

# Priority in Multiple License Applications in the Energy Markets

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## Introduction

The issue of multiple license applications for the same area in the electricity, natural gas and petroleum markets has gained more importance with the significant increase in private sector investments in Turkish energy markets over the last years. Accordingly, more detailed regulations have recently been introduced in the relevant legislation on this subject by the Turkish Parliament and the Energy Market Regulatory Authority (“EMRA”).

The issue of multiple license applications on the same area mainly arises in two forms: Firstly, there may be more than one investor desiring to invest on the same natural resource. For instance, applications to establish a power plant on the same river or wind power plant at the same area create such sort of intersection. Similarly, since the salt solution stratum constitute convenient platforms for underground storage of natural gas and the number of these kind of geographical locations is quite limited, interested investors usually target the same area and overlap becomes inevitable.

In the second type of overlap, there may be more than one investor desiring to invest on the same geographical area but in different markets. In such cases, it becomes a question of energy policy that the legislative and/or the regulatory authority should decide which investment is deemed more important and should therefore prevail from public benefit perspective.

From the investors’ perspective, it is of utmost importance in terms of foreseeability and legal security that multiple application cases are regulated with clear and transparent rules in advance in both types of overlaps.

Priority in multiple applications is regulated in various pieces of legislation, in particular the Electricity Market Licensing Regulation<sup>1</sup> (“EMLR”), the Natural Gas Market Licensing Regulation<sup>2</sup> (“NMLR”) and the Petroleum Market Licensing Regulation<sup>3</sup> (“PMLR”). One can observe that an analogy has been drawn among such regulations, especially with the amendments introduced by EMRA on 7 December 2008 and 31 January 2013. Furthermore, there are regulations which handle the issue on the basis of a particular market activity. The Regulation on the Selection of Applicants for Natural Gas Storage Activity in the Same Area<sup>4</sup> (“Natural Gas Storage Regulation”), which entered into force in 2012, and the Competition Regulation on the Preliminary License Applications for Wind and Solar Power Plants<sup>5</sup> are regulations of this kind. Increase in the number of such regulations point to the fact that the problem has become more significant in conjunction with the increasing number of investments and that it has become a necessity from the regulator’s perspective to clarify the applicable rules.

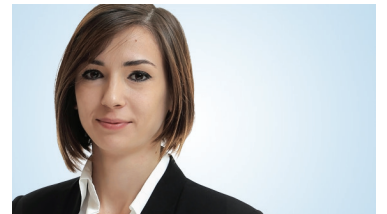
This article analyzes the order of priority for multiple license application firstly in each market separately, and then in the context of overlaps between different markets.



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1 Published in the Official Gazette No. 2880 9 dated 2 November 2013.

2 Published in the Official Gazette No. 24869 dated 7 September 2002.

3 Published in the Official Gazette No. 25495 dated 17 June 2004.

4 Published in the Official Gazette No. 28211 dated 21 February 2012.

5 Published in the Official Gazette No. 28843 dated 6 December 2013.

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## I. Priority in Multiple Applications in the Electricity Market

Article 14 of EMLR regulates the priority right in the event that there exist more than one application on the same area in the electricity market.

Pursuant to Article 14(2)(b) of EMLR, in the event that the area subject to application does not constitute an area allocated under an international treaty or subject to preparations for a nuclear power plant by MENR, the preliminary license applications can be categorized into two general groups as follows: (i) natural gas fired applications; and (ii) non-natural gas fired applications. As a general rule, “non-natural gas fired” applications have priority over “natural gas fired” applications. For “non-natural gas fired” applications; the order of priority is domestic coal, imported coal and renewable resources respectively. Pursuant to Article 14(2)(c)(2), in the event that there exists an overlap among the applications based on the same resource (i.e., domestic coal, imported coal or renewable resource), the order of priority shall be determined in accordance with the timing of application to EMRA.

Although Article 14(2)(c)(2) of EMLR sets forth, as a general rule, that applications based on renewable resources will be evaluated in accordance with the respective application dates, there also exist specific regulations regarding the order of priority for certain renewable resource types. Article 15(3)(ç) envisages a tender procedure by Turkish Electricity Transmission Company (“TEİAŞ”) for wind and solar plants in the event that there exist multiple applications for the connection to the same connection point and/or connection area. Pursuant to this provision, if an applicant is the owner of the area, other application(s) shall be rejected. The tender to be made by TEİAŞ, on the other hand, is regulated by the Competition Regulation on the Preliminary License Applications for Wind and Solar Power Plants. Pursuant to such Regulation, the applicant who offers to pay the maximum contribution fee per unit MW wins the tender and enters into a Contribution Agreement with TEİAŞ. A similar tender is also envisaged with regards to hydroelectric power plants. Pursuant to Article 29 of Electricity Market Law<sup>6</sup> and the Regulation on the Principles and Procedures for Executing a Water Usage Right Agreement<sup>7</sup>, General Directorate of State Hydraulic Works (DSİ) is entitled to select the legal entity with whom the water usage right agreement will be executed for the purposes of obtaining a preliminary license for hydraulic resources. Accordingly, among the applications whose feasibility studies were accepted as appropriate, the legal entity who offers to pay

the maximum annual hydroelectric contribution fee per unit of MW shall be notified to EMRA by the General Directorate of State Hydraulic Works for the execution of the agreement.

Nevertheless, there exists no general rule in terms of the applications which do not fall into any of the domestic coal – imported coal – renewable resources categorization mentioned above. For instance, it is yet unclear how the priority will be determined with regards to a preliminary license application for a non-renewable hydroelectric power plant or for a nuclear power plant which is not subject to studies by MENR.

## II. Priority in Multiple Applications in the Natural Gas Market

Article 4(4)(d)(3) of the Natural Gas Market Law No. 4646<sup>8</sup> and Article 9 of NMLR regulate the priority right in the event that there exist more than one application on the same area in the natural gas market.

Pursuant to 4(4)(d)(3) of the Natural Gas Market Law, in case there are multiple storage license applications for the same area, a tender will be held based on the license price, the criteria of which are to be determined by a regulation. Nevertheless; pursuant to the same article, in case the license applicant and/or its shareholders hold the ownership right or usage/easement or similar right enabling the storage activity on at least half of the immovable property, such application shall prevail. The Natural Gas Storage Regulation includes various criteria for the applicants, such as technical experience, financial capabilities and resources and envisages that a tender shall be held, based on the license price, among the applicants who meet such criteria.

Furthermore, NMLR envisages a slightly different mechanism on this issue. Pursuant to Article 9(2)(b), in the event of intersection of applications for underground natural gas storage and liquefied natural gas storage activities, the application for underground natural gas storage shall prevail. This provision is in compliance with the similar provisions in EMLR and PMLR. Nevertheless, neither Article 4(4)(d)(3) of Natural Gas Market Law, as explained above, nor Natural Gas Storage Regulation makes any distinction between underground storage license and liquefied storage license. Namely, the intersecting license types are simply referred to as “storage licenses”; however, it is not clear whether the rules shall apply in relation to the same type of storage license applications (such as underground storage-underground storage or liquefied natural gas-liquefied natural gas) or in relation to the

<sup>6</sup> Published in the Official Gazette No. 28603 dated 30 March 2013.

<sup>7</sup> Published in the Official Gazette No. 25150 dated 26 June 2003.

<sup>8</sup> Published in the Official Gazette No. 24390 dated 2 May 2011.

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different types of storage license applications. In the presence of Article 9(2)(b) of NMRL, it may be inferred that the Natural Gas Storage Regulation should be interpreted in accordance with this provision and should apply only in relation to the same type of storage license applications.

### III. Priority in Multiple Applications in the Petroleum Market

Article 9 of PMLR regulates the priority right in the event that there exist more than one application at the same area in petroleum market. Pursuant to Article 9(2)(b)(2) of PMLR, in the event that there exist a refinery license application and a storage license application on the same area, the refinery license application shall prevail.

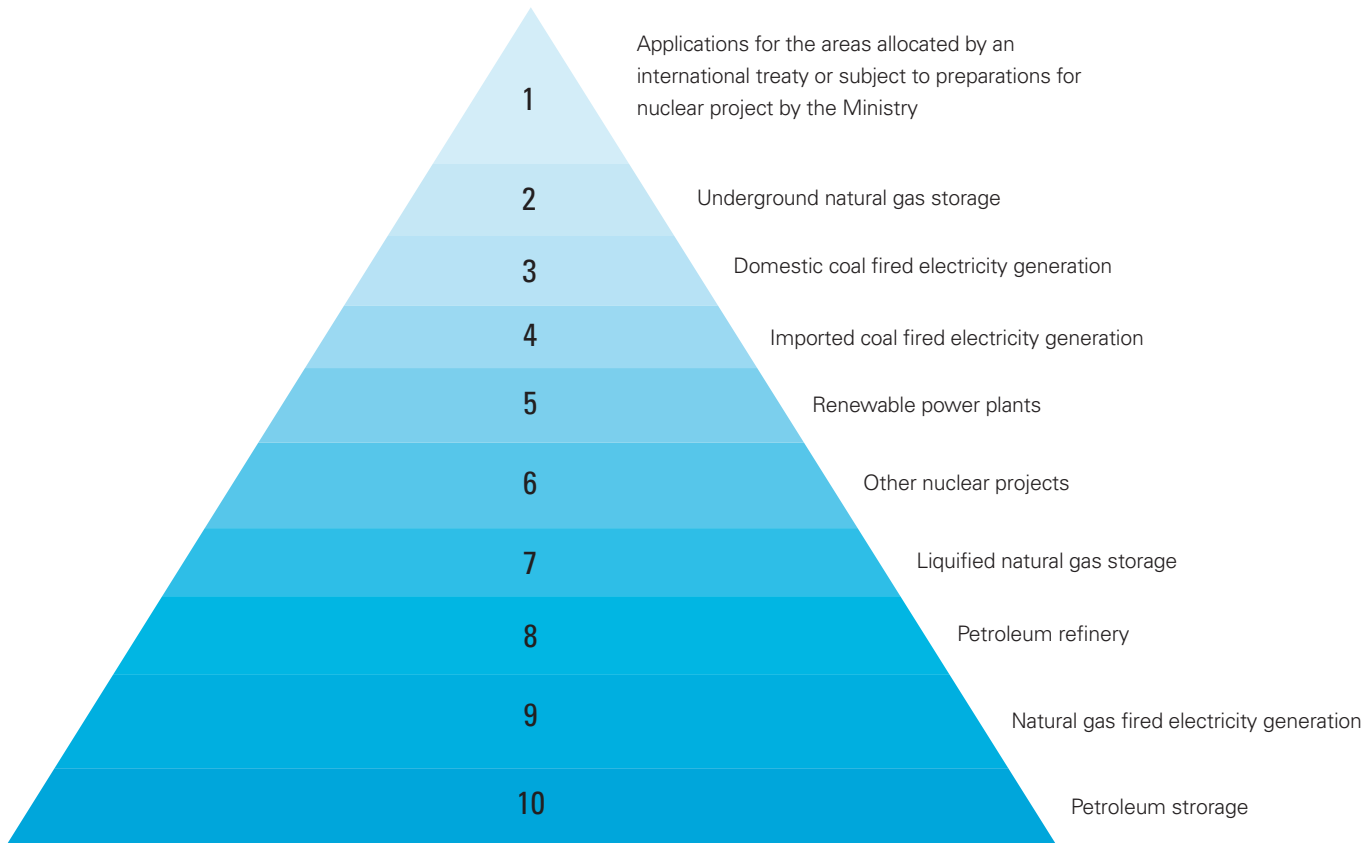
Pursuant to sub-paragraph (c) of the same paragraph, in the event that there exist more than one refinery or storage license application (namely, if a refinery license intersects with another refinery license application or a storage license application intersects with another storage license application), the earlier application shall prevail, and other applications shall be rejected.

### IV. Priority in Multiple Applications in Different Markets

Licensing regulations on electricity, natural gas and petroleum markets include parallel mechanism in relation to the priority order of applications in the event that there exist more than one application on the same area in different markets. According to such regulations, the priority order will be as follows:

Accordingly, the priority of the license or preliminary license applications in different markets should be evaluated in accordance with the ranking stated in the chart below.

Nevertheless, Article 6(9) of the Electricity Market Law states that *"In the event that a license application in relation to petroleum or natural gas market activities has been made on the area on which an electricity generation license application exists, the Board shall decide which application will be given priority by receiving the opinion of the Ministry."* This provision requires that the opinion of MENR be received. Nevertheless, such a requirement does not exist in EMLR or any other licensing regulation mentioned above.



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Considering that it is not legally possible to restrict the scope of a statutory provision by means of a regulation, it can be argued that the provisions in the regulations regarding the intersections of electricity, natural gas and petroleum licenses are not in compliance with the Electricity Market Law.

### **Conclusion**

Legislation on each of the energy markets includes parallel rules of priority in the event that there exist more than one application on the same area. These regulations should be considered as positive steps providing predictability and legal security in case of multiple applications.

Nevertheless, there are still issues which are open to criticism, such as the uncertainty about underground storage license and liquefied storage license applications in natural gas market and the incompliance of the regulations with the Electricity Market Law regarding the requirement to obtain the MENR's opinion as explained above.

Finally, please see as an Annex to this article a comparative chart showing the priority status in multiple applications.

