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Administrative Fines in the Energy Sector Applicable in 2017

Four Communiqués[1] have been issued by the Energy Market Regulatory Authority ("**EMRA**") to determine the applicable administrative fines in the energy sectors for 2017, which became effective as of 1 January 2017. The administrative fines have been adjusted in accordance with the revaluation value of 3.83%, which was determined by the Tax Procedural Law General Communiqué No. 474[2].

The ranges of administrative fines for each sector in 2017 are as follows:

- from TRY 627,250 to TRY 1,1254,504 under the Electricity Market Law No. 6446;
- from TRY 551,456 to TRY 1,102,918 under the Natural Gas Market Law No. 4646;
- from TRY 179 to TRY 919,097 under the Liquefied Petroleum Gas Market Law No. 5307; and
- from TRY 248 to TRY 1,254,504 under the Petroleum Market Law No. 5015.

[1] All Communiqués published in the Official Gazette No. 29912 dated 8 December 2016.

[2] Published in the Official Gazette No. 29885 dated 11 November 2016.

Recent Changes in the Electricity Market Legislation

With an effort to harmonize the secondary legislation, subsequent to the recent amendments[3] to the Electricity Market Law[4] (*click here to read our Client Alert entitled "Amendments to the Energy Legislation")*, the Regulation Amending the Electricity Market Licensing Regulation (the "**Amending Licensing Regulation**") and the Regulation Amending the License-Exempt Electricity Generation Regulation (the "**Amending License-Exempt Regulation**") together with the Communiqué Amending the Communiqué on License-Exempt Generation Regulation (the "**Communiqué**") were published by EMRA in the Official Gazette No. 29865 dated 22 October 2016 and became effective as of such date. These amending legislations adopted the content of the drafts which were elaborated in the Summer 2016 Issue of our Newsletter with minor differences (*click here to read our Summer 2016 Issue of our Newsletter)*.

Below are some prominent changes brought by the Amending Licensing Regulation:

- In the Electricity Market Licensing Regulation[5], preliminary licensing period was foreseen as "up to 24 (twenty four) months, with a possible extension up to 36 (thirty six) months depending on the type of resource and installed capacity of the investment". The Amending Licensing Regulation uses a different wording stating that preliminary license shall be determined by EMRA "for a period not to exceed 36 (thirty six) months, depending on the type of resource and installed capacity of the investment". As seen, the maximum period is still the same; however, EMRA has a wider authority to decide the preliminary license period up to the mentioned maximum limit.

- No environmental impact assessment decision is required when applying for preliminary license for electricity generation from domestic coal and it will be sufficient to obtain such decision by the end of the preliminary license term. Still, application for the environmental impact assessment shall be made within 90 (ninety) days following the date of the preliminary license. Also, as an additional new requirement, permits for the ash disposal sites of the plants generating electricity from domestic coal shall be obtained within the preliminary license term.

- Requirements regarding wind and solar measurements for preliminary license application are amended. Accordingly, one year wind and solar measurement collected in the past five years, instead of repealed period of three years, will be sufficient. The investments on Renewable Energy Resource Areas are exempt from the wind measurement requirement.

- Concerning the share transfer restrictions during the preliminary licensing period, the followings have been listed as exceptions: (i) changes as result of which indirect shareholders included in the pre-license become direct shareholders without having their ultimate shareholding ratios altered, and (ii) concerning legal entities which are included in the privatization programme, changes occurred in the shareholding structure as a result of sale or transfer of the shares belonging to public entities.

- A new obligation for the license holders has been envisaged; license holders shall use only domestic data processing centers for the purpose of processing and storage of data relating to their area of activity. In addition, TEİAŞ and the license holders are required to complete performance of their relevant obligations regarding the Information Security Management System standards by 31 December 2017.

When it comes to the prominent changes brought by the Amending License-Exempt Regulation, EMRA has published an explanatory announcement on 26 October 2016. Below points from such announcement are worth mentioning:

- References to domestic component incentives have been deleted from the Amending License-Exempt Regulation. In fact, license-exempt generation facilities had already been extracted out of the scope of application of domestic component incentives with the Regulation regarding the Incentives on Domestic Components Used in Facilities Generating Electric Power from Renewable Energy Resources[6] which became effective on 24 June 2016.

- For the transformer capacity allocations to be accorded to wind and solar power generation plants which fall within the scope of Article 5(1)(c) of the License-Exempt Regulation[7] (excluding roof applications), it was foreseen that a maximum amount of 1 MW of allocation could be accorded to any real or legal person together as a whole with the legal entities controlled by them for the same transformer station. The Amending License-Exempt Regulation states that this 1 MW of maximum allocation is applicable for those projects at the stage of application for connection and not for those in operation.

- New exceptions have been introduced to the share transfer restrictions for wind and solar power generation plants for the period between the application for license and temporary acceptance of the entire plant. Accordingly, share transfers will be allowed in cases of (i) changes in shareholding structure concerning transfer of public shares of publicly-listed legal entities, (ii) changes in shareholding structure due to the application of the right of first refusal of the shareholders, (iii) indirect changes in shareholding structure of legal entities due to the changes occurred in the shareholding structure of its foreign shareholders, and (iv) changes in the shareholding structure due to public offerings.

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3 The Law Amending the Electricity Market Law and Certain Other Laws was published in the Official Gazette No. 29745 dated 17 June 2016.

4 Published in the Official Gazette No. 28603 dated 30 March 2013.

5 Published in the Official Gazette No. 28809 dated 2 November 2013.

6 Published in the Official Gazette No. 29752 dated 24 June 2016.

7 Published in the Official Gazette No. 28783 dated 2 October 2013.

Regulation on Renewable Energy Resource Areas

The Regulation on Renewable Energy Resource Areas (the "**RERA Regulation**") was published by EMRA in the Official Gazette No. 29852 and became effective as of 9 October 2016.

Main features of the RERA Regulation can be summarized as follows:

- As mentioned in the Summer 2016 Issue of our Newsletter, the RERA Regulation regulates the renewable energy resource areas (the "**RERAs**") in every aspect, from the determination of potential RERAs to the principles governing energy sales; including the details for feasibility and infrastructure studies, ex officio registration of RERAs in the relevant zoning plans, pre-requisites and procedures for potential RERA investors, requirements that the investors of the RERAs shall comply during the preliminary license and generation license stages, and competition procedures where there are multiple applications for a RERA.

- The RERA Regulation foresees two different paths for development of a RERA: (i) the General Directorate of Renewable Energy (the "**Directorate**") may directly develop a RERA to be awarded by way of a competition pursuant to the RERA Regulation, which is the process currently applied for Karapınar I Project[8], or (ii) the Ministry of Energy and Natural Resources (the "**MENR**") conducts a RERA connection capacity allocation tender and the winning bidder develops the RERA in collaboration with the MENR. In the first scenario, it is the Directorate who takes all the necessary steps to render the area ready for construction of the power plant (including expropriation of the relevant zones, registration of the area to the zoning plan, obtaining necessary permits, construction of transmission lines etc.). Whereas, it is the private investor who undertakes to develop the project in the second scenario.

- In parallel to the recent amendments introduced to the Electricity Market Law stipulating that privately owned lands can be subject to expedited expropriation procedures provided that such lands are determined as RERAs, the RERA Regulation recognizes that the RERA studies may be conducted on privately owned lands. Reiterating the requirement introduced with the recent amendments to the Electricity Market Law[9], the RERA Regulation provides a minimum requirement for domestic equipment usage in the generation facilities to be established in RERAs. The RERA Regulation refers to the Communiqué on Domestic Products[10] for the definition of domestic equipment and accordingly, the percentage of domestic component within the equipment used in RERAs shall be at least 51%. The exact percentage of the domestic equipment to be used in the facility will be provided in the announcement to be made by the MENR regarding the capacity allocation on RERAs.

- In order to comply with the requirement of domestic equipment usage mentioned above, the private investors shall either (i) procure such equipment from other manufacturers, or (ii) manufacture such equipment themselves, depending on the method envisaged in the tender specifications. In the latter case, the investor is also required to build a plant for manufacturing of such equipment on the RERA.

The RERA Regulation envisages that the tender specifications provide for a ceiling price, applicable in the purchase period defined thereof which shall not exceed the aggregate price calculated in accordance with Table (I) and Table (II) of the Renewable Energy Law. The purchase period begins from the execution of the "RERA Usage Right Agreement" and therefore covers also the construction period.

Regulation Amending the Certification and Support of Renewable Energy Resources Regulation

The Regulation Amending the Certification and Support of Renewable Energy Resources Regulation (the "**Amending Regulation**") entered into force on 28 October 2016, with minor changes to its published draft (the "**Draft Regulation**") details of which were given in the 2016 Summer Issue our Newsletter.

The primary difference the Amending Regulation offers from the Draft Regulation is related to hybrid facilities benefiting from Renewable Energy Resources Support Mechanism ("**YEKDEM**"). The Amending Regulation removes the formula provided in the Draft Regulation in order to calculate the electricity amount generated from renewable energy resources to determine eligibility of those facilities to benefit from YEKDEM; but instead requires documentation showing (i) technical necessity of using a hybrid facility and (ii) approval of EMRA affirming the necessity of using a hybrid facility. EMRA shall then, evaluate each individual YEKDEM application of hybrid generation facilities and decide whether the applicant facility should benefit from YEKDEM.

Natural Gas Market Tariffs Regulation

The new Natural Gas Market Tariffs Regulation (the "**Regulation**") prepared by EMRA was published in the Official Gazette on 13 October 2016 and it came into force as of 1 January 2017.

The Regulation completely repeals the previous regulation which was in effect since 2002 (the "**Repealed Regulation**"). Significant changes brought by the Regulation are as follows:

- Broad principles regarding the regulation of tariffs have been introduced. Generally, provisions relating to fiscal sustainability, fair profitability, development of competition, economic efficiency, avoidance of cross-subsidization, incentive oriented approach, non-

[8] The competition announcement for Karapınar I Project was published in the Official Gazette No. 29863 dated 20 October 2016. The project involves the construction of a solar power plant with an installed capacity of 1,000 MW. The purchase guarantee period is 15 years, and the competition starting price ceiling is set as 8 US dollars/kWh. The deadline for submission of the bids is 12 December 2016, and the tender will take place on 15 December 2016.

[9] Published in the Official Gazette No. 28603 dated 30 March 2013.

[10] Published in the Official Gazette No. 29118 dated 13 September 2014.

discrimination and transparency shall be taken in consideration while determining tariffs. The Regulation also includes additional definitions such as customer, subscriber, eligible consumer, parameter, receipt notice, network operation regulations, tariff application period, productivity objectives, Consumer Price Index ("**CPI**") and domestic Producer Price Index ("**PPI**").

- Documents and information related to accrual and collection amounts as well as consumption and sales projections have been added among the documents and information that may be required from the legal entities whose tariffs are subject to regulation by EMRA. The Regulation has also removed "past two year" limitation; accordingly EMRA may ask for the documents and information concerning any previous year.

- In case of a force majeure, the Regulation authorizes the board of EMRA to directly determine the tariffs until the force majeure event ceases. The effect of such practice on tariffs shall be reflected to the current and/or the subsequent tariff period.

- In case of any significant change in the legislation or licenses which affect the parameters in tariffs, such parameters and accordingly the tariffs shall be adjusted to reflect the change. The effect of such changes on tariffs shall be reflected to the current and/or subsequent tariff period.

- The former and actual applicable tariffs of the legal entities, which are confirmed by EMRA shall be publicly available and published on the legal entity's website.

- The inflation rate to be considered in tariff calculations will be predicated on parameters of CPI and/or domestic PPI.

Regulation Amending the Natural Gas Market Licensing Regulation

On 23 November 2016, the Regulation Amending the Natural Gas Market Licensing Regulation[11] (the "**Amending Regulation**") was published in the Official Gazette No. 29897 and entered into effect on the same date. The provisions of the Amending Regulation mostly relate to the comprehensive changes that have been introduced to the Natural Gas Market Law No. 4646[12] on 3 June 2016. Some of the significant changes introduced to the Natural Gas Market Licensing Regulation[13] (the "**Licensing Regulation**") with the Amending Regulation can be summarized as follows:

- Amending Regulation expands the territorial scope of the definition of "city". Prior to this amendment, this definition was confined to the boundaries of the metropolitan and other municipalities. Thus, the city (as now defined) included the areas adjacent to municipal borders, in other words the entire province, for the purposes of the Licensing Regulation. Accordingly, the local distribution companies' statutory duty towards its subscribers to provide gas supply will also cover such adjacent areas.

- Amending Regulation enables merger or demerger of natural gas distribution licenses within a distribution region provided that such variation is requested by the relevant distribution license holder and is approved by EMRA by taking into account all technical and economic requirements of the relevant distribution region.

- EMRA will determine the natural gas storage obligation of importer companies for the next five years. Further, the board of EMRA will be authorized to determine the amount of natural gas to be imported for each year by the relevant importer companies up to 1/5 of the storage obligation of those companies within 5 years.

- In principle, natural gas license holders are not entitled to control other license holders pursuing the same activities. The said 3 June 2016 changes to the Licensing Regulation provided an exception for distribution companies with respect to such control related rules on the condition of EMRA's approval which will be granted subject to the conditions set out in the secondary legislation. Amending Regulation sets out these conditions as follows: (i) a reasoned request letter must have been submitted, (ii) all obligations within the scope of competition legislation must be fulfilled, (iii) documents and information required pursuant to the share transfer related provisions of the Licensing Regulation must have been submitted and (iv) any other documents and information which may be requested by EMRA must have been submitted by the applicant.

Recent Decisions of the Energy Market Regulatory Authority (EMRA)

Recent resolutions adopted by EMRA Board pertaining to the electricity market legislation, are as follows:

- EMRA Decision No. 6476-1, amending the Decision No. 5709 on the pre-license applications scheduled for October 2016 regarding wind power, was published in the Official Gazette dated 10 September 2016. With the Decision No. 6476-1, the pre-license applications to be made pursuant to paragraph 7 of the Article 12 of the Electricity Market Licenses Regulation[14] will be accepted between 3 and 7 April 2017.

- In accordance with the Energy Market Balancing and Settlement Regulation[15], Procedures and Principles on Determination of Profiles Used in Settlement Calculations (the "**Procedures and Principles**")[16] were issued by EMRA with the Decision No. 6513-2, which was published in the Official Gazette on 20 October 2016. Under the new Procedures and Principles, suppliers are allowed to use different profiles for different consumer groups following the approval of the market operator. Also, the market operators are required to announce the method regarding determination of profiles one month before the method becomes effective. For profiles to be used in 2017, the announcement deadline was 26 December 2016.

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11 Published in the Official Gazette No. 29897 dated 23 November 2016.

12 Published in the Official Gazette No. 24390 dated 2 May 2001.

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

14 Published in the Official Gazette No. 28809 dated 2 November 2013.

15 Published in the Official Gazette No. 27200 dated 14 April 2009.

16 EMRA Decision No. 6513-2 published in the Official Gazette No. 29863 dated 20 October 2016.

- Subsequent to the amendments to the Electricity Market Consumer Services Regulation pertaining to call centers to be established by the authorized distribution and supply companies, the EMRA Board adopted the Decision No. 6507-6 on Principles and Procedures regarding Service Quality Standards of Call Centers, which was introduced in the Official Gazette on 22 October 2016 and set the technical requirements of such call centers. As per the Decision No. 6507-6, authorized entities may establish the call centers within their organization or procure such service from independent system providers outside their organization. According to the Decision No. 6507-6, distribution companies and the designated supply companies are subject to annual reporting to EMRA concerning the results of the operations of such call centers.

- Important EMRA decisions regarding tariffs may be summarized as follows:

  - The Board Decision No. 6483, published in the Official Gazette on 30 September 2016 – The Primary Frequency Control Unit Service Cost offered by the TEİAŞ has been determined as TL/MWh 2,60 for the 4th quarter of the year 2016.

  - The Board Decision No. 6505, published in the Official Gazette on 1 October 2016 –In accordance with Article 17 of the Electricity Market Law, the active electricity energy cost to be applied by TETAŞ as of 1st October 2016, has been determined as 14,80 Krş/kWh for the distribution companies and authorized supply companies. The same Board Decision also provides that (i) tariffs applied for the consumers buying electricity from authorized supply companies shall continue to be applied for consumers directly connected to the transmission system and (iii) the EMRA is entitled to make amendments to tariffs which are proposed by TETAŞ.

  - The Board Decision No. 6506, published in the Official Gazette on 1 October 2016, wholesale electricity tariffs and regulatory tariffs to be applied to (i) the distribution system users, (ii) the non-eligible consumers or (iii) eligible consumers who are not entitled to choose their supplier by the distribution companies have been determined.

  - The Board Decision No.6500, published in the Official Gazette on 4 October 2016; additional transmission fee to be implemented in 2017 has been determined as 0.5% of the transmission tariff of TEİAŞ.

  - The Board Decision No. 6561, published in the Official Gazette on 28 October 2016. Day time periods for electric meters, in the direction of permanent daylight saving, which serve for multiple time tariff implementations for consumers have been determined.

Regulation Amending the Electricity Market Consumer Services Regulation

Regulation Amending the Electricity Market Consumer Services Regulation (the "**Regulation**") regarding call centers to be established by the authorized distribution and supply companies, was published in the Official Gazette on 20 October 2016 by EMRA. The amending Regulation furnishes the consumers who certified their medical conditions of dependence to life support equipment such as dialyzer or respirator with higher protection. To this end, the Regulation envisages that such consumers will not be subject to electricity cut-offs because of their debts and they will have the priority for the notification of any power outage.

Procedures and Principles on Storage Obligation in Natural Gas Market

EMRA with its Decision No. 6574-6 set out Procedures and Principles on Storage Obligations (the "**Procedures and Principles**") in the natural gas market which was published in the Official Gazette on 8 November 2016. The Procedures and Principles primarily identify entities liable with the storage obligations in the natural gas market, and describe the extent of the storage requirements.

Major aspects of the Procedures and Principles are as follows:

- The required storage amounts prescribed in Article 1 of the Procedures and Principles, are determined by the EMRA Board as (i) 6% of the annual import amounts for import license holders and (ii) 2% of the annual natural gas sale amounts for the wholesale license holders and the liquidated natural gas (LNG) importers, as set out in the Board Decisions No. 6574-7 and 6574-8 respectively.

- It is envisaged that the importers and wholesale license holders shall comply with at least 95% of their required storage amount by 1 November of the respective calendar year. Otherwise, suppliers shall inform the EMRA Board within the first week of November about (i) the reasons of the lacking amount and (ii) their compensation plan.

- The suppliers applied for reservation in underground storage facilities must pursue their storage obligations efficiently, and establish injection and reverse production programmes.

- The suppliers are not permitted to transfer the natural gas amounts stored in underground facilities to support the fulfilment of other suppliers' storage obligations during fall and winter periods of the relevant calendar year. However, suppliers having excessive natural gas in stock are free to transfer such amounts.

- For the reservation requests of suppliers made to the underground storage facilities, the Procedures and Principles establish a priority order as follows: (i) imported natural gas, (ii) natural gas to be sold to the distribution companies, and (iii) natural gas to be sold to eligible consumers.

Suppliers are obliged to notify the EMRA Board within 7 days following confirmation of their reservation requests and provide the EMRA Board with the executed storage services agreement.

Council of Ministers Decree regarding the Additional Financial Obligation on Import of Coal

Council of Ministers Decree No. 2016/9073 (the "**Previous Decree**") providing for additional financial obligations on import of coal to be used in power plants has been amended with the Council of Ministers Decree No. 2016/9166 (the "**Decree**") published in the Official Gazette No.29846 dated 3 October 2016. While the previous financial duty on coal imports was fixed to USD 15/ton, the amending Decree introduced a new formulation, where the duty applicable figure will be found by subtracting the international price of coal based on a nominal price of USD 70/ton. Same as the Previous Decree, imports from certain states[17] are excluded from the scope of the additional financial obligation.

Council of Ministers Decree regarding the Amendment of State Subsidies on Investments

Council of Ministers Decree No. 2016/9139 (the "**Amending Decree**"), amending the previous Council of Ministers Decree No. 2012/3305 (the "**Former Decree**") regarding state subsidies on investments, was published in the Official Gazette No. 29848 dated 5 October 2016. Some of the novelties that the Amending Decree introduces are as follows:

- The Amending Decree extends application of utilized income and corporate tax incentives to the same investors' other operations. Accordingly, provided that it does not exceed (i) the total amount of the investment expenses and (ii) 80% of the total contribution by the investor to the concerned investment, application of income or corporation tax incentives can be extended to investors' other operations as well.

- The Amending Decree re-sets the threshold of investment for manufacturing industry facilities in terms of minimum energy consumption and minimum energy efficiency.

- According to a new provision brought with the Amending Decree, if the investments are not completed within the investment period, investment expenses incurred up until the issuance of the completion visa may be considered to have benefited from the incentive certificate. However, the delayed investments shall not be entitled to benefit from the subsidies provided for in the incentive certificate.

Law on Investment Incentives on a Project Basis

The Law on Investment Incentives on a Project Basis No. 6745 (the "**Law**") was published in the Official Gazette No. 29824, dated 7 September 2016. As an omnibus bill, the Law includes amendments to various laws and statutory decrees with an objective to create a more favorable investment climate.

The significant introduced novelties are as follows:

- The Council of Ministers is authorized to decide on the provision of certain incentives, such as customs duty exemption, corporate tax deduction, compensation of at most 50% of energy consumption for a period of maximum 10 years, and other incentives as indicated under Article 80 of the Law, for investments that are determined to be supported by the Ministry of Economy on a project basis (*proje bazında desteklenmesine karar verilen yatırım*). The Council of Ministers is entitled to provide one or more of these incentives at its own discretion, and the relevant expenses will be covered from the Ministry of Economy's budget. Furthermore, the Council of Ministers is also authorized to grant a purchase guarantee to the products that are produced on a project basis by determining the guarantee term and amount.

- The Law, regarding project based investments, also authorizes the Council of Ministers to (i) grant exemptions from license, permit, registration and other similar obligations set forth under the relevant laws, (ii) make amendments to legal or administrative procedures to speed up and facilitate investment process by adopting a Council of Ministers' decision, and (iii) decide to cover all expenses related to infrastructure where it is necessary for the project.

- In the event that the investor transfers a project based investment, which is supported with certain incentives, the transferee will also benefit from these incentives provided that the transferee fulfils the required conditions.

- A corporate tax deduction is envisaged under the Law for companies that make investments supported on a project basis or acknowledged as regional, large-scale, strategic and privileged. The revenues of these companies that are independent from such investments and obtained within the investment period may also be subject to corporate tax deduction at a certain rate under the discretion of the Council of Ministers.

- The Law facilitates the conditions for benefiting from value added tax return under VAT Law No. 3065[18]. Under the previous regulation, an investment was eligible to benefit from VAT return if (i) such investment is a strategic investment as defined under the Council of Ministers' decision No. 2012/3305[19], (ii) minimum fixed investment amounts to TRY 500,000,000, and (iii) the investors are entitled to an investment incentive certificate. The Law abolished the requirement of

[17] EU Member States, EFTA States, Israel, Macedonia, Bosnia and Herzegovina, Morocco, West Bank and Gaza Strip, Tunisia, Egypt, Georgia, Albania, Jordan, Chile, Serbia, Montenegro, Kosovo, South Korea, Mauritius and Malaysia.

[18] Published in the Official Gazette No. 18563 dated 25 October 1984.

[19] Published in the Official Gazette No. 28328 dated 19 June 2012.

strategic investment, and authorized the Council of Ministers to set a minimum fixed investment amount between TRY 50,000,000 and TRY 1,000,000,000 on a sector basis.

- The Law enables the administration to demand the registration of the expropriated property unilaterally by introducing a requirement to include the landowner's identity information and his declaration of acceptance for registration of the property in the name of the administration into the expropriation protocol that is executed between the administration and landowner following their agreement on the expropriation price.

- With another amendment to the Expropriation Law, the Law provides for a detailed provision regarding administration's confiscation of private property without expropriation (*kamulaştırmasız el atma*) by allocating such private property to public authorities or public service under an administrative implementing development plan. The same provision also expressly states that conflicts arising from such explication or plan will be resolved by administrative courts.

- The Law postponed the obligation to employ workplace safety expert and medical doctor in low-danger workplaces that employ less than 50 employees to 1 July 2017.

- Notary certificates that are executed via electronic signature are accepted as valuable paper (*değerli kağıt*) and become subject to valuable paper fee under Valuable Papers Law No. 210[20].

Law No. 6750 Concerning Pledge on Movable Properties in Commercial Transactions

The Law No. 6750 Concerning Pledge on Movable Properties in Commercial Transactions (the "**Law**") was published in the Official Gazette on 20 October 2016. The Law became effective as of 1 January 2017, and with its entry into force, the former Law No. 1447 on Commercial Enterprise Pledge has been repealed. The main purpose of the Law is to facilitate financing, particularly for small medium enterprises. To this end, the Law codifies movable properties pledge within the same bill, and extends the scope of commercial pledge. The Law also anticipates establishment of the "Pledged Movable Registry" to increase transparency. Please refer to the Article in this issue of our Newsletter for detailed information on this Law.

Amendments to the Principles and Procedures regarding Electricity Market Distribution System Investments

- Amendments to the Principles and Procedures regarding Electricity Market Distribution System Investments (the "**Amendments**") was published in the Official Gazette on 3 December 2016, No. 29907 by the EMRA. The Amendments mainly aim to regulate the developments within the scope of the Third Implementation Period, which is between 1 January 2016 and 31 December 2020, for the electricity distribution activities.

The prominent changes proposed by the Amendments can be summarized as follows:

- According to the Amendments, in any implementation period, costs that do not exceed more than 10% of that implementation period's approved investment characteristic limit (*onaylı uygulama dönemi yatırım karakteristiği tavanı*) will not be subject to EMRA's approval, provided that these costs do not exceed more than 5% of the implementation period's approved investment limit (*uygulama dönemi onaylı yatırım tavanı*). It is clarified that costs that exceed these limits cannot be made without EMRA's approval. Otherwise, such costs will not be taken into consideration in calculating investment costs.

- The former Principles and Procedures regarding Electricity Market Distribution System Investments stipulated that the distribution companies would be allowed to exceed up to 5% of the network investments on a project basis which have been initially approved by EMRA, but was silent on the question in respect of the network investments on a project basis that exceed more than 5% of the approved investment plan. The Amendments envisaged that EMRA has the discretionary authority grant approval where such deviations amount to more than 5%, if and when the distribution company provides EMRA with its justifications for such deviation.

Draft legislation

Draft Regulation on Natural Gas Market Organized Wholesale Market

On 6 October 2016, EMRA published the "Draft Regulation on Organized Wholesale in Natural Gas Market" (the "**Draft Regulation**") on its website to receive comments of the interested parties until 5 November 2016. The Draft Regulation aimed to establish an organized wholesale market for natural gas, which would allow the system users to dissipate the instabilities in the transmission system. Similar to the structure of the Electricity Market Stabilization and Reconciliation Regulation, the Draft Regulation introduces the general principles of the organized wholesale market rather than elaborating on the entire procedure, and clarifies the obligations of the primary contributors to this market.

Pursuant the Draft Regulation, the organized wholesale market shall be operated by the market operator (which has been deemed to be EPİAŞ) and the Draft Regulation shall complement the bilateral agreements to be signed regarding the purchase and sale of natural gas, subject to private law provisions. EPİAŞ, as the market operator, and the transmission network operator, shall carry out the activities necessary in the organized wholesale market. The Draft Regulation envisages operation of the electronic system called the Continuous Trade Platform ("**CTP**") to conduct the transactions based on matching-up the compatible offers and acceptances by the market operator.

[20] Published in the Official Gazette No. 11343 dated 28 February 1963.

The Draft Regulation also stipulates preparation of market operation procedures and principles, including the operation rules for CTP, by the market operator and its submission to EMRA for approval within 60 days prior to launching of the CTP.

Material obligations of (i) market participants, (ii) market operator and (iii) transmission network operator are separately listed under the Draft Regulation. The Draft Regulation also includes a list of required elements for offers to be made through the CTP.

Draft Regulation on Measures Regarding Natural Gas Market Distribution Licenses

The draft Regulation on Measures Regarding Natural Gas Market Distribution Licenses (the "**Draft Regulation**") prepared by EMRA was published for opinions and recommendations to be submitted until 25 November 2016.

The Draft Regulation included the instances when the inner-city natural gas licenses would be annulled and the procedures and principles pertaining to the tender that needed to be conducted in order to determine the new licensee for the same region.

The significant provisions of the Draft Regulation are as follows:

- Distribution licenses shall be annulled by the board of EMRA Board upon determination of the commission to be formed for this investigation that any of the following instances has occurred;
  - deterioration of the financial standing of the licensee to an extent that liabilities within the scope of distribution activities cannot be fulfilled,
  - disruption of required services for distribution activities at an unacceptable level due to the distribution company's violation of law,
  - determining that the distribution company's violations become habitual,
  - determining that the distribution company becomes unmanageable and fails to fulfil its distribution activities,
  - deterioration of the quality of distribution activities up to an unacceptable level.
- An execution and coordination council will be established within 5 days following the EMRA Board's annulment decision to announce and conduct the tender to sell the relevant networks in distribution areas where the license has been annulled. The tender will be announced in the Official Gazette.
- The distribution company subject to license annulment is required to provide all information necessary for the tender participants during the sale process of the network in its entirety and avail all records for scrutiny.
- The winning bidder pays its offered fee to the former license holder and the performance bond of the former licensee in the records of the EMRA Board is recorded as revenue. Upon payment, a new license is issued for the legal entity that shall take over the network in accordance with the relevant legislation.

Draft Amendments to the Auction Regulation on Preliminary License Applications Regarding the Wind and Solar Power Plants

On 3 November 2016, EMRA published the draft amendments (the "**Draft Amendments**") to the Auction Regulation on Preliminary License Applications Regarding the Wind and Solar Power Plants[21] (the "**Regulation**") for the views and comments of the interested parties.

In a nutshell, the Draft Amendments mirror the changes introduced to the Electricity Market Law, No. 6446[22] (the "**Law**") on 4 June 2016 in respect of the overlapping wind and solar power plant preliminary license applications for the same connection point. Prior to such change, the Law had envisaged an auction on the basis of the highest contribution fee (in TRY) to be paid to TEİAŞ by the project company. After the said June 2016 amendments, the Law now stipulates that this auction will be carried out on "YEKDEM price-minus" basis, where the bidders will compete on the basis of the YEKDEM purchase price that will be applicable to the project company (in USD) by way of decreasing offers from the guaranteed YEKDEM purchase price[23], the renewable energy support mechanism. Both the Law and Draft Amendments provide that the winning bidders may also benefit their domestic production incentives under the YEKDEM mechanism, granted to projects in which a certain portion of mechanical and/or electromechanical parts have been produced in Turkey.

In addition to altering the auction method, the Draft Amendments increase the amount of the performance bond submitted to TEİAŞ as security for preliminary license obligations until commissioning. Pursuant to the Draft Amendments, the performance bond is calculated by multiplying the capacity (in MW) of the power plant with TRY 100,000.

Draft Strategic Environmental Assessment Regulation

Strategic Environmental Assessment (the **"SEA"**) is a mechanism used in the regional and local planning, which evaluates the possible environmental, social and economic impacts of the "plans" and "programmes" to be developed by relevant administrative authorities (such as agricultural master plans, specialization industry zone plans, urban development plans, etc.). On 12 May 2014, the European

[21] Published in the Official Gazette No. 28843 dated 6 December 2013.

[22] Published in the Official Gazette No. 28603 dated 30 March 2013.

[23] Currently, per kwh, 7,3 USD/cent is provided for wind projects, and 13,3 USD/cent is provided for the solar projects as guaranteed purchase price for the first ten years of operation. These figures apply to power plants that will be commissioned on or before 31 December 2020.

Union and the Republic of Turkey assembled a meeting for the project called "Technical Assistance for Implementation of the Strategical Environmental Assessment Regulation" which aims to construct the legal framework of SEA in Turkey and to implement the pilot projects. The Ministry of Environment and Urbanization has published the Draft Strategic Environmental Assessment Regulation (the "**Draft Regulation**") anticipated to become effective by the end of this year as per the outcome of the meetings of the foresaid group assembled within last months.

Although this Draft Regulation will not have a direct impact on the investments to be realized in Turkey, it will be a supplement to the Environmental Impact Assessment (the **"EIA"**) procedure as well as a basis for EIA applications. According to Article 7 of the Draft Regulation, if an investment subject to EIA requirement falls into the scope of a plan or programme which has been approved following a SEA procedure, then the SEA Report shall be taken into consideration during the implementation of the EIA procedure of such investment. In other words, EIA Report which will be issued for the investment should be in conformity with the SEA Report. Although the subject and methodology of the two environmental assessment procedures are similar, main distinctions are as follows:

- The EIA procedure focuses on specific investments (construction and operation works) whereas the SEA procedure deals with strategies and visions;
- The EIA is an encumbrance for the private investors whereas the SEA is an encumbrance for public authorities;
- The results of the EIA is binding and determines as to whether the specific investment will be implemented or not whereas the results of the SEA is not binding on the approval of the related plan and provides suggestions with respect to the preparation and implementation of the plan. However, if a specific plan is approved as a result of the SEA Report, such report becomes binding for the EIA Report;
- Main data resources for the EIA are numeric data (such as land explorations and sample analysis) whereas the SEA relies on abstract information in general (such as national strategical reports and statistical data);
- The EIA procedure provides a medium or short term impact assessment whereas the SEA procedure makes a medium or long term analysis which focus on sustainability;
- The outcome of the EIA is more detailed compared to the SEA which remains general and hypothetic.

Draft Regulation Amending the Certification and Support of Renewable Energy Resources Regulation

On 21 December 2016, EMRA published a new draft, amending the Regulation Amending the Certification and Support of Renewable Energy Resources Regulation which was entered into force on 28 October 2016 (the "**Draft Regulation**").

One of the main changes proposed by the Draft Regulation concerns the privatizations, within the scope of the the Law on Privatization Applications[24], related to generation facilities owned by public authorities which benefit from YEKDEM. The Draft Regulation envisages that the rights and obligations related to YEKDEM shall continue until the end of the relevant year in the name and on the account of the legal entity who acquired the facility, provided that it obtains a generation license.

Another amendment proposed by the Draft Regulation ceases the duty of the distribution companies related to calculation of electricity generation of hybrid facilities. Accordingly, instead of the distribution companies, it will be the Market Operator *(Piyasa İşletmecisi)* who calculates the amount of electricity generated from renewable energy resources (except solar power) and the license holders shall submit the relevant information and documents to the Market Operator.

Other recent developments

Constitutional Court Decision regarding Infrastructure Projects without Subvention

On 26 May 2016, the Turkish Constitutional Court rendered a decision on the unconstitutionality claims against 2015 Central Administration Budget Law No. 6583 (the "**Central Budget Law**")[25], and cancelled a number of provisions of the Central Budget Law including a sentence enabling hydroelectric power plant projects having 500 MW or more installed capacity to pursue subvention although this is not envisaged under the relevant annual central budget.

The lawsuit had been filed by the opposing political party (CHP), requesting the annulment of certain parts of Article 6, 9 and Schedule E of the 2015 Central Budget Law No. 6583[26]. The Constitutional Court widely admitted the annulment requests, including the sentence which enabled certain hydroelectric power plant projects which were not granted subvention in the first place to pursue subvention under the annual central budget, as set out in Article 9 of the 2015 Central Budget Law related to "Investment Expenditures". The said sentence was related to hydroelectric power plant projects having 500 MW or more installed capacity and certain transportation projects listed therein and it was creating an exception to the application of Article 62 of the Public Procurement Law No. 4734, pursuant to which subvention of long-term investment projects must be determined under the annual programs which are reflected by the central budget laws. The Constitutional Court annulled such exception created by the Central Budget Law on the ground of unconstitutionality of setting aside a provision of an ordinary law with the Central Budget Law.

[24] Published in the Official Gazette No. 22124 dated 27 November 1994.

[25] The Constitutional Court Decision Case No. 2016/47, published in the Official Gazette No. 29835 dated 22 October 2016.

[26] Published in the Official Gazette No. 29217 (Repeating) dated 26 December 2014.

However, since the Constitutional Court rendered the cancellation decision in late 2016, projects subject to the 2015 Central Budget Law have not been affected from this annulment decision. Also, before the cancellation decision, the 2016 Central Budget Law was already enacted with the same wording for the investment expenditures and projects pertaining to hydroelectric power plants exceeding 500 MW installed capacities. For this reason, another lawsuit has been filed by the opposing political party with the same motives of unconstitutionality against the 2016 Central Budget Law No. 6682[27]. Currently the lawsuit is pending before the Constitutional Court. In the meantime, as an action in line with the Constitutional Court decision, relevant desired exception to Article 62 of the Public Procurement Law was introduced through the Omnibus Law No. 6761 Amending Public Finance Management and Control Law and Certain Other Laws, which was published in the Official Gazette No. 29898 dated 24 November 2016. With this amendment, projects determined as having strategic importance are exempted from the requirement stated in Article 62 of the Public Procurement Law to qualify for subvention.

Medium-Term Financial Plan

Medium Term Programme which initiates the budget process and covers the period of 2017 -2019 prepared by Ministry of Development was approved by the Council of Ministers' decision dated 7 September 2016 and published in the Official Gazette No. 29849 (repetitive), dated 6 October 2016. Under the Medium Term Programme, the macroeconomic policies of Turkey for the period of 2017-2019 have been determined. It consists of six chapters and comprises the issues regarding (i) growth, (ii) fiscal policy, (iii) balance of payments, (iv) monetary policy, (v) financial markets and lastly, (vi) the employment policies.

Under the fiscal policy section, the Medium Term Programme broadly addresses the policies regarding (i) public expenditure, (ii) public investment, (iii) public revenue, (iv) public borrowing, (v) public financial management and audit, and (vi) state economic enterprises and privatization matters.

The following decisions under the "growth" section of the Macroeconomic Policies, are worth mentioning:

- Domestic production capacity in the fields of the new refinery construction, electrical car manufacturing, high-tech aircraft engines including their parts, pharmaceutical and medical device manufacturing will be increased by strengthening R&D and investment incentives system.
- Law regarding pledge on movable properties will be introduced for the ease of financing of the companies.
- In order to facilitate the judicial process in the fields of trade and finance, mediation system will be developed, expert witnessing and notary systems will be re-organized; specialized courts will be established particularly in the fields of finance and informatics; judicial process periods will be shortened and reconciliation institution with regard to the Competition Authority decisions will be established.
- Inventory of the lands that are suitable for investments, especially publicly owned lands, will be compiled and more efficient allocation processes will be designed for the investments.
- Major projects that are launched via public private partnership ("**PPP**") method will be completed; and new projects will be implemented within the same scope.
- Certain mechanisms will be developed in order to (i) facilitate accessing to long term funds by the private sector for financing investments, (ii) increase the amount of these funds, and (iii) reduce the cost of such funds.
- Sovereign Wealth Fund of Turkey which has been recently established to provide external source and support for the strategic large scale investments will be used effectively.
- In order to provide security of supply, indigenous and renewable energy sources and nuclear technology investments will be supported.
- Projects which will strengthen the strategic position of Turkey with regards to the international energy trade will be given priority.
- Efforts will be continued on the domestic production of the machinery and equipment to be used in the facilities generating alternative energy sources such as wind, solar and hydroelectric.
- The infrastructure of the electric transmission network will be strengthened to facilitate electric trade between neighbor countries.
- Exploration and production activities for domestic resources such as coal and geothermal fields will be accelerated.
- A new development and operation model will be developed with respect to mines.

Under the "Fiscal Policy" section the following matters also worth mentioning:

- Public investments will be directed towards the infrastructure which will support the productivity of private sector and in this context railway, harbor and logistic centers fields will be given priority.
- In public investments, including PPP projects; education, health, drinking water and sewage, science-technology, transportation and irrigation projects will be given priority.
- The process of planning, implementation, monitoring and evaluation of the PPP projects will be strengthened.
- Efforts will be continued in order to make the tax legislation simpler and efficient.
- Monitoring the risks of debt sustainability of contingent liabilities arising from public investment guarantees and commitments including those carried out by PPP method will be continued to manage the associated financial risks better.

[27] Published in the Official Gazette No. 29655 (Repeating) dated 16 March 2016.

- Exploration activities for oil and natural gas will be continued within the country and abroad by taking into consideration the cost-benefit balance; exploration and production activities for domestic resources such as lignite and geothermal will be maximized. Research activities will be conducted towards shale gas and other new technologies by taking into account the cost-benefit balance.

- Privatization implementations will continue based on a program within the framework of macroeconomic policies and long term sectoral priorities. Public offerings will be heavily utilized in privatization implementations.

The most important subject under the last chapter on "employment policies" is that the Labor Law shall be reviewed in accordance with economic requirements.

An Update on the Turkish Stream

The World Energy Congress held in Istanbul between 9–13 October 2016 offered the occasion for the signing of the Intergovernmental Agreement (the "**Agreement**") between Russia and Turkey pertaining to the Turkish Stream Natural Gas Pipeline Project (the "**Project**"). The Agreement signed on 10 October 2016 establishes the legal framework for the construction of two pipelines for the supply of natural gas from Russia to Turkey and to Europe. Following the approval of the President of Turkey, the Agreement was approved and entered into force by the Council of Ministers Decree No. 2016/9646, published in the Official Gazette No. 29928 dated 24 December 2016.

The Project comprises the construction of two pipelines crossing the Black Sea, with a total capacity of 31.5 billion cubic meters. Each having a capacity of 15.75 billion cubic meters, the first of the pipelines shall cover gas needs of Turkey entirely, while the second pipeline shall deliver gas to Europe via Turkey up until the Greek border. The two pipelines are expected to be completed and operational as of the end of 2019.

Pursuant to the Agreement, while Russia will assume the construction and ownership of the offshore sections of both pipelines, Turkey shall designate the company responsible for the construction, operation and ownership of the first pipeline's onshore section, with a length of approximately 200 km, which is designed to deliver gas to Turkey. In this respect, BOTAŞ is expected to initiate a turnkey construction tender in 2017 after completing feasibility studies.

A company shall be jointly formed by Turkey and Russia that shall design, construct, operate and own the onshore section of the second pipeline transporting gas to Europe via Turkey. The Agreement provides that both parties shall each hold 50 % of shares during incorporation with the possibility for third party financing at a later stage should the parties mutually agree. While the capacity utilization right pertaining to this section shall belong to Russian entities entirely, operating conditions including the transit tariff shall be determined by the joint company.

It is also noteworthy that the Project is not expected to cause suspension of the construction of the Trans Anatolian Natural Gas Pipeline Project for the transport of natural gas from Azerbaijan to Europe via Turkey since it is a separate project that will exist in parallel with a 15–year gas transportation agreement. Nonetheless, it is envisaged that simultaneous existence of two separate projects should lead to a price competition between Russian and Azeri gases.

Articles

Registered Pledge over Movable Assets: Novelties and Challenges

Av. Mustafa Durakoğlu, Av. Erdem Başgül, Av. Selin Erten

The Law No. 6750 Concerning Pledge on Movable Properties in Commercial Transactions (the "**Law**") was published in the Official Gazette No. 29871, dated 28 October 2016. As part of the secondary legislation concerning the Law, the following regulations ("**Regulations**") were published in the Official Gazette No. 29935 (Third Repeated Edition), and dated 31 December 2016 (the Law and the Regulations shall be collectively referred to as the "**Movable Pledge Legislation**"):

- Regulation on Establishment of Pledge Right in Commercial Transactions and Exercise of Post-Default Rights; ("**Post-Default Regulation**")

- Regulation on Value Appraisal of the Movable Assets in Commercial Transactions ("**Valuation Regulation**"); and

- Regulation on Pledged Movable Registry.

The Movable Pledge Legislation entered into force on 1 January 2017 and replaced the Commercial Enterprise Pledge Law No. 1447[28] (the "**CEP Law**").

The entry into force of the Movable Pledge Legislation had been envisaged under the mid-term program of the government between 2017 and 2019 to facilitate financing opportunities, particularly for small and medium enterprises. Yet, the impact of the Movable Pledge Legislation may be larger than anticipated in terms of structuring securities particularly due to its overarching scope extending to pledge of receivables as well as the unprecedented foreclosure regime it envisages.

Main Features of the Registered Pledge over Movable Assets

1. Ability to Pledge Without Transfer of Possession

Pursuant to the Turkish Civil Code No. 4721[29] ("**Civil Code**"), in principle, the pledgor must transfer the possession of the movable property to the pledgee for the perfection of a pledge on such property. In certain exceptional cases, Turkish law permits establishment of a pledge over the movable properties without the need to transfer the possession of this property. The most renowned example of such exceptional movable pledge has been

[28] Published in the Official Gazette No. 13909 dated 28 July 1971.

[29] Published in the Official Gazette No. 24607 dated 8 December 2001.

permitted under the CEP Law. While the Law replaces the CEP Law, it follows the rationale of its predecessor by enabling the assets to be pledged without any transfer of possession to the pledgee.

2. Scope of the Pledge

The Law and the Post- Default Regulation introduce comprehensive changes to the scope of the pledge on movable properties. Some of the prominent changes are as follows:

- Under the CEP Law, a commercial enterprise pledge includes (i) the trade name and enterprise name; (ii) movable assets that are allocated for the operation of the enterprise such as machinery, tools, equipment and motor vehicles; and (iii) certain intellectual property rights. The Law provides a more comprehensive but exhaustive list of movable property categories, including raw materials, inventories, consumable materials etc. [30]

- Such comprehensive list includes (i) receivables; (ii) incomes and revenues; and (iii) lease revenues and rights. Although pledge of receivables has been an available legal method of security, the common market practice was assignment and transfer rather than pledge. It remains to be seen whether the market will move towards the pledge of receivables in a single "movable assets pledge agreement". Also, it is controversial whether the Movable Assets Pledge Law would be applicable to the assignment of receivables agreements. On the other hand the Law clarifies that receivables arising out of assignment of receivable agreements can also be subject to pledge pursuant to the Law.

- The Law provides that a pledge can be established over prospective assets. Pursuant to the Post-Default Regulation, however, the subject of the prospective receivables must be limited to certain defined matters or subjects; otherwise pledge over the entirety of the prospective receivables will be invalid.

- In principle, the CEP Law requires the pledge to be established on the entirety of the movable properties in the commercial enterprise. Pursuant to the Law however, it is possible to establish a pledge over one or more movable assets that are listed in the Law. The Law permits the establishment of pledge over the entire commercial enterprise only if pledging some of the movable assets defined under the Law are not sufficient for securing the relevant receivable. In addition, if the debt is certain, the pledge can be established for up to 120% of the debt amount.

- The Law does not apply to (i) the pledges relating to the capital market instruments and derivatives, (ii) the deposit account pledges (*mevduat rehni*)[31]; (iii) the movable pledges under the Civil Code; (iv) pledges on vehicles, aircrafts, and ships; and (v) pledge on mining rights and ore.

3. Parties to the Pledge

According to the Law, a movable pledge agreement can be concluded (i) between the financial institutions (as the pledgee) and other parties (as the pledgor); or (ii) *vis-a-vis* merchants & craftsmen. Pursuant to the CEP Law, however, a commercial enterprise pledge could only be established in favor of the credit institutions or persons engaged in credit sales.

4. Execution and Perfection of the Pledge

Pursuant to the Law, the pledge agreement must be concluded in writing or by way of secure e-signature. If the agreement is concluded in writing, then such signatures must be certified by a notary public or signed before the registry, which is a publicly available official registry to be established for the movable property pledges pursuant to the Law and the Regulation on Pledged Movable Registry (the "**Registry**"). When compared with the form requirements under the CEP Law, the Law provides a relatively simplified procedure. On the other hand, these will amount to more cumbersome form procedures for certain receivable pledges, which are not currently subject to these form requirements.

Under the Movable Pledge Legislation, the pledge agreement is subject to a mandatory minimum content including (i) the subject of the debt; (ii) the amount of the debt, or if such amount is not certain, the amount secured under the pledge; (iii) information with respect to the distinctive features of the pledge; and (iv) maximum amount of the pledge. It is noteworthy that the CEP Law requires the underlying debt to be indicated in Turkish Liras whereas there is no such requirement under the Law.

The Law and Post-Default Regulation provides that the pledge agreement shall not contain any provisions stipulating that (i) the relevant movable shall not be subject to inferior or subsequent pledges; and (ii) the right to disposal over the movable asset shall be limited.

Following the execution of the agreement, the pledge agreement is perfected by way of its registration with the Registry. The prominent features of this Registry can be set out as follows:

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30 The Law defines the following as "movable assets": "*receivables; yielding trees; raw materials; animals, all kinds of income and revenues; all licenses and certificates (other than the ones issued by the administration) that are not subject to registration requirements with other registries; rental income; rental rights; movable assets allocated for operation such as machinery, tools, equipment, vehicles, heavy equipment, all types of electronic devices including electronic communication devices; consumable materials; stocks; agricultural products; trade name and/or enterprise name; commercial enterprise or craftsmanship; commercial number plate and commercial line; commercial projects; wagons; and among these movable assets, the ones that are under the possession of the third parties.*"

31 Deposit account has a specific meaning in the Turkish banking and finance parlance, and it is argued by legal scholars that deposit account pledges refer to the structures where the account holder is not entitled to dispose of the funds in this account during the existence of the pledges. Therefore, such pledges are generally accepted as movable pledges that require the transfer of possession to the pledgee. However, since the Law does not define deposit account pledges, it is not clear whether all types of bank account pledges or merely such specific deposit account pledges are excluded from the scope of the Law. It may be argued that the Law does not apply to any type of bank accounts given that funds and/or bank accounts are not listed among the asset categories that can be pledged under the Law.

- Pursuant to the Post-Default Regulation, the pledge can be structured in two different forms; namely:
  - Fixed Ranking System: In this system, the pledgor divides the value of its property into ranks based on nominal values. If there are multiple pledges on the same property, the ranking among the pledges is determined by their ranks. (i.e., at the foreclosure stage, first ranking creditors are paid first; and second ranking creditors cannot be paid until and unless first ranking creditors are paid in full). In the event a superior rank pledge ceases to exist, lower ranking pledges do not automatically escalate. However, it is possible for a lower ranking pledge to escalate to a superior degree, if parties conclude an escalation agreement and register it with the Registry.
  - Escalation System: Under the escalation system, the ranking among the pledges is determined in accordance with their date of establishment with the Registry. In other words, at the foreclosure stage, creditors that registered the pledge with the Registry prior to the other creditors will be paid first. If the superior rank pledge ceases to exist, lower ranking pledges automatically escalate.
- Pursuant to the Post-Default Regulation, the pledgee will be entitled to a statutory pledge right without the need to register such pledge right with the Registry, if it incurs costs for the prevention and remedy of the decrease in the pledged movable. In this case, such pledge will supersede all other pledges under the Law. In addition, the same regulations sets forth that if the pledgee shoulders mandatory costs for the protection of the pledged movable (particularly costs related to the insurance premium payments) the pledgee will be entitled to a pledge right without the need to register such pledge right with the Registry. Such pledge will benefit from the same rights that are vested with the secured receivable.
- Transfer of the pledged asset to a third party needs to be registered at the Registry.
- The pledgor must request the removal of the pledge from the Registry within three business days as of the date when the underlying debt extinguishes. If the pledgor fails to do so, an administrative fine in the amount of one-tenth of the debt will be imposed. It is very likely that the fine will be excessive in financing transactions.

5. Valuation

Before the establishment of the pledge, creditors must either determine the value of the movables that will be subject to the pledge or request valuation of the movables from the competent civil court of first instance. As explained in Section 6 below, such valuation becomes mandatory for the purposes of foreclosure of pledge. The procedural details of the valuation are elaborated under the Valuation Regulation.

6. Foreclosure of the Pledge

The Law and the Post-Default Regulation foresee three main methods for foreclosure:

- Transfer of the property through execution offices.
- Transfer of the receivable to the asset management companies.
- Exercise of lease and license rights, if the possession of the asset cannot be transferred.

The wording of the said legislation suggests that the aforementioned remedies need to be exhausted before the creditor's initiation of the standard foreclosure proceedings. Furthermore, it sets out comprehensive provisions regarding foreclosure by way of transfer of the property through execution offices. The prominent features of such foreclosure method can be listed as follows:

- Pursuant to the Law, this option is available if the pledgee holds a first degree pledge. Such transfer will be enforced pursuant to Article 24 of the Enforcement and Bankruptcy Law, No. 2004[32] (the "**EBL**"), which sets out the rules and procedures for seizure of a movable asset through execution offices.
- By way of mainly recognizing a foreclosure mechanism where the pledgee acquires the ownership of the pledged property, the Law provides an exemption to lex commissoria prohibition under Turkish law, which basically prohibits the parties to enter into an agreement entitling the pledgee to acquire ownership of the pledged property in the event of the pledgor's default, and requires the pledgee to be satisfied from the proceeds of the sale of such property only.
- The said transfer requirement in the foreclosure procedures may, for the most part, bring an end to the private sale discussions, which relates to the question whether, in lieu of the debt enforcement proceedings, the pledgor may sell the pledged asset through a private transaction. Other than the scenarios where the standard enforcement procedure can be initiated, this question now becomes obsolete as the pledgee itself becomes the owner of the pledged assets at the end of the foreclosure proceedings.
- In an attempt to preserve the rights of the pledgees at the inferior degrees, the Law stipulates that the first degree pledgee and the debtor will be severally liable towards such inferior pledgees.
- If the value of the pledged movable in the valuation report (as appraised by the expert appointed by the relevant civil court of first instance) is below the amount of the secured receivables of the pledgee who is entitled to take over the ownership of the pledged movable, the pledgee may request the transfer of the relevant movable by way of setting off 9/10th of the value of the pledged movable from its receivables. Such pledgee will be provided with a document that enables it to pursue the remaining portion of its receivables (*rehin açığı belgesi*).

[32] Published in the Official Gazette No. 2128 dated 19 June 1932.

- If, however, the value of the pledged movable is lower than the secured receivables, the pledgee may request the transfer of the relevant movable by way of depositing the excess amount to the execution office. If the creditor fails to deposit such amount, such pledgee and the debtor will be severally liable towards inferior pledgees in respect of this amount.

7. Exemptions.

The Law provides that the conclusion of the pledge agreements and formalities at the registry are exempt from taxes and fees.

8. Existing Commercial Enterprise Pledges

Pursuant to the Post-Default Regulation, the Movable Pledge Legislation will not apply to the commercial enterprise pledges that have already been established under the CEP Law. Such pledges will remain to be subject to relevant legislation.

Conclusion

The Movable Pledge Legislation marks an important change to the security regime under Turkish Law considering its extensive scope and foreclosure regime. On the other hand, it leaves behind some important question marks as to the operation and foreclosure of this pledge. Such questions are awaited to be responded with the court decisions, views of the legal scholars, and practice concerning the Registry.

Recent and upcoming conferences & events

- 9-13 October 2016, Istanbul: 23rd **World Energy Congress** organized by World Energy Council.
- 3-4 November 2016, Ankara: **9th International Energy Congress and Expo** organized by EIF and Turkish Petroleum.
- 2-3 November 2016, Ankara: **5th Turkish Wind Energy Congress** organized by Turkish Wind Energy Association.
- 2-5 November 2016 Istanbul: **2nd Istanbul PPP Week** organized by Foreign Economic Relations Board of Turkey.
- 23-24 November 2016, Ankara: **5th Annual PPP in Turkey Forum** organized by EEL Events.
- 6-8 December 2016, İstanbul: **SOLARTR 2016, Solar Conference and Exhibition** organized by GÜNDER, International Solar Energy Society Turkey Section. Av. Nigar Özbek, associate of Çakmak Avukatlık Bürosu, spoke on "Renewable Energy Resource Areas".
- 8-9 December 2016, Ankara: **3rd Health Economy Congress** organized by Health Economy and Strategies Association.
- 15-16 December 2016, İstanbul: **International Energy Technologies Conference** organized by DAKAM.
- 11-12 January 2017, İstanbul: **8th Energy Efficiency Forum and Expo** organized by Tan Fuarcılık Ltd.
- 8-9 March 2017, İstanbul**: Nuclear Power Summit** organized by the B2B Matchmaking Society.
- 15-16 March 2017, Ankara: **Turkey Oil and Gas Summit**, organized by the ITE Group.