internal resolution process through amicable settlement, followed by a stage of alternative dispute resolution such as the involvement of an expert; and the resolution by arbitration or court jurisdiction as the step of last resort.

In order for an arbitration clause or agreement to be valid under Turkish law, the parties' intention to submit disputes to arbitration must be clear and unconditional, and the jurisdiction of local courts must not have been provided as an alternative to arbitration. Split dispute clauses permitting parties to go to arbitration for some disputes and to courts for some others arising from the same contract may not be valid and enforceable under Turkish law if the distinction between these two categories of disputes are not sufficiently clear. This issue is not yet tested before Turkish courts. However, even if there is a distinction between the categories of disputes, given that a dispute may relate to both categories in practice, the validity and enforceability of split dispute clauses may be questionable as a matter of Turkish law.

12 How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Under Turkish law, parties to a lawsuit can request the judges to appoint an expert, or the judges themselves may appoint experts to prepare a report on issues that require technical and specific knowledge outside the legal issues. Notwithstanding this clear definition, until recently in practice Turkish courts commonly appointed experts in relation to legal issues alongside other issues and referred to such reports as legal ground for their decisions for the legal issues involved as well. In order to prevent such improper practice of expert evidence, the Experts Law No. 6754, which was published in the Official Gazette No. 29898 dated 24 November 2016, reiterated that only experts that have been registered with the official experts' registry by documenting their expertise in an area outside of law can be appointed as experts by the courts.

Apart from such court-appointed experts, the parties to the lawsuit can also obtain opinions from experts and can submit their reports to the court as evidence. In accordance with article 282 of the Civil

Procedural Law No. 6100, expert reports are accepted as discretionary evidence. In disputes involving energy matters, it is common in practice for courts to appoint experts and for the parties to obtain their own independent expert opinions as well.

13 What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

There are no energy-specific interim and emergency relief provisions under Turkish law, and therefore the general provisions governing such relief and measures are also applicable for energy disputes. Interim relief is available both under Turkish administrative law and civil law. An injunction relief may be requested by any person with legitimate interest from administrative courts to suspend the implementation of an administrative act. The courts are required to render an injunction relief if both the following conditions are met: the administrative act is clearly contrary to law, and an irreparable damage would occur if the implementation of the relevant administrative act is not suspended. A precautionary measure may be requested from civil courts either during a pending lawsuit or as an independent lawsuit. Precautionary measures may be granted by the courts if there is a risk that a delay may cause considerable damage, or any change in the existing conditions may obstruct or make impossible the usage of a right if the precautionary measure request is not accepted.

14 What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

There are no energy-specific enforcement rules under Turkish law, and therefore, the general enforcement rules are also applicable to energy disputes. Pursuant to the Turkish International Private Law and Procedural Law No. 5718 (the Turkish International Private Law and Procedural Law), for the enforcement of judgments rendered by foreign courts and finalised in accordance with the laws of the concerned states, an enforcement decision has to be given by a Turkish court. In order for a foreign judgment to be enforced in Turkey, the conditions stipulated under the Turkish International Private Law and Procedural Law must be met:

- there must exist reciprocity with the state in which the relevant judgment is given;
- the judgment must not be contrary to public policy rules of Turkey; and
- the right to defence of the parties must not have been violated during the trial process before the relevant foreign court.

The enforcement procedures of foreign arbitration awards will be subject to the Turkish International Private Law and Procedural Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in June 1958 (the New York Convention). It should be noted that in accordance with article 90 of the Turkish Constitution, international treaties such as the New York Convention have the same effect as Turkish domestic law. Turkey has, however, declared the first reservation and limited the applicability of the New York Convention to awards made in other contracting states according to the principle of reciprocity. Therefore, the enforcement of an arbitral award in Turkey shall be subject to the New York Convention only if it is rendered in a state that is a party to the New York Convention. The New York Convention satisfied the reciprocity requirement with respect to all states that are party to it so that no further application of the reciprocity test is required for those states. The enforcement of foreign arbitration awards that are outside the scope of the New York Convention is subject to certain conditions under the Turkish International Private and Procedural Law, which are similar to the conditions for enforcement of foreign court judgments as explained above. In addition, in light of article 15 of the International Arbitration Law No. 4686 (the International Arbitration Law), arbitral awards can be challenged before the relevant first instance court. In such case, the court would examine the file from the point of the cancellation grounds provided in the International Arbitration Law, which are very similar to the enforcement conditions of the New York Convention.

15 Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

There is no arbitration institution specific to the energy disputes in Turkey.

On a general note, Turkey is a party to the Energy Charter Treaty and foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to this treaty.

16 Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Arbitration is usually preferred to local courts in large-scale energy contracts. It is primarily chosen by the parties for the purposes of shortening the duration of the dispute resolution process, being able to submit the dispute to arbitrators who are qualified experts of the areas related to the specific dispute, and providing a relatively neutral dispute resolution process, especially in international transactions and within the scope of contracts signed with an administrative party.

With entry into force of the Law on Mediation for Civil Disputes No. 6325, mediation has also become an alternative option in resolution of energy-related disputes. In fact, in November 2017, a specialised Energy Disputes Mediation Centre has been established for the promotion and facilitation of mediation in disputes arising in the energy sector under the umbrella of the Energy Law Research Institute.

17 Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

Attorney's Act No. 1136 provides a settlement option under the supervision of attorneys who may invite parties of a dispute to settlement before filing a lawsuit or before the first hearing in the cases where a lawsuit is already filed. In case the counterparty accepts this invitation and the parties reach a settlement, settlement minutes must be signed by the attorneys and their clients. Such minutes will be in force of a final court judgment on the matter subject to the dispute.

The Law on Mediation for Civil Disputes No. 6325 offers mediation as an alternative option for dispute resolution. Pursuant to this law, confidentiality is one of the main principles, and the documents and information submitted during the mediation process, including but not limited to acknowledgement of any factual matters or claims, cannot be used as evidence before courts or arbitral tribunals. The only exceptions to this rule are any agreement of the parties to the contrary, any requirements by law to disclose these or the necessity of their disclosure for implementation of the settlement agreement. The individuals who violate the confidentiality rule under this Law and cause the relevant party to suffer any damage may be sentenced to prison for up to six months. The parties and mediators may sign a settlement agreement to set out the details of their agreement. The enforceability of such agreement requires an enforceability annotation to be received from the relevant court. The agreement will have the force of a court judgment after receiving such annotation. Therefore, the information stated under the settlement agreement may be required to be disclosed by the parties for enforcement purposes.

18 Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

The Turkish Parliament enacted in March 2016 the Law No. 6698 on Protection of Personal Data, which had been on its agenda since 2012 to establish a centralised data protection framework. In the course of the following year, the Board for Protection of Personal Data has been established and the secondary legislation of the Law has been enacted to cast further light on the implementation of the Law. In addition to this Law, there are various laws including provisions applicable to data protection and privacy such as some articles of the Constitution of the Republic of Turkey regarding the privacy of private life and freedom of communication, provision of the Turkish Criminal Code No. 5237 (the Turkish Criminal Code) regarding blocking and impairing the system, destroying or altering the data; and provision of the Turkish Civil Code regarding the protection of personality against violations.

In addition, Turkey is a party to the European Council Agreement on Cyber Crime, the United Nations Universal Declaration of Human Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms. Turkey has also signed and ratified the Convention for the Protection of Individuals regarding Automatic Processing of Personal Data (Convention No. 108).

19 What are the rules in your jurisdiction regarding attorney-client privilege and work product privileges?

In accordance with the Attorney's Act, attorneys are obliged not to disclose any information acquired from or in respect of their clients as a consequence of their representation without the client's permission. Furthermore, attorneys have the right to avoid testifying regarding any information acquired as a consequence of the representation of any client even if the client permits testifying.

Turkish law does not provide specific provisions regarding the nature of work products of attorneys or whom such products belong to. In the absence of specific provisions, these work products should be assessed within the context of the general intellectual property legislation. Furthermore, parties can set forth additional contractual obligations regarding the work product privileges in their terms of engagement.

20 Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

There is no specific administrative review for energy disputes required to be initiated before filing a lawsuit.

However, the applicable legislation provides an option to apply to the EMRA for the settlement of certain disputes. For example, in accordance with the Electricity Market Licensing Regulation, distribution and transmission licence holders can apply to EMRA for resolution of disputes arising from connection and system usage agreements.

Additionally, as a general rule in Turkish administrative review procedure, plaintiffs can first apply to the administrative authority ranking higher to the one that has rendered the subject administrative act (or to the administrative authority rendering the subject administrative act if there is no higher-ranking authority) for annulment, cancellation, revision or re-issuance of the respective act before filing of a lawsuit for the same.

Regulatory

21 Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

Administrative authorities regulating the energy sectors in Turkey are as follows:

- EMRA is an independent regulatory authority responsible for the regulation and supervision of the oil and gas markets (ie, mid-stream and downstream segments) and the electricity market.
- MENR determines and implements national energy policy objectives. In addition, it ensures coordination between related public bodies and private entities; and supervises all exploration, development, production and distribution activities in respect of energy and natural resources.
- The General Directorate of Petroleum Affairs evaluates applications and issues licences for exploration, extraction and operation of oil and gas sources and grants licences for these activities.
- The General Directorate of Mining Affairs evaluates applications and issues licences for exploration and operation of mines.
- The Turkish Atomic Energy Authority is responsible for regulation, supervision and guidance regarding the areas concerned with atomic energy together with EMRA.

22 Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

Both the Electricity Market Law and the Natural Gas Market Law No. 4646 require distribution and transmission network operators to provide access to the network on the same terms and conditions to all system users without discrimination, other than the incentives provided for the renewable energy facilities explained below. Similarly, under the Oil Market Law No. 5015, licensed storage and transmission companies must carry out all storage and transmission requests, save for capacity limitations, without discrimination among applicants. Furthermore, the owners of oil refineries are obliged to provide all distribution companies requesting to purchase oil from them with at least the same conditions they provide to their own distribution companies.

Without prejudice to the generality of the above, certain priorities are provided for facilities based on renewable energy resources. The Electricity Market Licensing Regulation requires both TEİAŞ (as the

Update and trends

Priority for local energy resources

The Minister of Energy and Natural Resources, Berat Albayrak has announced an energy strategy in 2016 where local energy resources will receive precedence in energy investments. Some of the significant reflections of this new strategy are listed below.

Renewable Energy Resource Areas (RERA)

RERA is an investment package comprising the construction and operation of a major-scale renewable power plant and a domestic component production plant; as well as conducting research and development activities. In 2017, the MENR has tendered the first two RERA projects, one wind power project and one solar power project, each with an installed capacity of 1,000MW.

Local coal incentives

The MENR aims to utilise the majority of local lignite and coal reserves for electrical energy production until 2023. The goal is to increase local coal's share in the country's electrical energy production portfolio until 2019. In this pursuit:

- a Council of Ministers Decree dated September 2016 introduced, with the exception of certain countries, an additional financial obligation for importers to pay at least US\$70 per ton of coal imported irrespective of the actual price.
- TETAŞ, the state-owned electricity wholesale company, had been empowered in 2016 to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ. With an amendment made in December 2017, the amount of electricity to be purchased has been fixed with a formula for the next seven years (ie, until the end of 2024) and the scope of implementation of the purchase has been extended so as to cover power plants operating based on a mixture of domestic and imported coal.
- Berat Albayrak noted in late November 2017 that an incentive will be provided to the import-coal fired thermal power plants as of 2018 on the condition that they convert to local coal.

Developments in nuclear energy

Interest in nuclear energy in Turkey has increased recently, bringing along with it several nuclear power plant projects. The aim is to have Akkuyu nuclear power plant's first unit be operational until 2022. The development studies are ongoing for the Sinop nuclear power plant.

The total installed capacity of these two power plants is expected to account for 10 per cent of the country's electricity supply by 2023. In addition, the field studies for a third nuclear power plant are ongoing.

Transit natural gas pipeline projects

Turkey is constructing its first transit natural gas pipeline projects with Azeri and the Russian government. Turkey, as an import-dependent country, places a great importance on these projects, with a view to increase and diversify its gas supplies:

- Trans-Anatolian Natural Gas Pipeline is expected to be operational by mid-2018, which will initially transport 16 billion cubic meters (bcm) of Azeri gas every year. Six bcm will be for Turkey's domestic consumption, while the rest will be delivered to Greece, Albania, Italy and further into Europe.
- Construction of the TurkStream gas pipeline was commenced on 7 May 2017. TurkStream will deliver 31.5 bcm of gas annually through the Black Sea to the Turkish Thrace coast. Half of this annual quantity will be consumed in Turkey and the other half will be exported to Europe. Construction of TurkStream is planned to be completed by 2020.

Natural gas organised wholesale market

On 31 March 2017, EMRA published the Natural Gas Organised Wholesale Market Regulation, which introduced establishment of a regulated spot market for natural gas trading. Currently, the market players trade pipeline gas by way of long-term supply agreements or spot trading where the parties conclude agreements by way of emails, or even by telephone. The market aims to complement such bilateral agreements between market participants. They will also be able to remedy their imbalances. The market is envisaged to be operational by 1 April 2018.

Climate Change

Turkey became a signatory to the Paris Agreement on 22 April 2016. However, it has not yet been ratified. Turkey is not subject to the emission reduction targets, while it is subject to common liabilities applicable to all contracting parties, such as the preparation of an intended national determined contributions (NDC). Turkey submitted its intended NDC on 30 September 2015. Under this, Turkey declared that it aims to reduce greenhouse gas emissions by 21 per cent by 2030, and increase its solar power capacity to 10,000MW; and wind power capacity to 16,000MW.

operator of the transmission network) and the distribution licence holders to give priority to those facilities generating electricity from renewable energy resources in terms of their connection to the transmission or distribution systems.

EMRA may intervene in the case of a breach of these requirements by TEİAŞ or distribution companies, and impose administrative fines and other sanctions to ensure fair access of all market players to the transmission and distribution networks.

23 What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

Decisions and actions of all regulatory authorities can be challenged before administrative courts pursuant to Administrative Procedure Law No. 2577. Furthermore, pursuant to the Ombudsman Law No. 6328, claims regarding administrative decisions and actions can be submitted to the Ombudsman Authority for resolution as well. The decisions of the Ombudsman Authority are not binding on the administration or courts; however, in practice, the administration tends to comply with them, considering the fact that the courts are also likely to comply with them in the case of a cancellation lawsuit filed against the same administrative act.

As explained above, it is also possible for the plaintiff to apply first to the administrative authority that ranks higher than the one that has rendered the subject administrative decision (or to the administrative authority rendering the subject administrative decision itself if there is no higher ranking authority) for annulment, cancellation, revision or re-issuance of the respective decision before filing a lawsuit for the same.

24 What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

The Petroleum Law No. 6491 and its Implementation Regulation permit certain unconventional research and exploration activities as part of the policy to benefit from all domestic resources. The hydraulic fracturing method, which is used for shale gas research activities, falls within the scope of these unconventional research and exploration activities.

The General Directorate of Petroleum Affairs issued more than 40 licences for exploration of shale gas.

The petroleum right holders who have the right to perform hydraulic fracturing must submit an additional form to the General Directorate of Petroleum Affairs. Such form must include all information regarding the results of the activity in terms of water, soil, air and other environmental pollution.

25 Describe any statutory or regulatory protection for indigenous groups.

Turkish law does not provide for a specific statutory or regulatory protection for indigenous groups; however, as explained in question 7, Turkish law permits individuals and legal entities to challenge all administrative acts, such as permits or licences of an energy project, if such administrative act violates the legitimate interests of such individual or legal entity. Such individuals and legal entities can also file compensation lawsuits against the relevant public authorities or private investors for the compensation of their damages arising from the relevant project.

26 Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

Turkish Foreign Investments Law No. 4875 (the Foreign Investments Law) provides that foreign investors are to be granted no less favourable treatment than that accorded to local investors. In addition, the Foreign Investments Law reiterates the constitutional principle that expropriation and nationalisation is only permitted if required for the public good and only in return for adequate compensation. In order to provide additional comfort to foreign investors, the Foreign Investments Law ensures that recourse to local and international arbitration and alternative dispute resolution mechanisms would be available for foreign investors. Foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to applicable bilateral investment treaties or the Energy Charter Treaty.

In respect of the scope of the provided coverage, the Foreign Investments Law provides a broad definition of foreign investment. Any contribution from outside of Turkey of funds in convertible currency, corporate securities (except foreign sovereign bonds), machinery and equipment, or industrial and intellectual property rights constitutes foreign investment. In addition, 'any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources' are included within the definition of foreign investment.

27 What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

Pursuant to Environmental Law No. 2872 and the Turkish Civil Code, in case of environmental pollution, the polluter and the property owner shall be subject to certain administrative fines in addition to their obligation to take preventive measures and eventually clean up the pollution. Pursuant to the Turkish Criminal Code, a person who intentionally or negligently causes pollution of soil, water or air is either imprisoned or punished with a monetary penalty, or both. Occupational Health and Safety Law No. 6331 also sets forth certain responsibilities for the employers such as to appoint an occupational safety expert, workplace doctor and other health personnel from among their employees; and to make a risk assessment directly or have it made by others for its workplace to determine the precautions required for the maintenance of occupational health and safety and the protective equipment to be used for such purposes. Failure to comply with these requirements may result in administrative fines or the shutting down of the works.

A very common risk associated with the Turkish power sector, as in other major energy and infrastructure sector projects, is the risk of legal challenge against permits, licences and any other administrative actions related to their projects. Under Turkish law, any person (individual or legal entity) who has a legitimate actual interest in the cancellation of an administrative action is entitled to file a cancellation

lawsuit against such action before administrative courts. 'Legitimate actual interest' is interpreted widely by administrative courts, and therefore any third party (individuals, communities, environmental groups, non-profit governmental organisations or other third parties) whose interests have been claimed to be violated due to an administrative decision may request its cancellation before an administrative court. Licences (including electricity licences), environmental permits, land rights and expropriations, construction permits, etc, are among the administrative actions that may be subject to such cancellation lawsuits. Non-governmental organisations (eg, environmental groups) and professional associations (eg, chamber of architects, environmental engineers) have been quite active in recent years to challenge power projects based on environmental grounds or violation of planning rules.

Other

28 Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

We are not aware of any current sovereign boundary dispute involving Turkey that could affect the energy sector.

29 Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

Turkey's involvement in international energy cooperation dates back to 1991, to the signature of the European Energy Charter, which was also intended to encourage cross-border energy cooperation. Turkey was among the participants of the Energy Charter Conference, and executed the Energy Charter Treaty on 17 December 1994, but did not ratify until 2001. After more than a decade, Turkey has finally ratified the trade-related provisions of the Energy Charter Treaty, providing cross-border conduct of energy markets by implementing the rules of the World Trade Organization, referred to as the Trade Amendment, with the Council of Ministers' decree published in the Official Gazette No. 30001 and dated 8 March 2017. Turkey has also joined the Energy Community, which aims to extend the European Union internal energy market to south-eastern Europe and beyond, with observer status in 2006.

30 Describe any available measures for protecting investors in the energy industry in your jurisdiction.

Turkey has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), which permits investment disputes between a state and an investor to be submitted to the International Centre for Settlement of Investment Disputes in Washington, DC. Furthermore, Turkey has also signed bilateral investment treaties with more than 80 countries around the world, all of which allows the investors of such countries to submit their investment disputes to arbitration in various forums, such as ICSID and International Chamber of Commerce.

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31 Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

The Electricity Market Licence Regulation, the Natural Gas Market Licence Regulation and the Petroleum Market Licence Regulation require licence holders to operate their institutional information and industrial control systems in accordance with the ISO/IEC 27001 information security management system standards and obtain the relevant certifications from an institution accredited by the Turkish

Accreditation Agency. With regard to operations within the electricity market, this obligation covers the licence holders of generation, transmission, supply, market operation and distribution services. While in the natural gas market, transmission and distribution licence holders must hold such certificate; this requirement only applies to refinery licence holders in the petroleum market. Further to the above, in respect of the electricity market, EMRA published two pieces of legislation in July 2017 regarding information systems in energy sector for ensuring the continuity of the information system by way of the supervision of industrial control systems, as well as management and reduction of risks concerning information systems in the energy sector.

Getting the Deal Through

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Anti-Money Laundering
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Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
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Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
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Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
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Risk & Compliance Management
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