Çakmak Avukatlık Ortaklığı

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Turkish Energy & Infrastructure

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Recent changes in legislation

Amendment to the Regulation on Acceptance Procedures Applicable to the Electricity Generation Facilities

As known, the Regulation on Acceptance Procedures Applicable to the Electricity Generation Facilities was published in the Official Gazette No. 29524 dated 6 November 2015 (the "**New Acceptance Regulation**") and the Regulation on Acceptance Procedures Applicable to the Electricity Generation Facilities published in the Official Gazette No. 22280 dated 7 May 1995 (the "**Repealed Regulation**") was repealed accordingly.

The New Acceptance Regulation had a transitory provision allowing the application of the Repealed Regulation until 6 May 2016. According to Provisional Article 1 of the New Acceptance Regulation, the Council of Ministers had been empowered to extend such period until 6 November 2016.

According to the Amendment to Provisional Article 1 of the New Acceptance Regulation published in the Official Gazette No. 29907 dated 3 December 2016 (the "**Amending Regulation**"), the Repealed Regulation will remain in force for electricity generation facilities that are scheduled to be accepted before 31 March 2017. In other words, the actual application of the New Acceptance Regulation has been postponed until 31 March 2017 and electricity generation facilities that will be accepted after 31 March 2017 will be subject to the New Acceptance Regulation.

Amendments to the Energy Market Tariff Calculations

The tariff calculations in the electricity market have been recently amended with two communiqués, namely the Communiqué Amending the Determination of Retail Energy Sale Tariffs Communiqué (the "**Amending Retail Sale Tariffs Communiqué**") and the Communiqué Amending Distribution System Revenues Communiqué (the "**Amending Distribution Tariffs Communiqué**"), which were both published in the Official Gazette No. 29939 dated 5 January 2017. Substantial amendments are summarized respectively as follows:

Amendments to the Determination of Retail Sale Tariffs Communiqué

Amending Retail Sale Tariffs Communiqué regulates the procedures and principles for calculating electricity retail prices. The cost items which are taken into account while calculating the retail sale prices have been expanded as (i) operating costs for invoicing and customer services, (ii) operating costs like retail sale services and (iii) all other amounts which cover all costs and services incurred for continuity of the operations and active energy expenditures are added.

The Amending Retail Sale Tariffs Communiqué also provides a number of restrictions on the calculation of the uncontrolled operation expense items as such, that (i) it limits the depreciation expenses incurred in relation to the investments as of 1 January 2016 which is to be included in calculation of retail sale prices, to a maximum of 10% of the fixed operation expenses; and (ii) it provides the limit of 1% for country collection risk average which constitutes the base for the provision for the calculation of doubtful commercial receivables. The Communiqué further states that the country collection risk average amounts exceeding the latter threshold will not be taken into account in the tariff determinations.

Amendments to the Determination of Distribution System Revenues Communiqué

Amending Distribution Tariffs Communiqué brought changes to the determination of distribution system costs. The scope of system usage costs are expanded to cover all relevant costs and services to be realized for the continuation of distribution activities, including system operation costs, reasonable investment revenues, costs related to meter reading and reactive energy. Within the framework, in addition to these units, costs pertaining to the technical and non-technical losses are also taken into consideration under the distribution system usage costs, and will be reflected to the consumers to the extent target loss rates set forth by EMRA are not exceeded. As per the Amending Distribution Tariffs Communiqué, the system usage costs may be diversified considering the connection position, consumption amounts and the purpose of usage. Moreover, the Amending Distribution Tariffs Communiqué defines the "displacement revenues" and determines the latter as another cost item to be incorporated for the distribution tariff calculations.

Amendment to the Regulation on the Electricity Market Balancing and Settlement

The Amendment to the Regulation on the Electricity Market Balancing and Settlement (the "**Amending Regulation**") was published in the Official Gazette No. 29948 on 14 January 2017 and has entered into force as of 1 February 2017. The highlights of the Amending Regulation, mainly aiming to strengthen the role of the market operator, can be summarized as follows:

- The Amending Regulation specifies the procedures to be followed by the suppliers that wish to sell energy under bilateral agreements to eligible consumers who will consume energy (i) at consumption points that have not been in use by any consumer during an invoicing period and (ii) for the first time and at a consumption point connected to the transmission system. While the procedure applicable to consumers defined in (i) is similar to the procedure already applicable for other eligible consumers, the Amending Regulation sets forth that the procedure for applications for the consumers in (ii) shall be determined and announced by the market operator.

- In the event of evacuation of a consumption point by an eligible consumer, the process regarding the removal of such eligible consumer from the portfolio of the relevant supplier shall be determined and announced by the market operator. The market operator is also responsible for updating the eligible consumer database.

- The Amending Regulation extends the scope of information about eligible consumers that should be placed in the database on the Market Management System ("**MMS**") and updated by the suppliers of those consumers. The Amending Regulation provides that the market operator may collaborate with public institutions to control and correct the data's consistency. The suppliers are responsible for the integrity and accuracy of the data in MMS, even if such data is obtained from the relevant database.

- The information in the eligible consumer database will be accessible by the current supplier of the customer.

The procedure applicable for access of eligible consumers to the eligible consumer portal shall be determined by the market operator.

Amendment to the Regulation on the Certification and Support of Renewable Energy Resources

On 23 February 2017, the Energy Market Regulatory Authority ("**EMRA**") has published a new regulation amending the Certification and Support of Renewable Energy Regulation[1] (the "**Amending Regulation**").

The main change brought by the Amending Regulation (which was also proposed by the draft that we have touched upon in our Fall 2016 issue) is that the rights and obligations related to the Renewable Energy Resources Support Mechanism (*YEKDEM*) of the generation facilities that have been privatized shall continue to be valid 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.

In addition, with the Amending Regulation, Article 6 of the Certification and Support of Renewable Energy Regulation which "envisages objections to the applications for YEKDEM and regulates how such objections shall be resolved" has been abolished.

New Rules Affecting the Renewable Energy and Mining Projects in Certain Protected Natural Assets

The Central Commission for the Protection of Natural Assets ("**Commission**") published three resolutions[2] ("**Resolutions**") on 25 January 2017 in relation to the use of protected natural areas. The Resolutions stipulate various rules which have implications on wind and solar energy as well as certain mining projects located on certain protected natural areas.

By way of background, the categories of protected natural areas are mainly determined under the Regulation on Rules and Procedures regarding the Determination, Registration and Approval of Protected Areas[3] ("**Regulation**") as well as the Commission's Resolution No. 728 on Rules and Procedures regarding the Use of Natural Protected Areas[4] ("**Resolution No. 728**"). Pursuant to the Regulation, protected natural areas are categorized as (i) sensitive natural areas, (ii) qualified natural areas, and (iii) natural areas under controlled use. The Resolution No. 728 further classifies protected natural areas 1st, 2nd, and 3rd degree natural protected areas.

Prominent novelties introduced with the Resolutions can be listed as follows:

- Mines may be established for purposes of extracting sand, stone, minerals, and other relevant materials in natural areas under controlled use.
- Wind energy power plants ("**WEPPs**") can no longer be constructed on sensitive natural areas. It is clearly stated that the existing WEPPs will not be adversely affected by this prohibition. However, for capacity increases, such WEPPs will be required to prepare a specific scientific report regarding the environmental impacts of these to obtain the approval of the Ministry of Forestry and Hydraulic Affairs and the Ministry of Food, Agriculture, and Livestock.
- New WEPPs can, in principle, be established on other protected natural areas under the Regulation, while the WEPPs on these areas will be subject to certain rules like the requirement to be located at least 300 meters away from sensitive natural areas. The existing WEPPs, together with the projects that have obtained a conservation development zoning plan approval, will not be subject to these rules.
- Solar energy power projects will not be permitted on the 1st degree, sensitive, and qualified natural areas. The development and construction of such projects on other protected natural areas, both under the Regulation and Resolution No. 728, will be subject to certain restrictions.

Amendment to the Implementation Regulations of Forestry Law

The Amendment to the Implementation Regulation of Articles 17(3) and 18 of the Forestry Law and the Amendment to the Implementation Regulation of Article 16 of the Forestry Law (the **"Amending Regulations"**) were both published in the Official Gazette No. 29955 dated 21 January 2017 and have entered into force on the same date.

The Amending Regulations include detailed provisions regarding necessary documents and fees to be paid for license applications and certain permits as well as incentives that energy companies are granted in relation to such fees.

Within this context, the amended version of Article 8(9) of the Implementation Regulation of Articles 17(3) and 18 of the Forestry Law No. 6446 (the "**Implementation Regulation**")[5], among others, is

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1 Published in the Official Gazette No.28782 dated 1 October 2013.

2 Resolution No. 98 Concerning Wind Energy Power Plants (WEPP) on Natural Protected Areas, Resolution No. 99 on Protection and Terms of Use of Natural Protected Areas, and Resolution No. 100 Concerning Solar Energy Power Plants (SEPP) on Natural Protected Areas were published in the Official Gazette No. 29959 dated 25 January 2017.

3 Published in the Official Gazette No. 28358 dated 19 July 2012.

4 Published in the Official Gazette No. 26579 dated 11 July 2007.

5 Published in the Official Gazette No. 28976 dated 18 April 2014.

noteworthy as Article 8(9) now stipulates that the incentives and reduced fees under the Provisional Article 4 of the Electricity Market Law[6] shall also be applicable to permits to be granted for areas relating to the disposal and storage of solid waste resulting from the operations of thermal power plants.

Prior to this amendment, in terms of thermal power plants, Article 8(9) only granted an 85% discount to the permit, lease, easement, and utilization permit fees for areas used for energy facilities, connection roads, and energy transmission lines for the first 10 (ten) years of investment and operation periods. With this amendment to Article 8(9), areas used for the disposal and storage of solid waste resulting from the operation of thermal power plants have also been included within the scope of this incentive.

In addition, Article 8(9) now stipulates that permit, lease, easement, and utilization permit fees for areas utilized for the disposal and storage of solid waste resulting from the operation of thermal power plants, which have been privatized via the asset sale method, shall benefit from this 85% discount for 10 (ten) years starting from their privatization date, provided that such permits have already been issued prior to the privatization.

Amendments to the Electricity Market Licensing Regulation

EMRA introduced significant amendments to the Electricity Market Licensing Regulation[7] (the "**Regulation**") by way of a regulation published in the Official Gazette No. 29989 and dated 24 February 2017 ("**Amending Regulation**").

The novelties brought with the Amending Regulation mainly aim to address the specific licensing requirements applicable to the Renewable Energy Resource Areas ("**RERAs**") pursuant to the RERA Regulation[8]. In addition, the Amending Regulation broadens the scope of the exceptions to the share transfer prohibition applicable during the preliminary license period. Lastly, this regulation envisages other material changes to the Regulation, as outlined in Section 3 of this note.

1. Incorporation of RERAs into the Regulation

RERA projects have distinct features when compared to other electricity generation projects. In order to reflect such RERA specific aspects in the Regulation, the Amending Regulation provides the below amendments, among others:

- Preliminary license period requirements differ in RERA and other energy projects. Basically, in RERA projects, by the end of the preliminary license period, the project company must make the factory that will manufacture the domestic components to be used in RERA projects available for operation. On the other hand, in other projects, such period is facilitated to carry out the development phase formalities such as completion of required permits and land usage rights, which might have already been finalized in the RERA projects before the announcement of the RERA tender. In parallel to such structural differences, the Amending Regulation differentiates the conditions that need to be satisfied during the course of the preliminary licensing period.

- The Amending Regulation reiterates the provisions in the RERA Regulation providing that the preliminary license period in RERA projects will be determined in accordance with the relevant tender specification and will not, in principle, exceed 36 months. However, it also permits such period to be extended with the approval of the Ministry of Energy and Natural Resources ("**MENR**") if EMRA determines that (i) the project company has reasonable excuses and plausible corrective action plans in respect of such delay; or (ii) such delay stemmed from a force majeure event defined under the RERA Regulation.

- Similarly, the Amending Regulation reiterates that the electricity generation license period in RERA projects will not exceed 30 years, and such license will not be renewed.

- The Amending Regulation sets out specific license cancellation grounds for the RERA projects such as incompliance with RERA legislation and project company default under the usage right agreement with MENR.

- The Amending Regulation provides that, in addition to the EMRA approval required for 10% or more (5% or more in publicly held companies) direct or indirect share transfers in generation license holders, the approval of the MENR will also be needed in respect of such share transfer for the RERA projects until such projects are accepted for operation.

- Pursuant to the Amending Regulation, EMRA will not be empowered to issue a public benefit decision for the purposes of expropriations in RERA projects. In this case, the Council of Ministers should be issuing an accelerated expropriation decision for RERA Projects.

Please also note that the Amending Regulation specifically stipulates that its relevant provisions will apply to the 1,000 MW Karapınar I Solar Project, the first RERA project which was tendered on 20 March 2017.

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

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

8 Published in the Official Gazette No. 29852 dated 9 October 2016.

2. Broader Liberty in Share Transfers during the Preliminary License Period

The Regulation prohibits share transfers resulting in direct or indirect ownership changes in a preliminary license holder company's shareholding structure, subject to certain exceptions. The Amending Regulation broadens the scope of such exceptions by way of also permitting such share transfers in the following circumstances:

- Direct or indirect share transfers among the existing direct or indirect shareholders of the preliminary license holders that do not amount to change of control in the shareholding structure of such preliminary license holder,
- Direct or indirect changes in the shareholding structure of preliminary license holders, in which more than half of the share capital is held directly or indirectly by public bodies, resulting from capital increase and/or change of shareholders, provided that no new shareholder enters to such preliminary license holder apart from such public bodies,
- Direct or indirect changes in the shareholding structure of preliminary license holder as a result of such license holders' and its shareholders' direct or indirect acquisition of their own shares pursuant to Turkish Commercial Code, No. 6102,
- Direct or indirect shares acquisitions at the preliminary license holder through foreign funds by foreign legal entities or Turkish legal entities that are controlled by such foreign legal entities.

3. Other Amendments.

Other material amendments in the Amending Regulation are the following:

- Pursuant to the Regulation, other than wind, solar, hydro, and geothermal power projects, the electricity generation projects must have obtained the applicable environment impact assessment decision at the time of their preliminary license application to EMRA. On the other hand, the said renewable projects can obtain such decision during the course of the preliminary licensing period. In parallel to such renewable projects, the Amending Regulation provides that biomass electricity generation projects can now also obtain the environmental impact assessment decision within the preliminary licensing period.

All power plants with a total installed capacity over 100 MW will be required to conduct their operations with the Turkish Standards Institute approved management systems provided under the Amending Regulation.

Relevant Provisions in the State of Emergency Decrees

Following the declaration of the state of emergency on 21 July 2016 with the Ministerial Decree No. 2016/9064, a remarkable amount of statutory decrees that impact the investment and corporate regulations have been published in the Official Gazette. Significant provisions of the above-mentioned decrees are as follows:

- Decree no. 669, which was published in the Official Gazette No. 29788 dated 31 July 2016, envisages a number of precautions concerning civil servants and military personnel who have been suspended or dismissed from duty, along with the re-organization of military institutions. In addition, the Decree no. 669 sets forth the restriction of suspension of bankruptcy procedures for corporations and cooperatives during the state of emergency.
- Decree no. 675 was published in the Official Gazette No. 29872 on 29 October 2016, and it regulates mainly the precautions concerning the removals of public servants and military personnel, liquidation of media organs and certain other institutions, and the assignment of Saving Deposit Insurance Fund as a public administrator (*kayyım*) to the companies and corporations in which individuals or legal entities associated to the Gulenist terrorist organization have less than 50% of the shares.
- Decree no. 678 entered into force on 22 November 2016 when it was published in the Official Gazette No. 29896. The Decree introduces the Center of Attraction Programme to be executed by the Development Bank of Turkey to promote investments in less developed regions, grant aid to the enterprises during their investment and operation processes, determine where usufruct will be created, and establish procurement principles regarding treasury lands for regional development purposes. Furthermore, Decree no. 678 envisages amendments to the Public Procurement Law No. 4734[9] (the "**Public Procurement Law**"), in relation to Article 11 of the Public Procurement Law, providing a list of instances for prohibition from tenders. As such, the potential bidders and/or bidders whose association with terrorist groups was detected and reported accordingly by the police or by the National Security Agency will be prohibited from tenders. In accordance with Decree no. 678, the Council of Ministers is now authorized to determine principles and procedures for the reporting of the above-mentioned bidders and/or potential bidders. A further addition to the same

[9] Published in the Official Gazette No. 24648 dated 22 January 2002.

Article stipulates that the bid security would not be recorded as revenue for the governmental authorities unlike other cases of prohibition from tenders as listed in the Public Procurement Law. A further addition to Article 11 was made with Decree no. 680 published in the Official Gazette No. 29940 (Repeating edition) dated 6 January 2017, which creates civil and penal immunity for the public agents throughout their activities in accordance with the concerned article of the Public Procurement Law, provided that they do not disclose documents and information which they have acquired.

- Decree no. 683, which was published in the Official Gazette No. 29957 dated 23 January 2017, anticipates a number of measures related to the commerce life. The Decree prevents judges from declaring court expenses and attorney fees to the detriment of the Administration during the proceedings filed in connection with the listed joint stock companies and capital market institutions, which have been subjected to precautions and sanctions during the state of emergency, and for the proceedings pertaining to their legal works and transactions. Furthermore, the Decree facilitates the procedure for bringing liability actions against the then-owners, shareholders, board members, managers, and other liable persons of the companies in which public administrators have been appointed to. It is further envisaged that the management and representation rights related to the ownership or shareholding of such liable persons who have been indicted will only be exercised by public administrators. Finally, the Decree prohibits the transfer of shares until the final exculpation judgement.

- Decree no. 684, published in the Official Gazette No. 29957 dated 23 January 2017, brings various changes including the provision of additional funding to the Turkish Wealth Fund and amendments to the Public Procurement Law and to the Banking Law No. 5411[10] (the "**Banking Law**"). Under the Public Procurement Law, the services of issuance of banknotes and securities to be provided by the Turkish Central Bank were exempt from the scope of application of the said law. With amendment to the Public Procurement Law, the Decree further expands this exemption and excludes tenders pertaining to the Turkish Central Bank's technology and security services, and the outsourcing and consulting services from the scope of application of the Public Procurement Law. Moreover, the Decree expands the scope of application of Article 11 of the Public Procurement Law concerning the prohibited persons from tenders. Accordingly, individuals or legal entities with foreign connections, if they were reported by the National Security Agency as being associated with any terrorist group, will not be entitled to participate in tenders subject to the Public Procurement Law. However, Article 11 of the Public Procurement Law will not be applicable to companies which have been transferred to the Saving Deposit Insurance Fund or the Saving Deposit Insurance Fund was assigned as its public administrator. Last but not least, the Decree adds a new provision to the Banking Law regarding the asset management companies. As per the latter, banks are entitled to incorporate asset management companies to transfer assets and receivables from funds and all other financial institutions. As per the amendment in the Decree, the incorporation of asset management companies by the banks having more than 50% of share capital owned or controlled by public authorities must comply with the principles and procedures to be determined by the Banking Regulation and Supervision Authority.

- Finally, Decree no. 686, published in the Official Gazette No. 29972 (Repeating Edition) dated 7 February 2017, provides various measures in pursuit of fighting against terrorism. Under the Decree, it is also foreseen that the transfers and assignments of shares engaged after the date on which proceedings have been launched in relation to the shares and shareholding rights of the companies managed by public administrators will be deemed as collusive transactions and such transactions will be deleted from the trade registry ex officio.

Procedures and Principles regarding Natural Gas Market Distribution Activities Investments

The Procedures and Principles regarding Natural Gas Market Distribution Investments (the "**Procedures and Principles**") entered into force in the Official Gazette No. 29983 dated 18 February 2017. The purpose of the Procedures and Principles is to set rules concerning the determination of investments which are the basis for regulated network costs, and expenses for such investments; as well as to set principles for the investment caps of the distribution companies, all of which are to be taken into account in the tariff calculations.

In accordance with the Procedures and Principles, the investment costs incurred by the authorized distribution companies will be deemed as network investment costs only if the following conditions are met: (i) the investment costs shall be related to the distribution network investments made in connection with the properties, e.g., pipelines, meters, and other lines, which are used and required for the continuation of the distribution activities; (ii) such properties must have been capitalized by making them ready for use; (iii) concerned investment costs

[10] Published in the Official Gazette No. 25983 (Repeating edition) dated 01 November 2005.

must be recorded in accordance with the principles set out in the Accounting Plan to be determined by the Electricity Market Regulatory Board (the "**Board**"), and be provable with the accounting documents; (iv) the investment costs must have been unbundled from the financing expenses such as exchange rate differences, late charges or interest, and from VAT; and finally (v) network investment costs shall be monitored under the ongoing expenses until they become ready for use in accordance with the Accounting Plan. The network investment costs consist of nine investment categories and the Procedures and Principles set forth specific principles for the determination of investment costs under each category.

The Procedures and Principles also determine rules for the approval and revision principles of investment caps of distribution companies. It is envisaged that the investment cap offers, to be prepared in accordance with the Procedures and Principles of Tariff Calculations for the Distribution Companies and applicable legislation for the relevant tariff implementation period, shall be submitted to EMRA by the distribution companies. EMRA is entitled to approve those offers either as they are or by making certain amendments. Yet, EMRA is also entitled to determine the investment caps of the distribution companies which, despite the cure period given by EMRA, fail to make their cap offers within the adequate format. Revision requests concerning the approved investment caps, transfers between the annual investment budgets and tariff calculation principles to be followed when the costs exceed or do not reach the investment caps, are conducted in accordance with the provisions of the Procedures and Principles of Tariff Calculations for the Distribution Companies. For tariff calculations, EMRA, taking into consideration the data provided by the distribution companies, would determine unit prices to analyse whether the investment cap projections are in compliance and to make other required analysis in relation to regulated network investment costs and investment caps. Distribution companies are required to provide the Board with information related to the amount of their approved annual capitalized investments within the period of time and format determined by the Board for supervision purposes.

Draft legislation

Draft Amendment to the License-Exempt Electricity Generation Legislation

On 27 January 2017, EMRA published both the Draft Regulation Amending License-Exempt Electricity Generation Regulation (the "**Draft Regulation**") and the Draft Communiqué Amending Communiqué on Implementation of License-Exempt Electricity Generation Regulation (the "**Draft Communiqué**") on its website to receive comments by interested parties until 10 February 2017.

The Draft Regulation envisages minor amendments to the License-Exempt Electricity Generation Regulation[11] (the "**Regulation**") with respect to the notification date of the amount of electricity surplus, generated by individuals or legal entities exempted from license requirement, which are determined by the network operator. The Draft Regulation, referring to the calendar set forth in the Energy Market Balancing and Settlement Regulation[12] (the "**Settlement Regulation**") for the notification of relevant figures of meters used for power supply-draw unit configurations for settlement, requires that the notification date of the surplus power amount is in accordance with this calendar.

As to the Draft Communiqué, the proposed amendments aim to comply with the Regulation on the Renewable Energy Resources Support Mechanism[13] (the "**YEKDEM Regulation**") and the Settlement Regulation. Pursuant to the Draft Communiqué, the system operators must notify the market operator concerning the power supply-draw information measured by the meters on an hourly basis rather than daily, in accordance with the YEKDEM Regulation. Furthermore, pursuant to the Draft Regulation, the Draft Communiqué sets a notification calendar consistent with the principles of the Settlement Regulation.

Other recent developments

Recent Developments Regarding the Sovereign Wealth Fund of Turkey

In our Summer 2016 Issue, we had announced the formation of the Sovereign Wealth Fund of Turkey (the "**Fund**") and explained its main features. The scope of the Fund has been expanded since then. Below is a summary of the changes:

- The shares owned by the Treasury in Türkiye Cumhuriyeti Ziraat Bankası A.Ş., Turkish Petroleum Pipeline Corporation (*BOTAŞ*), Turkish Petroleum Corporation (*TPAO*), Turkish Postal and Cable Services Corporation (*PTT*), Borsa İstanbul A.Ş., Türksat Satellite Communications and Cable TV Operations Corporation; the shares owned by the Treasury in Türk Telekomünikasyon A.Ş (which correspond to 6.68% of the capital of this company); the General Directorate of Eti Mine Enterprises and the General Directorate of Tea Enterprises have been transferred to the Fund in

[11] Published in the Official Gazette No. 28783 dated 2 January 2013.

[12] Published in the Official Gazette No.27200 dated 14 April 2009.

[13] Published in the Official Gazette No.28782 dated 1 October 2013.

accordance with the Council of Ministers Decision No. 2017/9756 dated 24 January 2017[14];

- Resources of the Defense Industry Support Fund, which amounts to 3 billion Turkish Liras, have been transferred to the Fund in accordance with the Council of Ministers Decision No. 2017/9758 dated 31 January 2017[15]. These amounts shall be repaid to the Defense Industry Support Fund within three months following the transfer;
- On 6 February 2017, the Privatization Administration announced on the Public Disclosure Platform that 49.12% of the shares of Turkish Airlines and 51.1% of the shares of Türkiye Halk Bankası A.Ş. have been excluded from the scope of privatization and will be transferred to the Fund following the acquisition of necessary permits.
- On 14 March 2017, Türkiye Halk Bankası A.Ş. announced on the Public Disclosure Platform that 51.11 % of its shares owned by the Privatization Administration have been transferred to the Fund as of 10 March 2017.

Aviation Related Requirements for Wind Power Projects

On 1 February 2017, EMRA announced certain aviation related requirements applicable to WEPPs, including the installation of wind measurement stations. Accordingly, at the planning stage, WEPPs must be located at least 2 km away from air and ground communication stations and at least 15 km away from navigational aid systems. These standards should function as criteria underlying the General Directorate of State Airports Authority's (*DHMI*) approval for WEPPs, which must be obtained during the development stage of such projects.

Postponement of the Application Dates for Wind Power Preliminary Licenses

On 10 March 2017, EMRA announced that the preliminary license application dates for wind power plants have been postponed from 2, 3, 4, 5 and 6 April 2017 to 2, 3, 4, 5 and 6 April 2018 by the decision of EMRA Board dated 9 March 2017 and numbered 6956-32. This postponement may be read in conjunction with the upcoming tender for the RERA project that is currently being developed by the General Directorate of Renewable Energy and may be interpreted as part of the regulators' efforts to shift developers' focus on RERA projects.

Kalyon & Hanwha Submitted the Lowest Bid in Karapınar I RERA Tender

The long awaited tender for the first RERA project, the 1000 MW Karapınar I Solar RERA Project, was concluded on 20 March 2017. Please refer to the newsletter rider on the Regulation on RERAs under Recent Changes in Legislation in the Fall 2016 edition of our newsletter for further information regarding the RERA legislation and to our client alert on RERAs for further information regarding the Karapınar I tender.

The project involves the construction of (i) a solar module manufacturing plant with a capacity of 500MWp/year, (ii) a research and development center for the development of solar power electricity generation technologies, and (iii) a solar power plant with an installed capacity of 1.000 MW. The winning bidder will be granted an electricity generation license for 30 years and benefit from a 15 year purchase guarantee on the basis of the purchase price it submits as part of its bid.

The following consortiums participated in the tender:

- Limak Enerji-CMEC-Hareon Solar,
- Kalyon Enerji -Hanwha Q Cells,
- Çalık Enerji-Solargiga Holding, and
- Acwapower Enerji-Kibar Yatırım-Chint

The ceiling price for the tender was USD 8.00 cent/kWh. Limak-CMEC-Hareon was the first consortium to retire from the tender when their bid was USD 7.81 cent/kWh. This was followed by the Çalık-Solargiga consortium when their bid was USD 7.73 cent/kWh. Finally, after the nineteenth round, Acwa-Kibar-Chint left the tender with a bid of USD 7.05 cent/kWh and the Kalyon-Hanwha consortium submitted the lowest bid with USD 6.99 cent/kWh.

Now that the tender process is completed, the sector players have shifted their focus to the expected RERA tender for wind projects, particularly after Berat Albayrak, the Minister of Energy and Natural Resources announced after the Karapınar tender that they are planning to launch such a tender.

Court decisions

Court of Appeals Decision on Electricity Loss-Leakage Fees

Following the entry into force of Amendments to the Electricity Market Law and Certain Other Laws No. 6719 (the "**Amending Law**"), in its recent decisions the Court of Appeals (the "**Court**") has changed its position on electricity loss-leakage fees, which have been a controversial matter among electricity retailers and consumers. The Court started to overrule the first instance court decisions that were rendered before

[14] Published in the Official Gazette No. 29970 dated 5 February 2017.

[15] Published in the Official Gazette No. 29970 dated 5 February 2017.

the publication of the Amending Law accepting the compensation claims by consumers for the collection of electricity loss-leakage fees on the grounds that these decisions do not elaborate the provisions and impact of the Amending Law.

The established precedent of the Court until the publication of the Amending Law was that imposing electricity loss-leakage fees on consumers, who actually acted entirely in compliance with the law, was contrary to the rule of law and the principle of equity. However, the Amending Law provides that the authority of courts in lawsuits relating to the fees determined by EMRA's revenue and tariff regulations is limited to reviewing whether such fees are in line with EMRA's regulations. Although, in principle, laws do not have retrospective effect, according to the explicit language of the Amending Law, this provision is also applicable to pending applications, lawsuits, and enforcement proceedings related to electricity loss-leakage fees. The Court's new position is that the collection of electricity loss-leakage fees from consumers is lawful so long as such collection is based on valid EMRA tariffs and decisions. As a result, provisions of the Amending Law as well as applicable EMRA tariffs and decisions must be taken into account by the courts in lawsuits regarding electricity loss-leakage fees.

Notwithstanding the above, the issue is not yet entirely resolved, as there are pending lawsuits before the Constitutional Court for the annulment of the Amending Law. Although, as a rule, decisions of the Constitutional Court do not have retrospective effect, as an exception to this rule, it is acknowledged by scholars and court precedent that Constitutional Court decisions apply to pending lawsuits. Therefore, if the Amending Law is annulled by the Constitutional Court, the Court's position on electricity loss-leakage fees may change once again for both currently pending and future lawsuits.

Articles

EPC and EPCM Contracts: What is the Difference, and How Do You Choose?

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Everyone knows that the key to the success of major construction projects is to achieve the right balance between the quality of the work and the price paid for it. This is not as easy as it sounds, as there are multiple players in the game, each with its own interests. From evaluation of the site to the design, construction, and commissioning of the project, each step needs an expert hand and a party to assume the responsibility. In this article, we will briefly compare two types of contracts commonly used in projects in the construction, infrastructure, oil and gas, power, and mining sectors: the engineering, procurement, and construction contract (the "**EPC Contract**") and the engineering, procurement, and construction management contract (the "**EPCM Contract**"). Although they sound similar, they are in fact very different, with a very different risk allocation and differing legal consequences. The major difference is the role of the EPC or EPCM contractor.

Note that this Article does not aim at providing all features of the EPC and EPCM contracts that may enable the readers to establish a risk matrix comparing these two types of contracts. Moreover, even though the following items and explanations reflect the well-established features of such contracts, the parties may, of course, deviate from these under the principle of freedom of contract due to the requirements of the project(s) or outcome of the negotiations.

EPC and EPCM: What is the Difference?

1. The EPC Contract

The EPC Contract is essentially a fixed price or lump sum turnkey contract for design, supply and construction. The EPC contractor is responsible for (i) the design/engineering, (ii) procurement, and (iii) the actual construction of the project.

The project owner/sponsor provides the EPC contractor with its technical and functional specifications (or requirements), and the EPC contractor designs, builds, and delivers the project in an operational state (turnkey) within the contractual time and cost limits.

The EPC contractor is responsible for the development of the entire project, including all elements of design/engineering, procurement, and construction. This includes performing the design and construction of the project, procuring the necessary equipment and materials for the project, including testing the equipment, and, where applicable, training of the personnel who will work in the facility. The EPC contractor is responsible for integrating the performance of all package contractors.

2. The EPCM Contract

The EPCM Contract is a professional services or consultancy contract. The EPCM contractor does not perform any actual building or construction works itself. Its job is construction management; it is responsible for the overall coordination and management of the design and construction process.

The EPCM contractor is responsible for (i) developing the design in accordance with the owner/sponsor's technical and functional specifications, (ii) the procurement of necessary materials and equipment, and (iii) the management and administration of the construction process, including the construction contracts ultimately awarded and the coordination of packages of works undertaken.

The EPCM Contract's fee structure is often "cost plus": the reimbursement of actual cost, plus a margin to account for profit, overhead, and risk. Options include a cost-reimbursable fee structure (an upfront payment of a certain amount plus additional fixed monthly payments) and a unit rate fee structure (an upfront payment of a certain amount plus additional payments to be made upon completion of specified phases in the construction process).

The EPCM contractor does not promise to complete the project within a certain timeframe or cost limit, nor does it guarantee fitness for purpose of the works. Since the EPCM Contract is a services project, the EPCM contractor is obligated only to act with reasonable care and skill in providing services.

The EPCM contractor is usually an engineering firm and it may provide the design directly. The EPCM contractor is responsible for ensuring that the engineering and design of the project complies with the owner/sponsor's technical and functional specifications.

EPC v. EPCM: Quick Points Comparison

There are many factors for an owner/sponsor to consider in its choice of contracting strategy. The owner/sponsor will need to carefully consider its commercial priorities (cost? speed? quality? liability? control? etc.), along with the financing method and actual market conditions, in order to select which project delivery method will best suit its needs.

3. Sector and Market

EPC Contracts have historically been preferred for large construction projects. However, EPCM Contracts are being used more and more often. Due to changing market conditions, the increasing cost of labor and materials, and the increasing size and complexity of construction projects, it may not be possible to undertake a project on an EPC Contract basis. There may not be enough, or even any, EPC contractors willing and able – technically or financially or both – to take on certain projects in certain sectors.

Both EPC and EPCM Contracts have been used for years in the construction, oil and gas, mining and power sectors. EPC Contracts are frequently used in large scale resource development projects, including the construction of oil and gas plants. EPCM Contracts, on the other hand, are increasingly being used in the mining sector, the power sector, for heavy engineering facilities or manufacturing plants, and in the petrochemical sector where there are not enough contractors able to take on all of the risks involved in the projects. EPCM Contracts are not usually used for civil engineering projects, such as road and bridge construction.

4. Usage and Standardization

The EPC Contract is considerably more widely used and understood than the EPCM Contract. EPC Contracts and related documents are relatively simple and standardized. The International Federation of Consulting Engineers ("**FIDIC**") has developed a standard form for EPC Contracts: "Conditions for Contract for EPC/Turnkey Contracts" (called the "Silver Book"). Other organizations have likewise issued standard forms and guidance. In contrast, there are no standard forms for EPCM Contracts. Thus, drafting an appropriate contract by the owner/sponsor will require a much greater effort. It is hoped that with the increasing usage of the EPCM Contract that an international organization will provide a standardized form.

5. Degree of Owner/Sponsor Involvement and Control

The EPC Contract is a turnkey contract, which means that once the owner/sponsor has provided the EPC contractor with the initial technical and functional specifications, the owner/sponsor can, at least in theory, sit back and relax until the EPC contractor hands over the completed and fully operational project. A much higher degree of involvement by the owner/sponsor is required by the EPCM Contract structure. An owner/sponsor should have adequate qualified and experienced in-house personnel to monitor and assist the EPCM contractor's management and administration of the project.

Under the EPC Contract, the owner/sponsor relinquishes control over the project to the EPC contractor. EPC Contracts are appropriate for projects where the owner/sponsor does not need to retain design control, know-how or flexibility in execution. The owner/sponsor retains much more control under the EPCM structure, which makes this structure appropriate where the owner/sponsor wants to retain a high level of control over the project.

6. Single Point Responsibility vs. Multi-Point Responsibility

Under the EPC Contract, the EPC contractor is the single point of responsibility for the owner/sponsor. The owner/sponsor is not a party to the subcontracts and can deal directly only with the EPC contractor. In contrast, under the EPCM Contract, the owner/sponsor must deal with the subcontractors. Although the EPCM contractor is expected to provide the owner/sponsor with assistance in the event of a dispute with a subcontractor, the owner/sponsor still faces additional responsibility compared to an EPC Contract.

7. Principal v. Agent

An EPC contractor is a principal. It undertakes construction work itself and enters into subcontracts directly in its own name. In contrast, an EPCM

contractor provides services and acts as the owner/sponsor's agent. It facilitates the owner/sponsor's subcontracts, but is not itself a party to them.

8. Cost

EPC Contracts are much more expensive than EPCM Contracts. The EPC contractor's assumption of risk for the entire project comes at a steep cost, while the EPCM contractor's minimal assumption of risk is reflected in its much lower cost. Unlike the EPC contractor, who has a natural incentive under a lump sum or fixed price contract to reduce cost in order to maximize its profit, the EPCM contractor has no such incentive. The EPCM contractor will not automatically be liable to the owner/sponsor if the project goes over cost. An EPCM contractor may be liable for a cost overrun only if it breaches its professional obligation and fails to exercise reasonable skill and care in carrying out its services, including monitoring costs and reporting on costs to the owner/sponsor.

9. Quality

Because the EPC Contract is a fixed price or lump sum contract, the EPC contractor wants to spend as little as possible in order to maximize its own profits; it will aim for the minimum compliant standard. The EPCM contractor makes no promises regarding quality.

10. Facing Variations

A massive construction project means an approximate construction period of at least one year. During the construction phase, changes in law may occur or some variations in the design or the equipment list of the project may be needed. One of the major challenges of a construction project is to fit in such variations in time. This can be more difficult for an EPCM contractor because it deals with multiple subcontractors. Another challenge is to fit in such variations in price. Here, the EPCM structure provides more flexibility compared to the EPC structure with a lump sum price. However, the practical consequences on the owner/sponsor may vary, as the changes do not always have to be to the detriment of the owner/sponsor, after all.

11. Liability for Defects

This is a distinction between the two types of contracts because of their nature: in the EPC structure we will be talking about defect in works whereas in the EPCM structure we will be talking about defect in services. The practical result is that the owner/sponsor will not be able to claim for rectification of defects from the EPCM contractor but will only be able to claim for indemnification if the EPCM contractor was not diligent in choosing the right subcontractors and negotiating the terms of their contracts. However, in the EPC structure, the EPC contractor would be liable for the defects no matter the reason behind and regardless of whether or not the defect is attributable to one of its subcontractors (unless otherwise agreed).

The EPC contractor provides a turnkey product guarantee. The EPC contractor promises to deliver the fully operational project within the time and cost limits specified in the contract and faces liability for any failure to keep its promise. EPC Contracts often include liquidated damages provisions for delay.

The EPCM contractor makes no promises about finishing a project on time or within cost or even as to the quality of the finished project. Because the EPCM Contract is a contract for services, the basis for liability is breach of professional obligations, including (i) performance of the design/engineering work, (ii) estimation of the project's duration, (iii) estimation of the cost and budget preparation, (iv) management of procurement and administration of the subcontracts, and (v) coordination of the design and construction packages between trade contractors.

12. Remedies

The EPC Contract provides the owner/sponsor with more remedies against the contractor should any problem occur. The EPC Contract usually requires a performance guarantee (subject to agreed liability caps) from the EPC contractor. Under the EPCM Contract, the owner/sponsor has limited rights and generally bears the burden of proving fault. The owner/sponsor may be able to obtain re-performance and some liquidated damages for deficient services.

Bankability or the Lender's Point of View

In addition to the owner/sponsor's own analysis, the key market player to influence the decision of the owner/sponsor will be the one who provides the financing for the project, i.e. the lender. So, the two contracts must be compared from the bankability point of view as well. The lender will obviously be most concerned about the owner/sponsor's repayment of its debt to the lender. Consider:

- Lenders have traditionally preferred the EPC Contract. At least on paper, the EPC Contract provides a high degree of certainty with respect to cost, time, and quality, which is comforting to project lenders. Financing options are more limited for EPCM Contracts.

- The easiest way to repay the lender is to complete the project so that the facility begins to operate and generate revenues as soon as possible. Regarding finishing on time, it is debatable whether one structure has an advantage over the other. However, it is important to keep in mind that the EPCM contractor will be responsible for coordinating multiple parties and the way that the interfaces are handled will be crucial for the destiny of the project.

- Lenders prefer a structure in which one party takes full responsibility for the completion of a

project. In the event of a delay in or impossibility of the delivery of the project for one reason or another, it would be important to have somebody take responsibility for it and be liable to indemnify the owner/sponsor's damages. From this point of view, having a single responsible party would be to the advantage of the lender who could have recourse against the EPC contractor's security package through the owner/sponsor. In the EPCM structure, on the other hand, having multiple subcontractors may be an issue if no one assumes responsibility or if there are interfaces where some risks are excluded from the coverage either because of disorganization or the terms of subcontracts which limit the liability of the respective subcontractors. Lenders' preference for a single point of responsibility may be less in smaller projects or where the owner/sponsor is sufficiently sophisticated.

- Another requirement from the lender's perspective would be access to a liquid security package composed of performance bonds, standby letters of credit, or any other security which can be as good as money, provided in favor of the owner/sponsor. It is easier to ask for such security from the EPC contractor who assumes the entire risk of the construction works compared to the EPCM contractor who acts as an agent between the owner/sponsor and the subcontractors who will be physically performing the works.

Conclusion

Despite the EPC Contract's dominant position, there are many reasons for the owner/sponsor to consider the EPCM Contract. First of all, the EPC structure may be too expensive or just not profitable enough for the owner/sponsor. As explained above, the EPC structure appoints the EPC contractor as the single party assuming the entire risk of the project, who, in return, will be asking for a higher remuneration for assuming this risk. Second, it may not even be possible to do a certain project in a certain sector on an EPC basis, such as a mega-project, if there are no EPC contractors available. Third, the owner/sponsor may have the required experience in the relevant type of construction and may have its internal resources to carry out the tasks it would otherwise be asking from the EPC contractor in return for remuneration. In such a case, the costs of the project will be reduced for the owner/sponsor and its profit will be greater. Lastly, the market conditions may decide for the owner/sponsor, as we saw following the global financial crises when demand for turnkey projects decreased.

Today, we see that the EPCM structure may be preferred in projects which require multinational participation and for which the balance sheet of a single EPC contractor would not be promising, such as the construction of a cross border oil pipeline. Although we see the EPC Contract more commonly used in project financing, there is an increasing tendency for the use of EPCM Contracts in the mining, petrochemical, and gas sectors, and it would not be a surprise if, one day, institutions of these sectors decide to develop standards for the EPCM Contracts as well.

Recent and upcoming conferences & events

- 3-4 December / 10-11 December 2016, Ankara: Dr. Cem Çağatay Orak, a partner of Çakmak Avukatlık Ortaklığı, was the moderator and speaker in the advanced educational program on "**Domestic and International Arbitration in Turkey**" organized by the Union of Turkish Bars Association and Turkish Lawyers Foundation (TÜRAVAK).

- 21 February 2017, Istanbul: **Bonds and Loans Awards Turkey 2017** organized by GFC Media Group where three of Çakmak Avukatlık Ortaklığı's transactions were the Winners of this year's Bonds & Loans Awards Turkey, including M&A Acquisition Finance Deal of the Year, Transport Finance Deal of the Year, and Natural Resources Finance Deal of the Year. Our transactions were also recognized as Runners Up for Natural Resources Finance Deal of the Year and Project Finance Deal of the Year, and as Finalists for Infrastructure Deal of the Year and Project Finance Deal of the Year. In the M&A Acquisition Finance Deal of the Year, we were the legal adviser to the Joint Lead Managers for the acquisition and operation of the Çanakçı and Akocak Hydroelectric Power Plant. In the Transport Finance Deal of the Year, we were the legal adviser to the Joint Lead Managers for the Third Istanbul Airport Project. For the Natural Resources Finance Deal of the Year, we were the legal adviser to the Joint Lead Managers for the acquisition of the Kadıncık I and II Hydroelectric Power Plants ("**HEPP**") and refinancing of the existing HEPP portfolio. Please click here for more information on the Winners.

- 23-24 February 2017, Istanbul: **The 17th International Energy Arena** organized by Strategic Technical Economic Researches Center (STEAM), with the theme "Global Developments and Investment Environment".

- 8-9 March 2017, Istanbul: **The 4th International Nuclear Power Plants Summit (INPPS)** organized by Nuclear Industry Association of Turkey and Nuclear Engineers Association (NMD), with the main theme of "Nuclear Commercial Twinning".

- 3-5 May 2017, Istanbul: **The 23rd International Energy & Environment Fair & Conference** organized by ICCI.

- 29 November-1 December 2017, Istanbul: **The 8th Bosphorus Summit** organized by International Cooperation Platform (UIP).

Upcoming infrastructure and power projects

- The tender for the Ankara-Niğde Motorway Project, which is the first build-operate-transfer ("**BOT**") model motorway construction project in Turkey, was announced on the General Directorate of Highways' website and published in the Official Gazette dated 30 December 2016. The bids are expected to be submitted on 14 April 2017 in closed envelopes.

- The bids for the Menemen-Aliağa-Çandarlı Motorway Project that comprises the construction of a motorway with a length of 76 km were submitted on 15 February 2017 in closed envelopes and the shortest operation period in BOT model tender was offered as 9 years 10 months 11 days by IC İçtaş+Astaldi+Kalyon Joint Venture. IC, Astaldi, and Kalyon Group were invited to the contract signing. Since the cost of the feasibility survey of the Project is below 1 billion Turkish Liras, a Debt Commitment Agreement of BOT contract will be signed by the Highways General Directorate in line with Article 8/A of Law No. 4749[16]. Therefore, the bureaucratic process is expected to be shorter than other BOT model contracts.

- The Çiğli-Aliağa-Çandarlı Motorway Project that is planned to have a length of 76 km was the first among BOT model projects waiting for Supreme Planning Council approval. The Motorway will connect İzmir to the North Aegean Çandarlı Seaport which will be the largest seaport in the Aegean region and one of the 10 biggest ports worldwide. The General Directorate of Highways has obtained an approval to announce the BOT model tender.

- Following the tender for the Karapınar RERA Project involving the construction of a solar power plant, the announcement for a RERA contest regarding the installation of WEPPs of 1000mW is expected to be made in the upcoming months.

[16] Published in the Official Gazette No. 24721 dated 9 April 2002.

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