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Turkish Energy & Infrastructure Newsletter

Spring 2015

In This Issue...

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Recent Changes in Legislation

In the Electricity Sector

Amendments to Electricity Market Balancing and Settlement Regulation

The Regulation Amending the Electricity Market Balancing and Settlement Regulation ("**Amending Regulation**") was published in the Official Gazette on 28 March 2014, but will enter into force on 1 July 2015. According to the information obtained from Energy Market Regulatory Authority ("**EMRA**") officials, the entry into force of the Amending Regulation has been postponed to 1 July 2015 so as to enable the development of the technical capacities and infrastructure that are required for implementation of the Amending Regulation. Indeed, the Amending Regulation introduces extensive and material changes which would require certain infrastructural progress, some of which are summarized below:

- Enerji Piyasaları İşletme Anonim Şirketi ("**EPİAŞ**") is designated as the market operator for day-ahead and intra-day markets; and the operation of the intra-day market is regulated in detail under the Amending Regulation. Until EPİAŞ obtains a market operator license, the Turkish Electricity Transmission Company ("**TEİAŞ**") will remain as the market operator.
- A central settlement bank to be established in accordance with the Capital Markets Law will function as a clearing house with respect of the financial operations amongst market participants.
- The rejection reasons available to the existing supplier of a customer in case of supplier change of that customer (i.e., having an ongoing agreement with a consumer and/or a consumer's failure to fulfil its obligations) no longer exist. Further, the approval mechanism for changing a supplier which requires the consent of the existing supplier has been removed.
- Distribution companies are no longer entitled to object to the transfer of an eligible consumer to the portfolio of another supplier on the grounds that the meters of the relevant consumer are not adequate for such transfer. As per the electricity market legislation, the distribution companies are required to provide the consumers with adequate meters.
- In the event of a determination that a market participant has unjustly blocked the transfer of an eligible consumer to the portfolio of a new supplier, the necessary corrections will be made on the system and the relevant market participant will become subject to sanctions as per Article 16 of the Electricity Market Law. Also, if it is determined that a supplier places an eligible consumer transfer request to EPİAŞ without concluding an energy sale agreement or executing the IA.02 form with the consumer: (i) the consumer will be removed from the portfolio of that supplier by the first day of the month following the transfer request; (ii) the supplier will be banned from requesting the registration of a new eligible consumer to its portfolio via bilateral agreements for three months pursuant to an EMRA Board decision; and (iii) the supplier will be sanctioned as per Article 16 of the Electricity Market Law.
- In the event that an eligible consumer requests to be registered by more than one supplier, EPİAŞ will carry out the necessary examinations and the eligible consumer will be transferred to the supplier who can present a valid bilateral agreement or IA.02 form. If more than one supplier can present the required documents, all registration requests regarding that consumer will be rejected by EPİAŞ.
- EPİAŞ will establish and make accessible to supplier an eligible consumer database to be used during the supplier switch process. The distribution companies and TEİAŞ are required to provide and keep up-to-date the following information with regard to the eligible consumers to whom they provide service: (i) name, trade name of the eligible consumers; (ii) the registration code of their utilization point; (iii) the city and district where the utilization point is located; and (iv) the full address of the utilization point. If a supplier switch process is hindered due to noncompliance with this requirement, TEİAŞ, or the relevant distribution company, will be subject to sanctions under Article 16 of the Electricity Market Law.
- The Amending Regulation authorizes EMRA to request that the Competition Authority initiate a competition scrutiny regarding any anti-competitive act or transaction of the market participants in relation to their activities regarding the organized wholesale electricity markets regulated under this Regulation either (i) directly or (ii) following submission of a report by TEİAŞ or EPİAŞ to EMRA. This authority is not limited to the abuse of dominant position or concerted action cases which was the scope of TEİAŞ's authority prior to the Amending Regulation.
- The Amending Regulation establishes a new sanction mechanism for competition breaches in the electricity market: if the Competition Authority detects a competition breach of a market participant and/or balancing unit, EMRA may impose maximum price limits to the breaching market participant and/or balancing unit in the day-ahead and balancing markets up to one year.
- Zero balance correction amounts will continue to be collected from market participants by using zero balance correction ratios until 1 January 2016.

Regulation on Organizational Structure and Operating Principles of Turkish Energy Markets Operator

The Regulation on Organizational Structure and Operating Principles of Enerji Piyasaları İşletme Anonim Şirketi ("**EPİAŞ**") which will act as the market operator in the Turkish energy markets after being licensed by EMRA ("**EPİAŞ Regulation**") was published in the Official Gazette on 1 April 2015 and entered into force on the same day. As per the EPİAŞ Regulation, aside

from the regular decision-making and execution bodies of a joint stock company, EPİAŞ will operate through various service units and committees such as the Surveillance and Compliance Committee, Risk Committee or the Market Monitoring Committee. Going forward, the Market Monitoring Committee will play a major role in the formation of a fair reference price in the Turkish electricity market and development of a competitive market. The duties and liabilities of these bodies within EPİAŞ are regulated in detail under EPİAŞ Regulation. EPİAŞ was incorporated and registered with the trade registry in March. TEİAŞ and Borsa İstanbul each hold 30% of its share capital whereas the remaining 40% is owned by private companies.

Regulation Amending the Electricity Market Consumer Services Regulation

The Regulation Amending the Electricity Market Consumer Services Regulation ("Regulation") was published in the Official Gazette on 18 March 2015.

The Regulation amended Article 20 of the Electricity Market Consumer Services Regulation and repealed sub-clause 3 of Article 20. With these changes, it is no longer possible to be an eligible consumer with a consumption undertaking.

Regulation Amending the Electricity Market Licensing Regulation

The Regulation introducing amendments to the Electricity Market Licensing Regulation ("Licensing Regulation") with respect to the pre-construction requirements was published and became effective with its publication in the Official Gazette on 4 February 2015.

The novelties stipulated under the Regulation can be classified under two categories:

- **A possible remedy for license cancellations due to non-compliance with pre-construction requirements:** Under the current legislation, a generation license holder that is still in the pre-construction period is required to certify to EMRA that it has completed the requirements envisaged under Temporary Article 15 of the Licensing Regulation within the pre-construction period provided in its generation license. In the event of the failure to complete these formalities within this period, EMRA grants an additional six months,[1] and this period is added to the remaining pre-construction period, if any. If, however, the generation license holder, again, fails to complete these pre-construction requirements within the extension period for any reason, other than force majeure events, EMRA will cancel the respective generation license. EMRA, in fact, has started to enforce this mechanism since August 2014 and canceled the generation licenses of those license holders who have failed to complete their pre-construction requirements.

  The Regulation sets forth a significant amendment to provide a remedy for the electricity market actors whose generation licenses have been cancelled due to their failure to complete the required pre-construction formalities in on time. According to this amendment, EMRA will *ex officio* re-evaluate the status of the license holders that have been subject to sanctions as a result of such failure. While this amendment seems to aim at restitution of the status of such license holders, its implementation may be prone to certain practical controversies, such as the vested rights of third parties etc.

- **Revision with respect to scope of pre-construction requirements:** With the amendment made under the Regulation, the following documents will no longer be required for the purpose of pre-qualification requirements: (i) preliminary project approval; (ii) an application letter to TEİAŞ or other relevant distribution companies with respect to connection and system usage agreements; and (iii) the affirmative opinion of the Chief of Staff with respect to forbidden military zones.

As a result, the current pre-construction requirements are as follows: (i) obtaining the necessary property or land usage rights; (ii) obtaining zoning approvals; (iii) applying for the technical interaction permit (for wind projects); and (iv) obtaining an Environmental Impact Assessment Decision. That said, the Regulation further stipulates that these documents may not be needed if the generation license holder obtains any of the following documents: (i) a construction license, (ii) a certificate in lieu of construction license; or (iii) a document certifying that a construction license will not be needed.

Changes in the Regulation on Water Usage Agreements

The Regulation on the Procedures and Principles regarding the Conduct of Water Usage Agreements for Producers in the Electricity Market ("**Regulation**") was amended by the General Directorate of State Hydraulic Works ("**DSI**"). The amended Regulation was published on the Official Gazette on 21 February 2015.

One of the important provisions of the amended Regulation for protection of the environment is that the flowing water to be left by a hydroelectric power plant into the downstream in order to maintain natural life must correspond to at least 10% of the average flow over the last 10 years.

Furthermore, under the Regulation, there have been certain amendments to the standard form water usage agreement, which is executed between DSI and electricity generation license holders to use water for hydroelectric power plants. As per the amended Regulation, an Environmental Impact Assessment decision is now sought as a prerequisite for

1 As noted in the Summer 2014 issue of our Newsletter, EMRA, by its decision No. 5317-2 dated 25 November 2014, provided a maximum 10 months extension to the pre-construction periods under the licenses of wind power generators, provide that license holders that intend to benefit from such extension were required to apply to EMRA by 15 January 2015.

executing a water usage agreement. From now on, under those agreements, generation companies are required to submit two semi-annual progress reports to DSI at the development phase and monthly progress reports during the construction phase.

Regulation on the Connection of the Wind Farms to Wind Power Monitoring and Estimation Center

A new Regulation on the Connection of Wind Farms to the Wind Power Monitoring and Estimation Center ("**Regulation**") was published in the Official Gazette on 25 February 2015. According to the Regulation, wind farms with an installed capacity of 10 MW are required to connect to the Wind Power Monitoring and Estimation Center (*Rüzgar Gücü İzleme ve Tahmin Merkezi*) as a pre-requisite for provisional acceptance. Such application must be made at least 30 days before the provisional acceptance application date. The Center will be mainly responsible for making wind power capacity estimations by using the data collected from the connected wind farms.

In the Other Sectors

Amendments to the Mining Law

The awaited amendment to the Mining Law No. 3213 ("**Mining Law**") was published in the Official Gazette on 18 February 2015.

An initial draft had been submitted and then withdrawn from the Parliament's agenda in 2014 for further consideration, especially due to the urgent need for detailed work place health and safety regulations in the mining sector and the significant increases in the State royalty amounts which had been criticized strongly by stakeholders in the sector. A new draft had then been prepared and submitted to Parliament on 30 December 2014. Upon adoption by the Parliament and ratification by the President respectively, the amendment to the Mining Law ("**Amendment Law**") entered into force on 18 February 2015.

As already mentioned in the Winter 2014 issue of our newsletter, some of the major changes introduced by the Amendment Law are as follows:

Supervision of Operation Activities: The Amendment Law introduces supervision by specialized entities for the compliance of mining operations with the applicable legislation and the operation plan submitted by the relevant license holders to the General Directorate of Mining Affairs ("**General Directorate**"). According to the Amendment Law, specialized legal entities will be authorized by the General Directorate to conduct such supervisions and prepare technical documents for submission to the General Directorate such as operation plans and projects.

The Amendment Law also abolished activity and sales information reports; and instead, a single report referred to as the "operation activities report" has been introduced as a combination of those two.

Royalty Agreements: Another very significant change brought about by the Amendment Law is the prohibition of the operation of underground coal mines by royalty agreements. According to the Amendment Law, license holders of underground coal mines, except for public authorities, can no longer engage third parties to operate their license areas through royalty agreements which is known as subcontracting in the market. Royalty agreements for other mines, on the other hand, are subject to the approval of the Ministry of Energy and Natural Resources.

The Amendment Law also provides for a temporary provision for existing royalty agreements, whereby requiring that the General Directorate is notified of existing royalty agreements within three months upon entry into force of the Amendment Law; otherwise, operations under the relevant royalty agreements will be suspended. According to the same provision, term extension requests by license holders of underground coal mines whose royalty agreements have not been terminated will not be accepted.

Financial Obligations and Royalty Payments: The Amendment Law introduces a new license fee that is to be calculated based on the relevant license groups and their sizes instead of the previously used fixed annual fees. The new fees will be applicable to existing licenses starting from 1 January 2016. The amount of State Royalties for Group IV mines such as gold, silver and platinum are set forth in an annex to the Mining Law, and provide for increasing State Royalty percentages (from 2% to 16%) depending on the London Stock Exchange's price per ounce during the relevant production period.

Forfeiture of Deposited License Securities: This sanction has been abolished by the Amendment Law. Instead, administrative fines varying from TL 10,000 to TL 50,000 are envisaged for license holders breaching their obligations under the Mining Law. Deposited securities of existing license holders will be returned upon their payment of the new license fees starting from 1 January 2016.

Cancellation Sanction for Non-Production: The Amendment Law removes the cancellation sanction for operation license holders who fail to make any production for three years within a period of five years for the first time and subjects such failure to an administrative fine of TL 50,000. The cancellation sanction will apply only in the case of license holders that fail for the second time to make any production for three years within a period of five years upon application of the administrative fine.

Completion of Necessary Permits within Three Years: The disputed cancellation sanction envisaged for operation license holders who cannot complete, within three years, the environmental permits and surface rights necessary for the issuance of an operation permit, such as environmental impact assessment affirmative approval, work place opening and operation permit and surface rights, is abolished. Instead of cancellation, an administrative fine of TL 50,000 is envisaged for

each year of delay in obtaining the relevant permits. Licenses for which no operation permit has been issued due to the failure in obtaining the relevant environmental permits and surface rights will not be extended beyond their initial terms.

Pursuant to Temporary Article 22 of the Amendment Law, an administrative fine of TL 30,000 will be imposed on holders of operation licenses who have applied for but not yet obtained the environmental permits and surface rights necessary for their operations pursuant to Article 7 of the Mining Law as of the date of the Amendment Law.

Feasibility Period for Group IV Mines: The Amendment Law provides for an additional "feasibility period" subsequent to the detailed exploration period for mines belonging to Group IV (b), (c) and (ç) (including gold, silver and platinum). Exploration license holders for Group IV (b), (c) and (ç) mines who apply with justified reasons for the necessity of a further feasibility study will be entitled to an additional "feasibility period" of two years if their application is found appropriate by the General Directorate.

Transfer of Licenses: The Amendment Law subjects the transfer of licenses, which had previously been within the authority of the General Directorate, to the approval of the Minister of Energy and Natural Resources. The license transfer fee has been increased as well.

Amendments to the Petroleum Market Licensing Regulation

Two amending regulations have entered into force regarding the Petroleum Market Licensing Regulation.

- Pursuant to the amending regulation published in the Official Gazette on 1 February 2015, unless the distribution license holders sell 60,000 tons of white product (benzene, diesel fuel), administrative sanctions shall apply to those distributors. This amendment abolishes the previous sanction that may lead to the cancellation of the relevant distribution licenses by an EMRA Board decision.
- The second amending regulation was published in the Official Gazette on 19 February 2015, and includes a provision for license fees to be paid in advance. The amending regulation also envisages that time-extensions for transportation, franchise and free user licenses will be granted by the Head of the Department of Petroleum Market, while those for the other licenses will be granted by an EMRA Board decision.

Regulation on Subscription Agreements Executed with Consumers

The Regulation on Subscription Agreements ("**Regulation**"), which had been prepared by the Ministry of Customs and Trade was published in the Official Gazette on 24 January 2015 and entered into force on 24 April 2016.

The material provisions brought about by the Regulation are as follows:

- **Form of the subscription agreements:** Subscription agreements can be concluded in writing or through distant methods; however a paper copy or a permanent electronic copy of the agreement must be delivered to the consumer.
- **Mandatory content of subscription agreements:** The Regulation lists the mandatory content of subscription agreements. The absence of any of the mandatory provisions will not result in the invalidation of the subscription agreement; however, administrative fines as per the Law on the Protection of the Consumer, will be imposed and as per the Regulation, if the breach is not cured immediately, the consumer will be entitled to terminate the subscription agreement without compensation or any penalty.
- **Subscriptions with an undertaking:** If there will be an undertaking, a written letter of such undertaking including the conditions and validity period of the undertaking must be submitted to the consumer as an integral part of the subscription agreement. Mandatory information to be included in the undertaking is also stated in the Regulation.
- **Discretionary termination right of the consumers:** The Regulation sets forth the rights of the consumers regarding the termination of subscription agreements, as well as the procedure and consequences of such termination. Consumers are entitled to terminate indefinite term subscription agreements and definite term subscription agreements with a term of 1 year or more, at any time, without being required to provide a reason or subject to any penalty.

Please refer to Articles Section of this Newsletter for further information on the Regulation.

Regulation on the Agreements Executed Out of Workplace

The Regulation on Agreements Executed Out of Workplace ("**Regulation**") was published in the Official Gazette on 14 January 2015 and entered into force on 14 April 2015. The Regulation mainly stipulates the procedures and principles of all sales conducted and the agreements executed out of workplace.

This Regulation repealed the Regulation on Procedures and Principles Regarding Door Step Sales, which was published in the Official Gazette on 13 June 2003.

Although the scope of the draft version of this Regulation also covered agreements with regards to the subscription of electricity, gas and water services, the published version of the Regulation has an explicit provision which stipulates that the Regulation is not applicable to subscription agreements regarding electricity, gas and water services.

Amendment to the Health PPP Law

The Law Amending Certain Laws and Statutory Degrees, No. 6639 was published in the Official Gazette on 15 April 2015 ("**Law No. 6639**"). Law No. 6639 amends the dispute resolution provision of the Law Concerning the Construction of Facilities, Renovation of Existing Facilities and Purchasing Service by the Ministry of Health by Public Private Partnership Model, No. 6428, published in the Official Gazette on 9 March 2013 ("**Health PPP Law**") and removes the statement providing that hearings must take place in Turkey from Article 4(11). By such amendment, an express provision permitting to determine the seat of arbitration outside Turkey has been added in the Health PPP Law.

Draft Legislation

Draft Law Amending the Electricity Market Law

Although the draft law amending the Electricity Market Law No.6446 had been ready for submission to the Turkish Parliament for enactment ("**Draft Amendment Law**"), because of the general elections that will take place on 7 June 2015, the legislative period of the Turkish Parliament concluded on 7 April 2015. Accordingly, the Draft Amendment Law has become obsolete. However, upon the reopening of the Parliament this fall, this Draft Amendment Law may be included in the agenda of the Parliament again.

The major changes proposed by the Draft Amendment Law can be summarized as follows:

- New definitions, "*Technical and Non-technical Loss*" and "*Distribution Network*" are introduced by the Draft Amendment Law. While technical loss is defined as the difference between the energy that is involved in the distribution system and the energy that reaches the consumers; and distribution network was defined as a distribution facility that is used to connect the inner installment of consumers to the distribution system excluding the connecting lines. The addition of these definitions to the Electricity Market Law is important since those concepts have been in use but not defined in the Law.

- The Draft Amendment Law would require that the relevant legal entities prepare their tariffs to be submitted to the Energy Market Regulatory Authority ("**EMRA**") for its approval to include all costs and service charges. Also, it underlines that the approved tariffs cannot include any costs which are not related to the market operations, other than the additional transmission cost.

- The definitions of "*distribution tariffs*", "*retail sale tariffs*" and "*last resource supply tariff*" are amended. The distribution tariffs definition is amended in a way to cover all additional costs including technical and non-technical losses. The target amounts for technical and non-technical losses to be used as the basis for the tariffs of the distribution companies are determined by EMRA. Distribution companies will be entitled to reflect the costs related to these losses to the consumers provided that such losses are not more than the targeted amounts.

- The Draft Amendment Law provides that in case of lawsuits that are filed or applications that are made against the goods or service charges in the distribution, retail sale or last resource tariffs by consumers, the jurisdiction of the courts or arbitration committee for consumers is limited to control whether the goods or services charges are in line with EMRA's regulatory rules. Also, with a provisional article, the Draft Amendment Law envisages that any filed lawsuit, initiated execution proceeding and submitted applications before the Draft Amendment Law will be reviewed and concluded in accordance with this principle and the revised tariff definitions. The same provisional article also provides

that the amounts returned to the customer based upon court or consumer arbitration committee decisions and costs related to those decisions will be reflected in the distribution tariffs.

- The Draft Amendment law brings an additional paragraph to Article 6 of the Electricity Market Law. According to this paragraph, for power generation plants to be established in accordance with international agreements, construction permits and other construction related permits, approvals, licenses and similar documents as well as the documents showing the ownership or usage right of the relevant site should be submitted to EMRA after the issuance of the license but within the time period determined by EMRA. The license is cancelled for failure to provide those documents in a timely fashion for any reason other than force majeure events or justified reasons not attributable to the license holder.

- Provisional Article 8 of the Electricity Market Law, which provides an exemption from environmental permits for certain generation facilities until 2021 (2018+3) has been subject to long debates, will also be amended by the Draft Amendment Law. The Constitutional Court has found Provisional Article 8 against the Constitution and cancelled the Article. However, the cancellation decision will enter into effect upon expiry of 6 months following publish of the decision in the Official Gazette, which has not taken place yet. Therefore, it is still effective. The amendment brought by the Draft Amendment Law does not remove the constitutional concerns either; and on the contrary extends the scope of the exemption from environmental permits until a certain date to the already privatized generation companies. With the amendment, the time period granted for obtaining such environmental permits will be changed to 2019 from 2021.

Draft Regulation Amending the Electricity Market Licensing Regulation

On 9 April 2015, EMRA announced a draft regulation ("**Draft Regulation**") proposing amendments to the Electricity Market Licensing Regulation ("**Regulation**") and requested that interested parties provide their opinions until 24 April 2015.

The prominent amendments proposed under the Draft Regulation are as follows:

- Under the current version of the Regulation, the relevant Environmental Impact Assessment ("**EIA**") decision is required to be obtained by the end of the pre-construction period. However, with the Draft Regulation, other than wind, solar or geothermal projects, the EIA decision is required to be in place at the time of the preliminary license application.

  For applications filed for wind, solar or geothermal type generation facilities, the relevant EIA decision can still be obtained by the end of the pre-construction period. In line with the current wording of the Regulation, such applicants must file their applications for an EIA decision (as well as for the technical interaction permit) within 180 days following the issuance of the preliminary license. Applicants failing to submit these applications within the said time frame will lose their right to an extension for the pre-construction period.

  In respect of the preliminary license applications that will be under the evaluation of EMRA at the time of the Draft Regulation's entry into force, other than wind, solar or geothermal projects, EMRA will grant a period of 24 months for the provision of the relevant EIA decision. On the other hand, for projects over which EMRA has not yet initiated its evaluations at the time of the Draft Law's entry into force, EMRA will reject relevant preliminary license applications.

  Similarly, pursuant to the Draft Regulation, in case of a license modification which requires a new EIA decision, such decision must be in place at the time of the modification application for the license modification. Also, for the license amendment applications that are under the evaluation of EMRA at the time of the Draft Regulation's entry into force, an additional period of 24 months is granted for the provision of the relevant EIA decision to EMRA.

- The Draft Regulation decreases the minimum share capital threshold for domestic coal fired electricity generation facilities in the preliminary license application stage from 5% to 1% of the projected total investment amount envisaged for relevant electricity generation facility by EMRA. This threshold is currently applicable only for nuclear power electricity generation facilities. Further, the Draft Regulation requires that the share capital of those electricity generation facilities to be a minimum of 5% of the projected total investment amount at the generation license application stage; whereas this limit is currently 20%.

- The Draft Regulation clarifies that EMRA's approval will not be required for the changes in the shareholding structure of publicly traded companies and/or publicly traded shareholders of the license holder. However, in the event of such a share transfer, a notification to EMRA for license modification would still be required, if needed.

- The Draft Regulation changes the "retail sale services" definition. With such change the scope of the retail sale services is limited to the services of the authorized supply companies, other than electricity energy and/or capacity sale (i.e., invoicing and collection services to be provided to customers and the services given through consumer services centers).

- The Draft Regulation introduces a definition for "hybrid facility", a concept which is currently regulated only under the renewable energy legislation. According to this definition, hybrid facilities refer to facilities where electricity energy is generated by way of two or more energy sources, provided that at least one of these sources is a renewable energy source. The Draft Regulation also sets forth that the details concerning the hybrid facilities will be governed under the secondary legislation to be issued by EMRA. Under the Draft Regulation, existing preliminary license and license holders are permitted to convert their facilities into a hybrid facility by way of amendment to their respective licenses, on the condition that the area where the generation facility is located remains the same.

- The Draft Regulation explicitly provides that the transfer of a generation facility by way of an asset sale would only be possible if such facility is in operation.

  The Draft Regulation, removing the current 5% (for publicly traded companies) and 10% (for private companies) thresholds, envisages that none of the direct and indirect shareholders of the applicant should be prohibited from electricity market activities. Furthermore, the Draft Regulation clarifies that the said requirement is also applicable to the managers of limited liability companies as it has been to the board members of joint stock companies.

- The Draft Regulation exempts organized industrial zones from the annual activity report requirements.

- Preliminary license and license holders become required to obtain a registered e-mail address and communicate the same to EMRA within two months following the entry into force of the Draft Regulation.

- The Draft Regulation stipulates that in the event of the transfer of the license to a new legal entity having the same shareholding structure with the current license holder, EMRA will, in its approval decision, set forth certain obligations for the new legal entity and designate a time frame for fulfillment of such requirements. Failure of the new entity to comply with these requirements in a timely manner, save for the force majeure events, will result in the cancellation of EMRA's approval on the transfer.

- The Draft Regulation stipulates that, in the event that there is more than one application on the same area in respect of renewable energy sources, the priority among these applications will be as follows: (i) geothermal, (ii) wind, and (iii) solar. Furthermore, the Draft Regulation deleting the "first come-first served" basis in case of more than one preliminary license applications for natural gas fired electricity generation facility located in the same area, furnishes EMRA with discretion in terms of such overlaps.

- The Draft Regulation stipulates that the pre-construction requirements as well as the minimum capital and performance bond requirements under the Regulation will not be sought, provided that the temporary acceptance for the relevant generation facility has been granted.

- In cases where there is more than one application for the same transformer capacity, the Draft Regulation proposes the application of one of those alternatives when the Draft Regulation enters into force: (i) determination of relevant principles under a communiqué to be issued by EMRA; or (ii) conducting an auction by TEİAŞ; or (iii) adopting "first come-first served" basis.

Articles

The Regulation on Subscription Agreements and its Application to the Electricity Sales Agreements

Av. Özlem Kızıl Voyvoda, Av. Gülşen Kutlu

The Regulation on Subscription Agreements ("**Regulation**") prepared by the Ministry of Customs and Trade and was published in the Official Gazette on 24 January 2015. The Regulation entered into force on 24 April 2015, i.e., 3 months after its publication in the Official Gazette.

The scope of the Regulation mainly covers subscription agreements executed in the electricity, water, natural gas and electronic communications sectors. Only certain provisions of this Regulation are applicable to subscription agreements executed in other sectors. Also it should be noted that the application of this Regulation is limited to subscription agreements executed with customers who are qualified as consumers under the consumer protection legislation.

The Regulation stipulates the form and mandatory content of subscription agreements, the content of payment notifications, subscriptions with undertaking, termination of subscription agreements, the results of termination and the liabilities of the seller/provider.

Subscription agreements can be concluded in writing or through distant methods. However in either case, a copy of the agreement must be delivered to the consumer on paper or as a permanent electronic copy. The font size of the agreement must be at least 12 points. There is a long list in the Regulation with respect to the mandatory content of those agreements. Some of the important provisions are as follows:

- the total fee of the goods or services including the all applicable taxes;

- in case the fee of the goods or services is to be calculated based on a tariff, the name and content of the chosen tariff and the unit consumption fee on the date of the agreement together with the consumption period;

- information regarding how the services will be suspended in the event the invoice is not paid within due time and how will the services be re-provided once the outstanding invoice is paid and how long these procedures will take;

- information on force majeure events that may result in suspension of the services (if any);

- information on how the amount of the consumption will be determined in case of a deficiency of the meter or the similar measuring device;

- if there are additional fees to be collected from the consumer as per the relevant legislation, a list of those additional fees, their sum on the date of the agreement and information on how new sums will be notified to the consumer in case of an amendment;

- information on the consequences of a consumer's default;
- the amount of the security deposit to be collected from the consumer (if any) and information on how and when such amount will be returned to the consumer upon the expiry or termination of the agreement;
- information on termination events and the consequences of termination; and
- information on the consumers' right to apply to the consumer courts or the arbitration committee for consumer claims in case of a dispute.

Consumers may terminate indefinite term and definite term subscription agreements with a term of 1 year or more, at any time, without showing any reason or being subject to a penalty. The only exemption to this rule is related to the subscription agreements with an undertaking, as explained below. With regard to definite term subscription agreements with terms of less than 1 year, consumers are entitled to terminate the agreement if the conditions of the agreement are changed by the seller or the provider. Also, consumers may terminate subscription agreements under any circumstances, provided that there is a valid reason restricting the consumer from benefiting from the services. Save for the more favourable periods stated in the other legislations, the seller/provider is required to honour the consumer's termination within 7 days following the receipt of the termination notice. If the subscription agreement is not terminated by the seller/provider within the periods stated in the Regulation, no payment can be requested from the consumer after that period even if the consumer benefits from the relevant services or goods. Within 15 days following the termination, the seller/provider is required to return the remaining part of the payment made by the consumer and the deposit or security payments, if any, without any deduction.

The Regulation also describes subscription agreements with undertaking and sets forth the mandatory content of the undertaking to be obtained from the consumer, as well as the termination of those subscription agreements and consequences of termination. A written letter of undertaking comprising the conditions and validity period of such undertaking must be submitted to the consumer as an integral part of the subscription agreement. The letter of undertaking must state the validity period of the undertaking, the qualifications of the goods or services to be provided, the total price of the goods or services including all taxes, the price of the tariff without undertaking, the monthly discount amount and the calculation method of the amount to be paid by the consumer in case of early termination of the subscription agreement with an undertaking. The price of the goods or services to be provided based on an undertaking cannot be higher than the prices applicable to customers who do not provide an undertaking.

In case of an early termination of a subscription agreement with an undertaking by the consumer, only the discounts that have been made as per the undertaking and the unpaid installments of the goods or the services (if additional goods or services are provided within the scope of the undertaking) (collectively "**Discount Amount**") may be requested from the consumer. However, if the total amount that would have been paid by the consumer if the agreement had not been terminated is less than the Discount Amount, the limit of the amount to be requested by the consumer must be the lesser amount. It should be noted that the Regulation has an explicit provision with regard to the change of address of the consumer during the undertaking period. As per Article 16/2 of the Regulation, if the place of residence of the consumer changes and providing the relevant service to the new place of residence under the same conditions is not possible, the consumer may terminate the subscription agreement with undertaking without paying any penalty. The seller or the provider is obligated to notify the consumer in writing (or via a permanent electronic mean) with regard to the expiration of the undertaking, within one invoice term, at the latest prior to the end of the undertaking.

The seller/provider is required to send a payment notification to the consumer at the end of each consumption period indicating the service fee to be paid by the consumer for the relevant period. The payment notification must, *inter alia*, include the first and last indexes grounding the consumption (if any) and the reading dates; the consumption or usage amount; the unit price and pricing period and similar issues; the content and the price of the tariff in case of application of a tariff; and explicit and clear information regarding each item constituting the total price to be paid by the consumer, including the tax types. Also, in case of subscriptions with an undertaking, information regarding the remaining undertaking term and installment amount of the good if an additional good has been provided within the scope of the undertaking must be included in the payment notifications.

As can be seen, there are many requirements that should be taken into account by electricity supply companies when executing subscription agreements with their customers who qualify as consumers under the consumer protection legislation. In fact there are several additional requirements they must consider when concluding those agreements via a distance sale method arising from the Distant Agreements Regulation.[2] However, although it is clearly stated in the Regulation that the subscription agreements can be concluded distantly, we are aware that EMRA is of the opinion that electricity subscription agreements (*i.e.*, bilateral agreements) cannot be concluded via distant sale method due to the requirements of the electricity legislation.

Distribution of Profits and Calculation of Distributable Profits under Turkish Commercial Law

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A. Distribution of Profits

Year-end Dividends and Dividend Advance

The distribution of profits and the payment of any year-end dividends in respect of the preceding financial year are made each year upon the recommendation of the Board of Directors ("**BoD**") and approval of the shareholders at the annual General Assembly ("**GA**"). Dividends are payable on a date and in the form determined at the annual GA. Advance dividend payments are also possible in joint stock companies under the TCC provided that the respective company is profitable during the relevant accounting period where the dividend advance will be distributed. Such calculations are made based on the profit generated according to interim financial statements (i.e. March, June, and September). It should be noted that such advance dividend is eventually deducted from the year end dividends and the decision of an advance dividend is rendered in the annual general assembly of the company. In other words, shareholders do not become entitled to receive dividends solely based on interim financial statements but receive an advance payment from the year-end financials. In the event that the net profit of the company based on the year-end financials does not cover the dividend advance within the year, the dividend advance exceeding the net profit will be deducted from the free reserves as in the balance sheet of the previous year and if the free reserves fall short of covering the distributed dividend advance, the excessive dividend advance is returned to the company by the shareholders upon notification by the BoD.

Under Turkish law, the statute of limitations in respect of dividend payments, including interim dividends, is five years following the date of the GA approving the distribution, after which time uncollected dividends are transferred to the Treasury.

Dividends can only be determined in Turkish Lira by the GA. A shareholder wishing to receive dividends in a foreign currency is exposed to currency fluctuations in general and particularly between the date on which dividends are declared and the date on which dividends are paid.

B. Calculation of the Distributable Profits

It is also noteworthy to underline the relation of the independent auditing requirement with the distribution of profit which was introduced by the new TCC. The new system opened the door to new questions regarding the basis of the calculation of net profit. Before the launch of the new accounting and bookkeeping standards and requirements, all financial statements used to be prepared in accordance with the Tax Procedural Law, with the exception of public companies. However after 1 January 2013, companies became obligated to prepare two separate financial statements if they are subject to independent auditing, one under the Turkish Accounting Standards – a transposition of the International Financial Standards (IFRS) – and the other subject to the Tax Procedural Law, which inevitably caused certain accounting discrepancies. A recent development, the Decision of Public Monitoring, Accounting and Audit Standards Institution dated 26 August 2014, brings the requirement for the companies and institutions that are listed in its annex to prepare their financial statements pursuant to Turkish Accounting System and leaves an optional choice for the others that are not listed. The list contains a range of companies and institution such as banks, joint-stock companies, financing institutions etc.

Nevertheless, there is now a vital question waiting to be answered: briefly, which accounting system must a company, subject to independent auditing, take as the basis to calculate its profit?

The legislation does not provide any express provision in this regard. This ambiguity has already been settled for public companies as they are also required to prepare IFRS financial statements in addition to tax law based financial statements under the capital market legislation. Accordingly, the "Profit Share Guide" issued by Capital Market Board provides that the upper limit of the distributable profit for public companies is the profit calculated in accordance with the Tax Procedural Law based financial statements. Based on this provision, some argue that the net profits of the company should be calculated based on the Tax Procedural Law. On the other hand, a widely held view is that the net profits of the company subject to independent auditing should be calculated according to the annual balance sheet, which is prepared based on the Turkish Accounting Standards in order to comply with the requirements of the Turkish Commercial Code. Usually in practice, certified public accountants suggest that their clients calculate their profit in accordance with the system which brings the lowest level of profits, to be on the safe side. This might be either the Tax Procedural Law or the Turkish Accounting Standards, depending on the criteria they bring.

It seems that Turkish companies will continue to struggle with this ambiguity until the issue is addressed by supplementary legislation and the market practice is settled with relevant court precedents.

2 Published in the Official Gazette No. 29188, dated 27 November 2014.

Other Recent Developments

Constitutional Court Decision regarding the Health PPP Law

The Constitutional Court Decision regarding the Health PPP Law No. 6428 (the "Law") was published in the Official Gazette on 15 April 2015.

A lawsuit had been filed by the opposing political party (CHP) in 2013, requesting the annulment of all of the provisions of the Law. The Constitutional Court rejected the request for all of the provisions except for Article 4.4.1, which authorizes the Ministry of Health ("MoH") to have the project companies audited by outside private auditing companies, based upon the reasoning that the Law does not specify the required qualifications of such auditing companies or the sanctions applicable to them in case of violations of their duties. We believe that this provision should not be applicable to the independent technical advisors jointly appointed by MoH and the project company but the administration's technical advisors only, and since the Constitutional Court Decisions do not operate retroactively, that decision should not affect the provisions the project agreements which have already been signed.

The Constitutional Court Decision is a positive decision as it rejects the annulment request for all other provisions of the Law. In particular, the Decision provides that:

- the project agreements are private law agreements.
- the provision of an independent and continuous superficies right for a 30 year period is not contrary to the Constitution; and
- the provision of medical support services by the project company is not contrary to the Constitution.

Furthermore, it should be noted that the amendments made to the Law by Law No. 6527 in 2014 (e.g. the provision authorizing MoH to amend the project agreement and the new temporary provision specifying which rules apply to previously tendered projects) have been subject to a separate annulment lawsuit before the Constitutional Court with File No. 2014/92. That separate lawsuit is still pending.

Recent Developments on Employment of Foreigners

The Constitutional Court rendered a decision on 14 January 2015 annulling Article 14(1)(d) of the Law on Work Permits of Foreigners No. 4817. Pursuant to this recent ruling, after his/her application for a permit for a workplace, business or occupation is rejected by public authorities, a foreigner does not have to wait for the one year cool-off period in order to request a new permit for the same workplace, business or occupation.

Furthermore there is a draft law on Employment of Foreigners ("**Draft Law**"), currently pending at the relevant Parliamentary Commission. The Draft Law aims at pursuing an alignment with the European Union *acquis*, also is designated to respond to the recent intense demand on work permits by foreigners in Turkey. Below are the major regulations under the Draft Law:

- A centralized policy-making authority is envisaged and this position is assigned to the Ministry of Labor and Social Security ("**Ministry**"). Employment of Foreigners Advisory Committee is formed with this purpose and designated to practice upon legislative developments and implementations in this respect. The Committee also determines the criteria to be used when assessing work permit applications.
- The most striking provision of the Draft Law is Article 10 paving the way for foreign employees to work in health and education sectors. The Draft Law provides a pre-permit procedure, which would supposedly be sufficient to assess the competence of the employee, and prevent the official authority from rejecting the application with the reason that "occupational competence of the foreigner cannot be evaluated".
- Article 16 of the Draft Law furnishes the Council of Ministers with the right to grant permission to the foreigners to engage with the jobs, which are in fact designated by relevant laws as the jobs that can be conducted only by Turkish citizens.
- Pursuant to Article 14 of the Draft Law (i) shareholder managers of limited liability companies, (ii) shareholder directors of joint stock companies; and (iii) acting partners of partnerships limited by shares may apply for independent work permit.
- Foreign architects and engineers have become able to work in Turkey as long as they have a diploma from a Turkish university or a diploma equivalence certificate from the Higher Education Board (YÖK).
- Foreign students registered in a Turkish university have become able to obtain a work permit in order to work throughout their education period.
- Administrative judicial remedy is available for the related parties, if they apply in 30 days following the administrative decision of the Ministry.

Recent and Upcoming Conferences & Events

- 28 – 29 April 2015, İstanbul: **Health PPP Summit**, organized by PPP Experts and Elmadağ Law Firm. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated the panel on "Health PPP Projects from Contractors' Perspective".
- 6 – 8 May 2015, İstanbul: **ICCI 2015, 21st International Energy & Environment Fair & Conference** organized by UFI, the Global Association of the Exhibition Industry.
- 7 – 9 May 2015, İstanbul: **5th Multinational Energy and Value Conference** organized by Center for Energy and Value Issues.
- 25 – 28 May 2015, İstanbul: **6th World Forum on Energy Regulation – Bridging the World of Energy Regulation** organized by the Presidency of the Republic of Turkey and Energy Market Regulatory Authority.
- 28 – 30 May 2015, İstanbul: **5th International 100% Renewable Energy Conference** (IRENEC 2015) organized EUROSOLAR Turkey, Renewable Energy Association of Turkey.
- 31 May – 3 June 2015, İstanbul: **The International Symposium on Sustainable Aviation** organized by the International Symposium on Sustainable Aviation.
- 11 – 12 June 2015, İstanbul: **Enexion Energy Academy**. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, will give a speech on Bilateral Sales Agreements in the electricity sector.
- 15 – 17 June 2015, İstanbul: **3rd Annual Optimizing Mine Operations Conference** organized by Mines and Money.
- 11 – 13 June 2015, İstanbul: **REW İstanbul – 11th International Recycling, Environmental Technologies and Waste Management Trade Fair** organized by Tarsus and IFO İstanbul Fair Services.
- 16 June 2015, İstanbul: **3rd Annual Wind and Solar in Turkey Forum** organized by E.E.L. Events Ltd.
- 15 – 16 November 2015, Antalya: **G20 Leaders Summit** hosted by the Turkish G20 Presidency.

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