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Recent Changes in Legislation

Amendments to the Electricity Market Balancing and Settlement Regulation entered into force on 1 July 2015

As was announced in our Spring 2015 Newsletter, the Regulation amending the Electricity Market Balancing and Settlement Regulation (the "**Amending Regulation**") was published in the Official Gazette on 28 March 2014, and entered into force on 1 July 2015. The Amending Regulation introduced a number of new concepts and mechanisms such as the intra-day market, establishment of a central settlement bank, ability of distribution companies to object to the transfer of eligible consumers between suppliers', establishment of a new eligible consumer database by EPİAŞ and a new sanction mechanism for competition breaches. The enforcement of the Amending Regulation was postponed to achieve development of the necessary technical capacities and infrastructure to ensure application feasibility of the Amending Regulation, especially in respect of the intra-day market change.

Amendments Required by PMUM to Bank Guarantees and Assignment of Receivables Agreements

As part of the restructuring of electricity market operating activities in Turkey, the market operator role is now being taken over by the newly formed Energy Markets Operation Co. ("**EPİAŞ**") from the Electricity Market Financial Settlement Center ("**PMUM**"), a sub-division of TEİAŞ. In relation to this restructuring, PMUM announced to electricity market participants in a recent public announcement that:

- Bank guarantees given by market participants to PMUM to secure their financial obligations must be amended and the addressee of such letters must be revised to EPİAŞ (as opposed to TEİAŞ in the current case) by 21 August 2015[1], and
- Assignment of receivables agreements executed between market participants and lenders as a security for the financing of the projects must be amended and the addressee of assignment of these agreements must be revised to EPİAŞ (as opposed to TEİAŞ in the current case) by 21 August 2015.

Regulation Amending Implementation Regulation on Articles 17/3 and 18 of the Forestry Law

Regulation Amending Implementation Regulation on Articles 17/3 and 18 of the Forestry Law ("**Amending Regulation**") was published in the Official Gazette and entered into force on 20 May 2015.

The Amending Regulation introduces a new paragraph to Article 8 of the Implementation Regulation of Articles 17/3 and 18 of the Forestry Law (the "**Implementation Regulation**") regarding final forestry permit applications to be made by companies who have been granted preliminary licenses by the Energy Market Regulatory Authority ("**EMRA**"). According to the new paragraph, preliminary license holders can be granted with final permits for a maximum period of 3 years provided that no works shall be conducted on the site within that period. Upon the preliminary license holder's application, the term of the forestry permit can be extended in parallel with the extension period of the preliminary license issued by EMRA. Once the license is submitted to the administration the term of the forestry permit will be prolonged; the site will be delivered to the license holder and the license holder will be able to commence works on the site. This amendment reflects the processes envisaged in the Electricity Market Licensing Regulation regarding preliminary licenses and license periods. Once the license is granted by EMRA the license holder will be entitled to operate on the site, unlike the preliminary license period where it is not entitled to conduct any works.

The Amending Regulation further states that during the preliminary license period no easement right (such as usufruct right) may be created in favour of the license holder.

Lastly, Annex 1 of the Implementation Regulation, which sets forth the coefficients to be taken into account while calculating the permit fees for each permit type, is also amended with the Amending Regulation. This amendment decreases the coefficients for nuclear and thermal power plants. Also, a separate coefficient has been determined for energy transmission and distribution lines.

Amendment to Corporate Tax Law No. 5520 regarding Tax Deduction for Capital Increases entered into force on 1 July 2015

Law No. 6637 amends certain laws and statutory decrees including a tax deduction right which has been granted to companies conducting capital increases in cash. Accordingly, 50% of the deemed interest calculated over the cash portion of the capital increase (as registered at the trade registry) from the payment date until the end of the respective accounting period will be deducted from the corporate tax base of corporate taxpayers. The indicated deduction rate and the calculation method of the deduction are set forth by the Council of Ministers with its Decision No. 2015/7910 dated 26 July 2015 (the "**Decision**") which was published in the Official Gazette No. 29402 dated 30 June 2015.

According to the Decision, an extra 25 to 50 points are added to the deduction rate depending on the percentage of the shares that are publicly traded, and 25 points are added for capital increases used to upgrade machinery, equipment and/or land used for production and industry facilities with investment incentive certificates. Also, the tax deduction rate is reduced to 0% for (i) companies having a passive income (such as

1 While PMUM had announced on 23 July 2015 that the deadlines for submissions were extended from 31 July 2015 until 31 August 2015, PMUM recently announced on 11 August 2015 that such submissions should be filed until 21 August 2015.

companies profiting from interest rates, licensing fees, lease etc.), (ii) if 50% or more of the active capital of the company are long term securities or belong to subsidiary companies or shares of another company, (iii) if the capital increase was used as a credit for capital subscription in another company, (iv) if the respective company invests in real estates, (v) if the company has conducted a decrease in capital between the period of 9 March 2015 and 1 July 2015. This provision entered in force on 1 July 2015.

Draft Legislation

Draft Regulation Amending the Electricity Market Consumer Services Regulation

The Energy Market Regulatory Authority ("**EMRA**") has recently published the Draft Regulation Amending the Electricity Market Consumer Services Regulation (the "**Draft Regulation**") on its website for the review and comments of market players. The Draft Regulation aims to harmonize provisions of the Electricity Market Consumer Services Regulation with the newly amended provisions of the Electricity Market Balancing and Settlement Regulation ("**Amended Regulation**").

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

- In conformity with the Amended Regulation, rejection reasons available to the existing supplier of a consumer in the case of consumer's change of its supplier (i.e. having an ongoing agreement with a consumer and/or consumer's failure to fulfil its obligations thereunder) will no longer exist.
- Distribution companies will no longer be entitled to cut-off the electricity of eligible consumers due to their outstanding debts.
- Eligible consumer lists will no longer be required to be published by the distribution companies and TEİAŞ or the distribution companies, as the case may be, will not be required to keep their records.
- In cases where the meter of an eligible consumer does not conform to the regulations, the meter will be changed by TEİAŞ or the distribution company and this will not be an obstacle for the eligible consumer to choose its supplier freely.
- The Draft Regulation envisages that the suppliers will be required to (i) obtain the eligible consumer's signature to evidence that they have been informed of all commercial options and potential risks in writing prior to executing an agreement (as also envisaged in Article 23 of the current Electricity Market Consumer Services Regulation) and (ii) submit such evidentiary document bearing the eligible consumer's signature to EMRA, if and when requested.

Draft Regulations Concerning Electronic Commerce

Law No. 6563 on Regulation of Electronic Commerce, which was published in the Official Gazette No. 29166 dated 5 November 2014, became effective on 1 May 2015. The Ministry of Customs and Trade have also finalized their work on the regulations regarding the implementation of this Law on 29 April 2015. Two new draft regulations, namely, (i) Regulation on Contracts and Orders in Electronic Commerce, and (ii) Regulation on Commercial Communication and Electronic Messages have been announced for public opinion.

- Draft Regulation on Contracts and Orders in Electronic Commerce mainly sets forth the obligation to provide information with regards to the service providers, agents of the service providers, contracts and orders. The draft legislation also aims to create a complete transparency by introducing a requirement of registration to the relevant trade registry for Electronic Commerce businesses. Service providers are prohibited from transferring any personal data to any third party without the prior consent of the owner of such data.
- Draft Regulation on Commercial Communication and Electronic Messages aims to regulate the duty to inform regarding the commercial communications performed by electronic communication devices and the procedures and principles that shall be followed by service providers with regards to electronic messages. The draft legislation answers the questions concerning approval and complaint procedures to be followed by the recipients, in case of an unlawful electronic commercial communication.

2 Published in the Official Gazette No. 20249 dated 11 August 1989.

Article

Currency of Letters of Guarantee In Turkey

Av. Naz Bandik Hatipoğlu- Av. Nigar Gökmen

Turkey has developed and followed a currency protection policy since the 1930s. This policy has been liberalized over time as Turkey's focus has shifted to industrial and infrastructural developments based on foreign investments. Accordingly, Decree No. 32 on Protection of Value of the Turkish Currency[2] ("**Decree No. 32**") was enacted in 1989 to further liberalize the currency protection policy. However, issuance of letters of guarantee in foreign currency remains subject to certain restrictions under Decree No. 32.

Letters of guarantee issued by Turkish banks in foreign currency are to be paid either in foreign currency or in its Turkish Lira equivalent. Restrictions for the letters of guarantee in foreign currency are removed with an amendment made to Decree No. 32 in 2002 for cases where the payment of the letter of guarantee is to be made in Turkish Liras. Indeed, in the Circular of the Turkish Republic Central Bank No. 2002/YB-1 dated 2 January 2002 and its implementation circulars[3], it is stated that the banks may freely issue letters of guarantee in foreign currency as long as they are to be paid in Turkish Liras. However, restrictions set forth under Decree No. 32 still apply if a letter of guarantee is issued in foreign currency and its payment is determined to be made in foreign currency as well.

Pursuant to Article 18(1) of Decree No. 32, residents of Turkey may freely obtain letters of guarantee from abroad in foreign currency as long as the principal is a resident abroad. Similarly, residents of Turkey may also freely issue the same in favor of residents of Turkey or abroad. The term "Residents of Turkey" is defined under the Decree No. 32 as natural and legal persons who have legitimate settlement addresses in Turkey including Turkish citizens who are employees or have professional occupations or independent businesses abroad. "Resident abroad" is defined under Decree No. 32 as a natural or legal person who is not considered as a resident in Turkey. Therefore, there is no currency restriction for issuance of letters of guarantee when an issuing bank, beneficiary or principal is resident abroad.

Article 18(2) of Decree No. 32, on the other hand, prohibits Turkish banks from issuing letters of guarantee in foreign currency in favor of Turkish residents if the principal is also a resident of Turkey, except where the letter of guarantee is related to an international tender. "Bank" is defined under Decree No. 32 as deposit banks, participation banks and development and investment banks operating in Turkey. According to this definition, foreign bank branches in Turkey are also to be accepted as "banks" in accordance with Decree No. 32. "Foreign currency" is defined under Decree No. 32 as any kind of account, document or instrument that provides payment with foreign currency.[4] There is, however, no definition under Decree No. 32 for international tenders but in accordance with the general principles and market practice in Turkey, it can be defined as tenders open to the persons residing abroad.[5]

In light of the above, in cases where one of the issuing banks, beneficiaries or principals is a foreign entity or where the letter of guarantee is related to an international tender, Turkish banks are entitled to issue letters of guarantee in foreign currency to be paid in foreign currency. In addition, if a counter guarantee is received from abroad, Turkish banks are entitled to issue letters of guarantee in foreign currency to be paid in foreign currency in favor of residents of Turkey and where the principal of which is a resident of Turkey under Article 18(1) of Decree No. 32. The reason for this is that when a counter guarantee is obtained for a letter of guarantee, such letter of guarantee is accepted as if it is received from abroad and Article 18(1) of Decree No. 32 provides that Turkish residents may freely obtain letters of guarantee from abroad.[6] The letters of guarantee to be issued by Turkish banks in foreign currency to be paid in foreign currency are subject to the consent of the Ministry of Economy except for in these circumstances.

There are two different views in doctrine regarding consequences of not complying with the above mentioned foreign currency restrictions brought for letters of guarantee by Decree No. 32. One of these views asserts that a letter of guarantee would become null and void in case it is issued contrary to Decree No. 32. The other view states that the letter of guarantee itself would continue to be effective but its foreign currency clause would become invalid. In accordance with the latter view, a letter of guarantee contrary to Decree No. 32 would need to be paid in its Turkish Lira equivalent. There is, however, a Supreme Court (*Yargıtay*) decision rendered in 1963 which supports the initial view and upheld that the letter of guarantee was invalid because it was issued in foreign currency without obtaining the consent of the Ministry.[7]

It should also be noted that the doctrine accepts provisions of the Decree No. 32 as mandatory and directly applicable since they are related to Turkish public order. Accordingly, it is asserted that even if the governing law of a letter of guarantee is not Turkish law, Decree No. 32 may still apply if the letter of guarantee is issued by a resident of Turkey.

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3 Implementation Circulars of Turkish Republic Central Bank no. B.02.2.TCM.0.07.06.00-129.01 dated 4 November 2014 and no. B.02.2.TCM.0.07.06.00-010.06.02 dated 8 August 2013 and no. B.02.2.TCM.0.07.00.06-010.06.02 dated 20 January 2012 which have been prepared based on the Ministry of Economy Undersecreteriat of Treasury letters no. 25226 dated 15 June 1995, no. 9975 dated 11 March 1996, no. 52735 dated 20 August 2004, no. 18866 dated 10 May 1996, no. 3308 dated 16 January 2003, no. 46683 dated 26 December 2011, no. 31960 dated 21 October 2014 and no. 53436 dated 16 August 2002, no. 31960 dated 21 October 2014, no. 1814 dated 31 January 2013 and no. 46683 dated 26 December 2011.

4 Foreign currency definition under Decree No. 32 does not distinguish convertible or non-convertible currencies and the decree does not include any provision that prohibits the legal validity of letters of guarantee that are issued in terms of non-convertible currency.

5 Reisoğlu, Seza, *Banka Teminat Mektupları ve Kontrgarantiler*, Ankara. 2003, page 454.

6 Reisoğlu, Seza, *Banka Teminat Mektupları ve Kontrgarantiler*, Ankara. 2003, page 456; Doğan Vahit. *Banka Teminat Mektupları*. Ankara 2002, page 351.

7 Ankara Barosu Dergisi, 1963, page 387.

Other Recent Developments

Energy Market Regulatory Authority's Natural Gas Market Sector Report for 2014

On 16 June 2015, the Energy Market Regulatory Authority ("**EMRA**") published its Natural Gas Market Report for 2014 (the "**Report**"). The main highlights of the Report are as follows:

- With an 8.82% increase compared to 2013, the total natural gas import in 2014 amounted to 49,262 million Sm^3.
- Russia remained as Turkey's largest natural gas supplier in 2014. Yet, Russia's share in Turkey's total natural gas import decreased to 54.76% from 58% in 2013. According to the Report, this decrease stems from the increase of Spot LNG imports from 892 million Sm^3 in 2013 to 1,689 Sm^3 in 2014.
- With a considerable increase from the 6,083 million Sm^3 figure of 2013, Turkey imported 7,280.87 million Sm^3 of LNG in 2014 (both through long term contracts and as Spot LNG), and such import accounted for 14.78% of the natural gas import in 2014.
- In parallel to the preceding years, only BOTAŞ and Ege Gaz imported spot LNG in 2014 among 39 spot LNG import license holders. It is noteworthy that Ege Gaz's share in such imports decreased sharply from 24.62% to 5.36%, when compared with 2013.
- On the consumption front, the actual natural consumption for 2014 has been realized as 48,717,179,257 Sm^3, with a 4.77% divergence from the national natural gas consumption estimation of EMRA for 2014 stated in its decision No. 4855 dated 30 January 2014. The Report also reveals that 521.29 million Sm^3 of LNG was consumed in 2014, and this accounted for 1.07% of the overall natural gas consumption.

Energy Market Regulatory Authority's Decision Re. Preliminary Generation License Applications for Wind Power Plants

The Energy Market Regulatory Authority ("**EMRA**") adopted a decision pursuant to Article 12(7) of the Electricity Market Regulation on 30 July 2015 with No. 5709, where it decided to collect preliminary generation license applications for wind power plants on 3, 4, 5, 6, and 7 October 2016. To be eligible for this application, applicants must submit the monitoring results revealing the wind performance in the relevant area for a period of one year between 7 October 2013 and 7 October 2016. The decision states that 2,000 MW, the generation capacity allocated for wind energy until 2020, will be fully utilized within the year of 2016.

Previously, EMRA had adopted a decision in relation preliminary generation applications for wind power plants on 12 December 2013 for a capacity of 3,000 MW, and collected applications during the last week of April 2015. EMRA has recently announced that its evaluations in respect of these applications are still ongoing.

Annulment Decision of the Constitutional Court regarding Environmental Impact Assessment Requirements

Temporary Article 3 of the Environmental Law granted an exemption from the environmental impact assessment requirement to projects which were included in the public investment program before 23 June 1997; this was partially annulled by the Constitutional Court Decision published in the Official Gazette No. 29406 dated 4 July 2015.

The aforementioned Article provided an exemption not only for the projects which are currently at operation stage, but also for projects at the tender stage. In its decision, the Court makes a distinction between projects still at the tender stage and projects which have already started operations. The Court annulled the exemption for projects still at the tender stage on the basis that, at this stage, it is possible to minimize any potential environmental damages, underlining the State's duty on the protection of environment. However, the Court dismissed the annulment request for projects which already started operations. According to the Court's judgment, in this case, reversal of environmental damages will most likely be unsuccessful and cessation of operations will result in waste of public resources and increased public damages. The Court also pointed out the State's authority to monitor and sanction if the operations result in environmental damages.

This is not the first time that the foresaid provision has been annulled by a Turkish court as it was cancelled by the Council of State when it was previously regulated under Article 3 of the Environmental Impact Assessment Regulation. This was one of the arguments of the plaintiffs requesting the annulment before the Constitutional Court, as they argued that similar provisions granting the same exemption were found illegal by the Council of State.

Annulment Decision of the Constitutional Court regarding Temporary Article 8 of the Electricity Market Law

The environmental permit exemption, provided in Temporary Article 8 of the Electricity Market Law, set forth a grace period for compliance with environmental requirements; this included (but did not limit to) Environmental Impact Assessment by state-owned (EÜAŞ-affiliated) power plants, including those to be privatized. With this article, EÜAŞ-affiliated power plants were

granted a grace period until 31 December 2018 to comply with the environmental laws and this grace period could be extended by up to 3 years (until 2021) by the Council of Ministers. The Constitutional Court annulled this Temporary Article 8 in its meeting of 22 May 2014. The effective date of the annulment, however, had been postponed for 6 months starting from the announcement of the decision in the Official Gazette. The detailed ruling of the Constitutional Court was published in the Official Gazette No. 29396 dated 24 June 2015; thus, the ruling is expected to come into effect on 24 December 2015.

The Constitutional Court, in its detailed ruling, pointed to the requirements of rule-of-law, namely public interest and impartialness of the laws, and the importance of sustainable environment and development principles as grounds for the annulment.

On the other hand, the Draft Law Regarding Amendments to Electricity Market Law and Other Laws is aimed at providing an alternative solution to the exemption stipulated in Temporary Article 8. This draft legislation extends the grace period mentioned previously until 2019; yet, unlike the annulled Provisional Article 8, it does not suggest the option of a further 3 year extension period by the Council of Ministers. Furthermore the exemption of the draft is aimed at targeting previously privatized companies as well. It is currently unknown if and when this draft legislation will come into effect. If it is delayed beyond December 2015, which is the effective date of the Constitutional Court's annulment decision, privatized power plants will be in a position where they are missing the environmental permits that they would be required to have obtained pursuant to the prevailing legislation.

Constitutional Court Decision regarding Article 16(5) of the Statutory Decree No. 556 on Protection of Trademarks

The Constitutional Court annulled Article 16(5) of the Statutory Decree No. 556 on Protection of Trademarks with its Decision No: E. 2015/49 K. 2015/46 dated 13 May 2015. The annulled Article regulated that, during transfer of a registered trademark, (i) other registrations of the same trademark and (ii) trademarks which are misleadingly similar, are also transferred if these are registered for the same or similar goods or services. The Constitutional Court decided that such regulation pertained to persons' right to property and therefore cannot be regulated by statutory decrees as per Article 91 of the Constitution. As of today, while transferring a trademark, it would not be obligatory to transfer the same or similar trademarks which are registered for the same or similar goods or services.

Constitutional Court Decision regarding Paragraph 5 and 6 of Article 35 of Law on Collection Procedure of Public Receivables No. 6183

Paragraph 5 and 6 of Article 35 of Law on Collection Procedure of Public Receivables No. 6183 ("**Law No. 6183**") was annulled by the Constitutional Court on 19 March 2015 with decision No. 2014/144E. 2015/19K. Paragraph 5 of Article 35 stated that if legal representatives and the person who manages the entity are different persons during the occurrence of the public receivable and during the time that the public receivable becomes due, these representatives are jointly liable to pay the mentioned public receivable from their individual assets unless the foresaid debts are paid by the respective company. Paragraph 6 of Article 35 indicates that the provisions which specify the liability of the legal representatives pursuant to Tax Procedural Law no. 213 ("**Tax Procedural Law**") do not prejudice the applicability of the liability stated in Article 35 of the Law No. 6183. While the aim of the Law No. 6183 to regulates the provisions with respect to all public receivables, Tax Procedural Law only regulates the provisions with respect to the tax receivables. This provision enables the liabilities under Law No. 6183 regarding the public receivables become applicable to tax receivables as well.

The Constitutional Court has cancelled Paragraph 5 of Article 35 with the reasoning that if the legal representatives are different persons during the occurrence and the payment date of the public receivable, representatives which have fulfilled their financial obligations and liabilities will unjustly hold responsible for the actions they neither they have committed nor they had a chance to intervene. Since the mentioned possible event would punish the legal representative for the actions that another person has committed, it would constitute a contradiction with the state of law principle.

The Constitutional Court has also cancelled Paragraph 6 of Article 35 with the same reasoning. The liability of the legal representatives under Article 10 of Tax Procedural Law is based on fault. In order for the representatives to be held responsible pursuant to Article 10 of the Tax Procedural Law, the legal representatives should not fulfil their tax obligations and duties. However, on the other hand, Paragraph 6 provides a strict liability for public debts, which indicates that even though the legal representative has not acted in faulty manner, they are still liable for public receivables accrued against the legal entity unless it has not been paid by the Company. These provisions which were specified in different laws contradicts with each other. Since both of these laws could be applied to the same legal event, this creates an uncertainty, making it against the state of law principle. Both of these provisions were found against Article 2 of the Constitution of the Republic of Turkey and were annulled by the Constitutional Court.

Recent and Upcoming Conferences & Events

- 9-11 September 2015, Istanbul: **Steel Success Strategies International** will cover global market fundamentals, continuing impact of the economic crisis and overcapacity, maximizing profitability through technological innovation, Turkish and Middle Eastern demand for flat rolled products, and how hedging strategies can boost financial gains.
- 10-11 September 2015, Istanbul: **IEI Turkey Energy Conference 2015** brings together an expert panel of professional speakers from leading companies to offer their diverse views and advice on energy investment and finance.
- 11-15 September 2015, Istanbul: **The International Conference Mediterranean Coal Markets.**
- 11-12 November 2015, Istanbul: **Bonds, Loans & Sukuk Turkey** is a conference bringing together issuers, borrowers, investors and bankers to discuss the developments of local and international bond, syndicated loan and sukuk markets.
- 15-16 November 2015, Antalya: **The G-20 Summit** will be the tenth annual meeting of the G-20 heads of government.

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