

# Turkish Energy & Infrastructure

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## Recent Changes in Legislation

### Amendment to the Regulation on Transactions Affecting Foreign Exchange Position

In September, the Presidency of the Republic of Turkey imposed broad restrictions on the use of foreign currency in domestic transactions, with its Decree No. 85 Amending the Decree No. 32 on the Protection of the Value of Turkish Currency<sup>1</sup> (“**Decree**”) and gave the Ministry of Treasury and Finance (“**Ministry**”) the authority to provide exemptions to these restrictions. The Ministry exercised this authority by publishing the Communiqué No. 2018-32/51 Amending the Communiqué regarding the Decree No. 32 on the Protection of the Value of Turkish Currency<sup>2</sup> (“**Communiqué**”), on 6 October 2018. This was followed by a questionnaire<sup>3</sup> (“**Q&A**”) published by the Ministry to

clarify certain aspects of the Communiqué. Below is a summary of the restrictions on the use of foreign currency in certain domestic transactions and the exemptions to those restrictions, based on the Decree, the Communiqué, and the Q&A.

### Restrictions and Exemptions

The determination of payment obligations in a foreign currency (or indexed to a foreign currency<sup>4</sup>) is prohibited for contracts between persons (both legal and real persons) resident in Turkey<sup>5</sup> for the following subject matters:

- The sale or lease of any kind of immovable properties (including residences and workplaces with roofs) that are located in Turkey (including in its free trade zones);
- The sale or lease of any kind of vehicles including construction vehicles unless the lease

<sup>1</sup> Published in the Official Gazette No. 30534 dated 13 September 2018.

<sup>2</sup> Published in the Official Gazette No. 30557 dated 6 October 2018.

<sup>3</sup> The Q&A is accessible here: <https://hazine.gov.tr/File/Index?id=cd32ef43-d5ee-45d3-a6fe-d3127a5a4632>.

<sup>4</sup> For the purposes of the restrictions, the notion of foreign currency indexation includes (i) indexation to precious metals or assets whose prices are determined based on a foreign currency in

international markets such as gold and petrol, and (ii) indirect indexation to foreign currency.

<sup>5</sup> For the purposes of the restrictions, the notion of a Turkish resident includes (i) branches, representation offices, ordinary offices, and liaison offices of Turkish residents located abroad, (ii) funds abroad that are operated or managed by Turkish residents, (iii) companies abroad in which Turkish residents hold 50% or more of the shares, and (iv) companies abroad that are directly or indirectly owned by Turkish residents.

contracts concerning vehicles (including construction vehicles) were concluded before 13 September 2018;

- Financial lease except for financial lease contracts (i) concluded within the scope of Articles 17 and 17/A of the Decree No. 32 on the Protection of the Value of Turkish Currency<sup>6</sup>, and (ii) related to the sea vessels as defined under the Law Amending Turkish International Ship Registry Law and Statutory Decree No. 491<sup>7</sup>;
- Services (including consultancy, agency, and transportation services) except for service contracts (i) under which the service will be performed abroad, (ii) concluded with persons that do not have Turkish nationality even if they are resident in Turkey, (iii) relating to electronic communication starting or ending abroad, (iv) relating to exportation, transit trade, sales and deliveries deemed as exportation, and services and activities generating foreign currency income<sup>8</sup>, and (v) relating to hardware and software, including license contracts (sale contracts concerning software produced both in Turkey or abroad are exempted);
- Labor except for labor contracts under which the labor will be performed abroad; and
- Construction except for construction contracts concerning the construction, repair, or maintenance of sea vessels as defined under the Law Amending Turkish International Ship Registry Law and Statutory Decree No. 491.

The Communiqué provides the following exemptions to the restrictions on the usage of foreign currency in the contracts discussed above depending on the parties to the contract:

- Contracts, other than for the sale or lease of immovable properties and labor contracts to which public institutions are party, (i) concluded by public institutions and organizations and the Turkish Armed Forces Support Foundation's companies<sup>9</sup>, and (ii) subcontracts concluded within the scope of the performance of tenders, contracts and international agreements to the extent that the

payment obligations under these tenders, contracts and international agreements are determined in a foreign currency or as foreign currency indexed payments, are within the scope of the exemptions. Contracts to which banks are a party in connection with the transactions undertaken under the Law on Public Financing and Debt Management<sup>10</sup> also benefit from the exemptions.

- Companies engaged in air transportation including (i) commercial airway enterprises, (ii) companies providing technical maintenance services with respect to aircrafts, and (iii) establishments providing ground services in airports, enterprises established by the establishments providing ground services in airports, and companies in which the establishments providing ground services in airports hold 50% or more of the shares, except for the sale or lease of immovable properties and labor contracts, benefit from the exemptions.
- Service and labor contracts entered into by companies located in free trade zones, foreign capital companies,<sup>11</sup> and Turkish residents that do not have Turkish nationality also benefit from the exemptions.

#### **Contract types that are not subject to the Decree**

Contracts concerning the sale or lease of movable properties (except for vehicles) are not subject to restrictions.

The issuance of capital market instruments subject to the Capital Markets Law<sup>12</sup> (including foreign capital market instruments, depositary receipts, and foreign investment fund shares) and the obligations related to their issuance, sale, and purchase and relevant transactions are not subject to restrictions.

Insurance contracts are categorically not subject to restrictions. However, where one of the payment obligations arising from the contracts that are within the scope of the restriction is the insurance contract, the payment obligation in the insurance contract shall not be denominated in or indexed to a foreign currency.

<sup>6</sup> Published in the Official Gazette No. 20249 dated 11 August 1989.

<sup>7</sup> Published in the Official Gazette No. 23913 dated 21 December 1999

<sup>8</sup> For the purposes of the exemptions, this type of service contract includes contracts under Article 6(3) of the Communiqué on Exemption from Tariffs, Duties and Fees of Exportation, Transit Trade, Sales and Deliveries Deemed as Exportation, and Services and Activities Generating Foreign Currency Income (Export: 2017/4).

<sup>9</sup> For the purposes of the Communiqué, it refers to companies such as ASELSAN, HAVELSAN, ROKETSAN, TUSAŞ, İŞBİR and

ASPİLSAN in which the Turkish Armed Forces Foundation holds more than 50% of the companies' shares to strengthen the Turkish Armed Forces.

<sup>10</sup> Published in the Official Gazette No. 24721 dated 9 April 2002.

<sup>11</sup> For the purposes of the Communiqué, foreign capital companies include (i) foreign residents' branches, representation offices, ordinary offices, and liaison offices located in Turkey and (ii) Turkish companies in which foreign residents directly or indirectly hold 50% or more of the shares.

<sup>12</sup> Published in the Official Gazette No. 28513 dated 30 December 2012.

## What should be done for the contracts that do not benefit from the exemptions?

- 1) The parties were obligated to convert the contract's relevant amounts to Turkish Lira by 13 October 2018 (the Communiqué did not extend the original deadline set by the Decree).
- 2) If the parties cannot agree on the foreign currency exchange rate to be used for the conversion, then the relevant amounts shall be converted to Turkish Lira based on the indicative effective selling rate determined by the Central Bank of the Turkish Republic on 2 January 2018 and the amount obtained this way shall be increased based on the monthly fluctuation of the Consumer Price Index (CPI)<sup>13</sup> until the date of conversion.
- 3) Concerning contracts for the lease of residences and workplaces with roofs, the lease amount shall be determined in Turkish Lira in accordance with the methods stated in items 1 and 2 above for a period of two years. However, if the parties cannot reach an agreement during this process, the lease amount can be increased based on the monthly fluctuation of the CPI for one year following the year when the conversion to Turkish Lira is made. For the following year, the lease amount can again be increased based on the monthly fluctuation of the CPI for one additional year.
- 4) Where the exemption is provided for only one of the parties of the contract (such as service contracts entered into by companies located in free trade zones) and this party prefers not to benefit from the exemption, the contract amount shall be converted. However, if the exemption is based on a specific contract type (such as a service contract related to transit trade), the conversion of the contract amount to Turkish Lira requires the consent of both parties.

## Sanctions

In the event of violation of the Decree and the Communiqué, administrative fines between approximately TL 6,300 – 55,000 shall be applied under Article 3 of Law No. 1567 Regarding the Protection of the Value of Turkish Currency.<sup>14</sup>

## New Communiqué: Capital Loss and Financial Distress

The Communiqué on the Procedures and Principles Concerning the Implementation of Article 376 of the Turkish Commercial Code No. 6102 (“**Communiqué**”)

was published in the Official Gazette No. 30536 dated 15 September 2018 and became effective on the same date. The Communiqué applies to joint stock companies (*anonim şirketler*), limited liability companies (*limited şirketler*), and partnerships limited by shares (*sermayesi paylara bölünmüş komandit şirketler*) as defined under the Turkish Commercial Code No. 6102<sup>15</sup> (“**TCC**”).

### 1) Foreign exchange loss calculations

The Communiqué provides the companies with the opportunity to not take into consideration the financial losses arising from outstanding foreign exchange obligations when calculating the financial distress or capital loss including technical bankruptcy, until 1 January 2023. This would prevent the negative impact of the fluctuation in the foreign exchange rates on the balance sheets of the companies until the stated deadline.

### 2) Loss of 1/2 of capital and statutory reserves

Article 376 of the TCC provides that the board of directors must promptly convene the general assembly (“**GA**”) and propose remedies to cover for the losses that amount to one-half of the share capital and statutory reserves of the company. The Article lists remedies in a non-exhaustive manner as follows: (i) capital increase, (ii) closing or downsizing of certain production units, (iii) sale of subsidiaries and (iv) changing the marketing system of the company.

The Communiqué added “capital replenishment” among these remedies. This addition was for clarification purposes, as capital replenishment was already being used as a remedy for the capital loss.

### 3) Loss of 2/3 of capital and the statutory reserves are lost (*technical bankruptcy*)

Pursuant to Article 376 of the TCC, the board must promptly convene the GA to decrease the capital to 1/3 or less<sup>16</sup> or replenish the capital, in case the company is experiencing a technical bankruptcy (i.e., the company has lost 2/3 of its share capital and statutory reserves). Normally, unless there is a unanimous consensus on the change on the agenda of the meeting, it is not possible to discuss the capital loss unless there is a related agenda item for the GA. However, the Communiqué introduces an exception to this principle in case of technical bankruptcy. Accordingly, the GA may discuss the capital loss during the first upcoming GA meeting even if the capital loss is not listed as an agenda item for such meeting.

<sup>13</sup> The simple calculation method, not compound calculation, shall be used to determine the CPI.

<sup>14</sup> Published in the Official Gazette No. 1567 dated 20 February 1930.

<sup>15</sup> Published in the Official Gazette No. 27846 dated 14 February 2011.

<sup>16</sup> Provided that the minimum capital requirements under the TCC and any other applicable legislation are satisfied.

In addition, the Communiqué lists “capital increase” among the remedies to cure technical bankruptcy that was not set out in Article 376 of the TCC. The capital increase was already being used as a remedy for the capital loss in practice but it was not clear whether this was legitimate because it was not clearly set forth under the TCC. We believe that its validity may still be questionable due to its inconsistency with the TCC.

#### 4) Financial distress (assets do not cover the liabilities)

Pursuant to Article 376 of the TCC, the board is required to apply to the Commercial Court of First Instance where the headquarters of the company is located and request a declaration of bankruptcy if the remedies listed below cannot be applied:

- (i) Merger with a company that has enough equity to cover for the financial distress of the company;
- (ii) Deferring of certain creditors’ debts by their acceptance which should also be verified by the experts appointed by the court; and
- (iii) Decreasing, increasing or replenishment of the capital.

The final remedy listed above was introduced by the Communiqué and its interpretation and compatibility with the nature of the financial distress situations set forth under the TCC will be seen in the forthcoming interpretation and application by the courts.

#### 5) Capital increase methods

The Communiqué also brought some additional requirements for the capital increase which will be used as a remedy both for capital loss and financial distress:

- (i) The share capital may be decreased and increased at the same time. In this case, ¼ of the increased amount should be paid before the registration. This method was already being used in practice before the issuance of the Communiqué.
- (ii) The share capital may be increased directly, without decreasing first. In this case, ½ of the new share capital (not the increased amount) should be paid before the registration. This is a new method brought under the Communiqué and requires heavier pre-payment requirements for the capital increase compared to the provisions of the TCC.

### Institutional Changes Pursuant to the Executive Presidency Model

On 9 and 10 July 2018 two Statutory Decrees and a number of Executive Presidential Decrees were

published in the Official Gazette to harmonize the legislation and institutional structure of Turkey with the new form of executive presidency adopted by Turkey.

Effective as of 10 July 2018, the number of ministries was reduced from 21 to 16. The reduction is due to the merging of 10 ministries into 5 new ministries, namely:

- The Ministry of Family and Social Policies and Ministry of Employment and Social Security have merged to become the **Ministry of Employment, Social Services and Family** (*Çalışma ve Sosyal Hizmetler ve Aile Bakanlığı*),
- The Ministry of Science, Industry and Technology and the Ministry of Development have merged to become the **Ministry of Industry and Technology** (*Sanayi ve Teknoloji Bakanlığı*),
- The Ministry of Customs and Trade and the Ministry of Economy have merged to become the **Ministry of Trade** (*Ticaret Bakanlığı*),
- The Ministry of Food, Agriculture and Livestock and the Ministry of Forestry and Water affairs have merged to become the **Ministry of Agriculture and Forestry** (*Tarım ve Orman Bakanlığı*), and
- The Ministry of Foreign Affairs and the Ministry of the European Union have merged to become the **Ministry of Foreign Affairs** (*Dış İşleri Bakanlığı*).

Two ministries’ names have also changed. The Ministry of Finance has now been renamed the **Ministry of Treasury and Finance** (*Hazine ve Maliye Bakanlığı*). The Ministry of Transport, Maritime Affairs and Communications has now been renamed the **Ministry of Transport and Infrastructure** (*Ulaştırma ve Altyapı Bakanlığı*).

Presidential Decree No. 1<sup>17</sup> has also established the office of the Administrative Affairs Chairmanship and a Chair of Administrative Affairs, who is defined as the highest-ranking civil servant. The Chair is responsible for supervising all affairs, transactions and accounts of all governmental units and is accountable to the President. Structured under this Chairmanship are:

- The Law and Legislation General Directorate,
- The Personnel and Principles General Directorate,
- The Security Affairs General Directorate, and
- The Support and Financial Services General Directorate.

By Presidential Decree No. 2018/54<sup>18</sup> the previous General Secretary of the President, Metin Kıratlı, was appointed the Chair of Administrative Affairs.

<sup>17</sup> Published in the Official Gazette No. 30474 dated 10 July 2018.

<sup>18</sup> Published in the Official Gazette No. 30498 dated 3 August 2018.

With Presidential Decree No. 2, nine new bodies were established to aid the President in developing governmental policies, ranging from science and technology, education, economic policies, security, legal policies, culture, food and health and social policies to local governance.

With Statutory Decree No. 702<sup>19</sup>, the Nuclear Regulatory Authority (“**NRA**”), an independent public authority for nuclear related activities, and a joint stock company under the NRA were established.

With Statutory Decree No. 703<sup>20</sup>,

- The General Directorate of Press and Information,
- The State Personnel Presidency,
- The Justice Academy of Turkey,
- The Undersecretariat of Public Order and Security,
- The Turkish Statistical Institute,
- The Renewable Energy General Directorate, and
- The Institute of Public Administration for Turkey and the Middle East

were abolished. Furthermore, under Statutory Decree No. 703,

- The General Directorate of Petroleum Affairs and the General Directorate of Mining Affairs were merged under the name of the General Directorate of Mining and Petroleum Affairs (“**MAPEG**”) and
- TETAŞ, the state entity responsible for the commerce of electricity, merged with EÜAŞ, the state-owned electricity generation company, under the name of EÜAŞ.

Statutory Decree No. 703 abolished the offices of undersecretary and vice-undersecretary and central governors’ offices that were tied to the Ministries and affiliated institutions. However, these officers shall continue to perform their duties until the deputy ministers in the Ministries and the chairs in the affiliated institutions are appointed and start working.

Presidential Decree No. 3<sup>21</sup> regulates the procedures and principles of appointment of officials to high ranking public offices that have been tied to the President. The Decree specifies two separate lists; offices on the first list will be appointed by the President’s decision, while

offices on the second list will be subject to the President’s approval.

The Presidential Decree No. 4<sup>22</sup> regulates and restructures the institutions previously tied with ministries. The European Union Ministry has now become a division under the Ministry of Foreign Affairs, under the name “European Union Presidency”. Along with these changes, Turkish Radio and Television Institution (“**TRT**”) has been tied to the Presidency. The Privatization Administration, which was previously tied to the Prime Ministry, has now been restructured to fall under the Treasury. The Presidency of the General Staff and the Commanders-In-Chief of the Armed Forces now falls under the Ministry of National Security. Lastly, the Social Security Institution will no longer be supervised by the Chamber of Accounts.

The Presidential Decree No. 5<sup>23</sup> increased the authority of the State Supervisory Council. Aside from judicial bodies, the State Supervisory Council can investigate all state institutions, institutions funded by public capital, foundations, associations, employee associations and unions. It can further oversee all nongovernmental organizations.

Under Presidential Decree No. 9,<sup>24</sup> the President is granted the authority to accede to international treaties, extend their time limit, suspend their application or terminate them.

Presidential Decree No. 10<sup>25</sup> states that regulations, communiqués and draft laws prepared by the ministries along with public institutions and bodies are now required to be in accordance with the past and future Presidential Decrees, the presidential program and the Presidential reform plans, and the Constitution and existing body of law.

Presidential Decree No. 13<sup>26</sup> established the Strategy and Budget Presidency. This Presidency is tasked with working and coordinating with the Ministry of Treasury and Finance to prepare the working principles’ basis and the procedures of all public administrations within the centralized administration.

Presidential Decree No. 14<sup>27</sup> established the Communication Presidency. This Presidency is tasked with arranging activities with the press, organizing how the state is presented, ensuring that the information presented is accurate both in the domestic sphere and abroad, and issuing press identification cards.

<sup>19</sup> Published in the Official Gazette No. 30474 (1<sup>st</sup> Repeating Issue), dated 9 July 2018.

<sup>20</sup> Published in the Official Gazette No. 30474 (3<sup>rd</sup> Repeating Issue), dated 9 July 2018.

<sup>21</sup> Published in the Official Gazette No. 30474 dated 9 July 2018.

<sup>22</sup> Published in the Official Gazette No. 30479 dated 15 July 2018.

<sup>23</sup> Published in the Official Gazette No. 30479 dated 15 July 2018.

<sup>24</sup> Published in the Official Gazette No. 30479 dated 15 July 2018.

<sup>25</sup> Published in the Official Gazette No. 30479 dated 15 July 2018.

<sup>26</sup> Published in the Official Gazette No. 30488 dated 24 July 2018.

<sup>27</sup> Published in the Official Gazette No. 30488 dated 24 July 2018.

Lastly, the President was appointed as the president of the joint stock company tasked with the administration of the Turkish Sovereign Wealth Fund. Furthermore, the President will have the authority to appoint the members of the administration as vice-proxy. The President thus appointed the Minister of the Treasury and Finance, Mr. Berat Albayrak, to this position<sup>28</sup>.

## **New Organizational Structure of the Ministry of Energy and Natural Resources**

With the Statutory Decree No. 703 Amending Certain Laws and Decrees for the Purposes of Compliance with the Amendments to the Constitution ("**Statutory Decree No. 703**")<sup>29</sup>, Law numbered 3154 on the Organization and Duties of the Ministry of Energy and Natural Resources<sup>30</sup> ("**Law No. 3154**") was repealed. The organization and duties of the Ministry of Energy and Natural Resources ("**MENR**") were reshaped by the Executive Presidential Decree No. 1 published in the Official Gazette dated 10 July 2018 and numbered 30474.

In the light of the foregoing amendments, the organizational structure of MENR was substantially changed. These changes can be summarized as follows:

- The General Directorate of Renewable Energy was abolished, and the General Directorate of Energy Affairs took over its duties with respect to renewable energy related matters;
- The Department and Board of Transit Petroleum Pipelines was abolished and its duties were transferred to the General Directorate of Foreign Affairs and International Projects;
- The General Directorate of Mining Affairs and the General Directorate of Petroleum Affairs merged as the General Directorate of Mining and Petroleum Affairs ("**GDMPA**"). The merger will be completed following the procedures to be determined by MENR and GDMPA within six months starting from the publication date of the Statutory Decree No. 703;
- The name of the General Directorate of Foreign Affairs and European Union was changed to the General Directorate of Foreign Affairs and International Projects;
- The name of the Directorate of Nuclear Energy Project Implementation Department was changed to the General Directorate of Nuclear Energy;
- The Directorate of Affiliated and Related Corporations Department was abolished; and

- Two new directorates were established within the central organization: the Directorate of Support Services and the Directorate of Information Technology.

In addition to the new organizational structure of MENR, with the Statutory Decree No. 703, Elektrik Üretim A.Ş. ("**EÜAŞ**") and Türkiye Elektrik Ticaret ve Taahhüt A.Ş. ("**TETAŞ**") merged under EÜAŞ. With this merger, EÜAŞ is now the competent body to:

- Carry out the energy purchase and sale agreements concluded within the scope of the existing contracts executed by TETAŞ;
- Perform in the natural gas organized wholesale market, in addition to executing and carrying out bilateral agreements regarding the purchase and sale of electric power and electric power capacity;
- Purchase and sell energy within the scope of electric power exchange, import and export agreements and existing concession and implementation agreements;
- Procure energy from the companies operating national coal-fired power plants in accordance with the principles and procedures, including the amount, period and price, to be determined by MENR, in the event that the required electric power cannot be provided through the existing agreements;
- Sell electric power to competent supply companies over the wholesale tariff for its consumers whose tariff is subjected to regulation.

## **Change in the Authority of the High Planning Council in respect of the BOT and PPP Projects**

Pursuant to the recent changes in the legislation, the Ministry of Development was abolished and the High Planning Council ("**HPC**"), which was attached to the Ministry of Development, has become a council to the Strategy and Budget Department of the Turkish Republic Presidency. Presidential Decree No. 2018/3 brought further changes regarding the HPC to be effective as of 2 August 2018 and, among other changes, transferred all of the HPC's authorities and duties under Law No. 3996 Concerning the Realization of Certain Investments and Services through Build-Operate-Transfer Model ("**BOT Law**") and Law No. 6428 Concerning the Construction of Facilities, Renovation of Existing Facilities and Purchasing Service by the Ministry of

<sup>28</sup> Published in the Official Gazette No. 30533 dated 12 September 2018.

<sup>29</sup> Published in the 3<sup>rd</sup> repeating Official Gazette dated 9 July 2018 and numbered 30473.

<sup>30</sup> Published in the Official Gazette dated 19 February 1985 and numbered 3154.

Health by Public Private Partnership Model ("**Health PPP Law**") to the President of Turkey.

In light of the transfer of authority brought by Presidential Decree No. 2018/3, from now on, the President of Turkey, instead of the HPC, shall be entitled to provide the required approvals and authorizations to the relevant administrations for the projects to be realized under the BOT Law.

Concerning the Health PPP Law, Presidential Decree No. 703 brought a one-time exception for the existing projects to empower the President of the Republic of Turkey to approve variations exceeding the limits under the relevant project documents. Other than this, all procedures applicable to variations and authorization of the relevant governmental authorities which were followed by the HPC remain the same. Since all of the authorities of the HPC under the Health PPP Law were transferred to the President by the Presidential Decree No. 2018/3, now the President of the Republic of Turkey shall follow the same procedure and rules for the variations and other projects-related approvals.

## Electricity Market Consumer Services Regulation

The new Electricity Market Consumer Services Regulation ("**New Regulation**") was published in the Official Gazette No. 30436 dated 30 May 2018 and replaced the Electricity Market Consumer Services Regulation that was published on 8 May 2014.

The New Regulation introduced a new consumer category of "eligible consumers having low consumption", which is defined as the eligible consumers with less than 100,000 kWh of annual electricity consumption, and provided certain protections for this new category. There is no major change brought by the New Regulation concerning the retail agreements of the non-eligible consumers and bilateral agreements of the eligible consumers not having low consumption.

The major new protections regarding the eligible consumers having low consumption are summarized in the table below. These consumers will also benefit from all protections provided by the consumer protection legislation<sup>31</sup> if they consume the electricity for their own needs, i.e., the consumption is not related to commercial purposes.

No.	Subject	New Protections for the Eligible Consumers Having Low Consumption
1.	Term	Term can be fixed or indefinite but the fixed term is limited to 3 years. If it is more than 3 years, it will be accepted as an indefinite term.
2.	Renewal	Explicit consent of the consumer is required for renewal, and provisions regarding automatic renewal cannot be agreed in the agreement. Suppliers are required to inform the consumers whose bilateral agreements with fixed terms are to be ended, at least 60 days before the end date.
3.	Procedural Requirements	The agreements shall be signed (including the renewal) with wet-ink signature or electronic signature and a true copy of the original shall be delivered to the consumer on the signing date. The copy can be delivered on paper or through permanent data storages. There is no definition of permanent data storage under the New Regulation, but we believe that it includes e-mail and short message. The suppliers must inform the consumers in accordance with the forms attached to the New Regulation (attachments 1 and 2) before the signing of the agreement and must receive a confirmation from the consumers in that regard. The agreement can be terminated by telephone, e-mail or in written form, save for the requirements under Article 18 of the Turkish Commercial Code, which only applies to merchants.

<sup>31</sup> Consumer Protection Law No. 6502 published in the Official Gazette No. 28835 dated 28 November 2013 and relevant secondary legislation.

No.	Subject	New Protections for the Eligible Consumers Having Low Consumption
4.	Invoice	Must be sent to those consumers at least 10 days before the payment date.
5.	Amendment	Explicit consent is required. The suppliers are required to communicate their amendment proposals to the consumers at least 15 days before the date such amendments are planned to take effect.
6.	Termination	Consumer's right to terminate: Justified reason is <u>not</u> required for (i) the contracts with fixed term only during their first 14 days (following conclusion or renewal), and (ii) the contracts with indefinite term. Supplier's right to terminate: Justified reason is required regardless of the term of the contract.
7.	Termination Penalty	For termination by the consumer: Penalty can apply only for termination by the consumer after the first 14 days of the fixed term contracts. The amount of the penalty cannot be more than 10% of the total amount calculated multiplying the total electricity consumed in the last 12 months by the applicable fee at the end of the termination date. For termination by the supplier: The same amount of penalty shall be paid by the Supplier in case of termination without a justified reason.

## Nuclear Regulatory Authority

The Nuclear Regulatory Authority (“NRA”) was established as an independent regulatory authority for nuclear energy related activities by the Statutory Decree No. 702 Concerning the Organization and Duties of the Nuclear Regulatory Authority and Amendment of Certain

Laws (“Decree”)<sup>32</sup>. The Decree became effective on 9 July 2018.

Prior to the Decree, in Turkey, the Turkish Atomic Energy Institution (“TAEK”) was empowered with the supervisory and regulatory authorities in the nuclear energy sector under the Law No. 5710 Concerning the Construction and Operation of Nuclear Power Plants and the Sale of the Energy Generated from Nuclear Power Plants<sup>33</sup> (“Nuclear Energy Law”). The Decree does not abolish TAEK or repeal the Turkish Atomic Energy Institution Law No. 2690<sup>34</sup> (“TAEK Law”). However, the authorities of TAEK concerning nuclear energy are now limited to the disposal of radioactive wastes and the preparation of a draft National Radioactive Waste Management Plan that must be submitted to the Ministry of Energy and Natural Resources (“MENR”) every 5 years starting from 2020. TAEK will also continue to perform its activities under the TAEK Law, other than those covered by the Decree as the authorities of NRA. The Decree provides that all plants, equipment, materials and activities regarding nuclear energy and ionizing radiation are within the scope of the Decree.

Accordingly, all protocols, agreements, undertakings, contracts, rights, receivables, debts, lawsuits and execution proceedings of TAEK concerning safety, security and nuclear assurance related regulatory and supervisory activities will be transferred to the NRA without the requirement of an additional transaction as of the publication date of the regulation regarding the organization of the NRA. The NRA will decide which duties of TAEK given under the international agreements will be transferred to the NRA. The NRA will also use those assets of TAEK to be decided with a separate protocol.

### 1) Structure of the NRA

The Decree provides that the NRA shall be composed of a board and a presidency:

- The board will be the decision making organ of the NRA. The first members of the board shall be appointed within two months following the effective date of the Decree, which is 9 July 2018. The board shall hold its first meeting within two weeks following the appointment of its members. The board shall consist of five members. The authority to appoint the board members is granted to the President of Turkey.
- The organizational structure and procedures to be followed regarding the appointment of the presidents and vice presidents of the presidency of the NRA, as well as the duties and authorities

<sup>32</sup> Published in the Official Gazette No. 30473 dated 9 July 2018.

<sup>33</sup> Published in the Official Gazette No. 26707 dated 21 November 2007.

<sup>34</sup> Published in the Official Gazette No. 26707 dated 21 November 2007.

of the presidency, shall be provided under a regulation to be issued by the President of Turkey.

The activities, matters and areas to be regulated by the NRA and the duties and authorities of the NRA will be determined by the President of Turkey. In addition, the NRA shall be associated with the Ministry that will be determined by the President of Turkey. Although there is no determination of the President on this issue yet, the Decree itself refers to MENR in the definition section of the "Ministry"; thus, it can be assumed that the NRA will be associated with MENR.

## 2) Licensing Requirement

Pursuant to Article 4 of the Decree, an authorization must be obtained from the NRA to perform the activities falling within the scope of the Decree. Article 4 further provides that the NRA may determine the activities for which no authorization is required but for which a notification would be sufficient. It also provides that the issues that are subject to an authorization certificate or approval by the NRA and the activities that require a permit and/or license to be obtained from the NRA will be determined by the President of Turkey.

The Decree does not specify the timetable and the administrative procedure to be followed by the NRA during the licensing process. It provides that certain fees shall be paid to obtain the licenses; however, no further detail is provided by the Decree in this regard. On the other hand, it provides that the NRA shall determine considerations and address these issues in a regulation within one year following the Decree's effective date of 9 July 2018.

## 3) Strict Liability

The Decree provides for strict liability and explicitly repeats the same rule set forth in the Paris Convention on Third Party Liability in the Field of Nuclear Energy ("**Paris Convention**") by stating that the authorized operator shall be responsible concerning the nuclear activities. Taking the respective safety and security measures, complying with the legislation, and fulfilling due obligations do not reduce the liability of the authorized person. It is also clearly stated that the NRA shall have no liability just because of its control and authority over the authorized person.

## 4) NÜTED

The Decree provides that a company under the trade name of NÜTED Nükleer Teknik Destek Anonim Şirketi ("**NÜTED**") shall be established to provide services required by the NRA in implementing its duties under the Decree such as support, analysis, consultancy, auditing, training and certification. NÜTED will start to operate after its registration with the relevant Trade Registry. The Decree does not provide any specific time period for such registration.

Article 13/6 of the Decree provides that, save for the duties and authorities of the NRA, the President of Turkey shall be authorized to adopt required regulations regarding the principles and procedures to be followed for the activities of NÜTED and the establishment of a corporation or acquiring shares of the existing companies in Turkey or abroad.

Furthermore, the Decree provides that the initial capital of NÜTED shall be one million Turkish Lira, to be paid by the Treasury. At least 51% of the shares of NÜTED shall be owned by the NRA.

## 5) Transition Period

- *Authorization Power:* Pursuant to Temporary Article 3 of the Decree, TAEK will continue to have its authorization power until the first meeting of the NRA Board, which shall take place within two weeks following the appointment of the NRA board members. As mentioned above in item 1, the NRA's board members will be appointed within 2 months following the Decree's effective date of 9 July 2018.
- *Existing authorizations and applications:* The Decree provides that the NRA may enact additional requirements for the existing authorization, approval or consent holders. In such a case, the NRA may grant a period of up to three years to the relevant party to fulfill the additional requirements. This principle also applies to the applications that are pending at the time TAEK's authorization power expires following the first meeting of the board. In this regard, all records and documents concerning TAEK's safety, security and nuclear assurance related regulatory and supervisory activities will be transferred to the NRA without the further requirement of an additional transaction as of the publication date of the regulation regarding the NRA's organization.
- *Existing activities:* Concerning the activities that require an authorization from the NRA under the Decree but which started to be performed prior to 9 July 2018 (without being subject to any such authorization requirement), the parties must apply to obtain the required authorization under the Decree within one year following 9 July 2018.
- *References to TAEK under the legislation:* All references made to the TAEK Law under the legislation shall be deemed to be made to the Decree and all references to TAEK under the legislation shall be deemed to be made to the NRA concerning the nuclear energy and ionizing radiation.
- *Secondary legislation:* The existing secondary regulations shall continue to be implemented until

the issuance of regulations in accordance with the Decree.

## Articles

### A New Actor in Project Financing: Project Bonds

#### I. WHAT ARE PROJECT BONDS?

Project finance was dominated by commercial bank loans until the 1990s, when project bonds emerged as an alternative source for the financing of large infrastructure projects. Now, even though bank loans remain as the main instrument in project finance, project bonds providing access to capital markets in financing of larger projects (either in part or in full) started to offer strong competition. Thus, project bonds seem to be gaining in prominence despite the fluctuations in the number of projects funded by the project bond market.

Project bonds are capital market debt instruments that are issued for project-based funding. Originally, they were mostly issued to re-finance existing bank loans because of the investors' hesitation to shoulder the construction risk. However, with an accurate rating and well-organized transaction structure, project bonds have been successfully used for the financing of projects in full.

Nowadays, project bonds are used as a financing tool in various fields, with the most common ones being infrastructure, energy, mining, transportation and public-private partnership ("PPP") projects.

#### II. PROJECT BONDS vs. COMMERCIAL BANK LOANS

The banks' liquidity, capacity and their risk appetite were greatly reduced following the credit crisis in 2008 and, consequently, the Basel III rules coming into force in 2013. The Basel III rules were enacted in response to the credit crisis, and thus provide stricter requirements for equity, capital and liquidity ratios on banks, especially for long-term lending. In such an environment, alternative lenders and investors obtained a bigger role in the project finance market, such as insurance companies, pension funds and infrastructure debt funds.

These new investors prefer long-dated stable returns with almost no construction risk and project bonds offer both even though some exposure to construction risk is inevitable. The above-mentioned market conditions and the general characteristics of project bonds resulted in a dramatic increase of project bond issuances in the 2000s.

The advantages of project bonds compared to traditional bank loans are as follows:

##### 1) Fixed Pricing

Project bonds are fixed rate instruments, which enable the issuers to lock their financing cost for the entire term of the financing<sup>35</sup>. Therefore, the ambiguity in respect of the financing costs is eliminated.

In contrast, bank loans provide fluctuating interest rates and (almost always) require a pre-payment mechanism which causes uncertainties in financing costs.

##### 2) Long Tenors

The investor base in project bonds prefers projects that have long tenors (more than 20 years) due to their preference for long-term and stable investment opportunities which will also yield profitable returns. Thus, long-term off-take contracts and power purchase agreements are especially favorable for funding with project bonds.

##### 3) Diverse Sources of Financing

Due to a lack of geographical borders and thanks to a deep investor base, projects are able to attract several investors from different fields, resulting in an increase in the projects' credibility.

##### 4) Lighter Covenants and Guarantees

Project bonds require lighter covenant and guarantee packages compared to conventional loan financing where banks usually request stricter securities such as parent company guarantees. Additionally, the covenants in project bond financing tend to be occurrence-based rather than maintenance-based, and thus offer a more manageable financing for sponsors.

##### 5) Flexible Amortization

Project bonds provide extensive grace periods with the possibility of offering unpaid periods along with flexible amortization options. The flexible amortization system also enables structuring lump payments on the maturity date.

##### 6) Rapid Execution

A typical project bond can be issued in 8 to 10 weeks. This timeframe will be sufficient even for the projects where several credit ratings are required.

Notwithstanding the above, there are also several concerns among investors with regards to the financing of projects from the capital markets:

- Requirement of a high credit rating from a credible credit rating agency

<sup>35</sup> Credit Agriculture Securities, *Project Bond Focus, Issue 2: Project Bond 20*, 2016, p. 2

- Uncertainties in the capital markets
- Requirement to obtain approval from the bond holders for amendments to be made
- Negative carry - addressed below in further detail

### III. NEGATIVE CARRY

Negative carry, meaning the cost of holding a security being higher than the returns of such security, has always been a concern for the bond issuers. It arises from receiving a cash flow upon the issuance of the project bond while the capital expenditures are incurred over the construction period of a longer term<sup>36</sup>.

Despite it being a concurring argument an acknowledged concern with respect to bonds, there are alternatives being proposed for reducing the risk of negative carry:

- (i) The first solution is to structure a delayed draw mechanism to enable funds to be accessible overtime with multiple, need-based draws.
- (ii) Another suggestion for bond issuers is to combine a commercial bank loan with a project bond enabling delayed draws. The cash flow generated from issuance of the project bond can be used for the construction stage and the drawdown periods of the bank loan can be planned to begin after all the proceeds derived from the bond are used.

### IV. PROJECT BOND ISSUANCE

The issuance stage of the project bonds is the most important and time-consuming phase of project bond financing. The issuance usually takes between 8 to 10 weeks and can be divided in three phases:

#### 1) First Phase: Due Diligence

The due diligence procedure starts with the appointment of legal and technical counsel and other independent consultants and the selection of the rating agency. The main contracts of the project are typically negotiated and drafted during this period.

In practice, it usually takes between two to three weeks to complete this phase.

#### 2) Drafting and Rating Process

The funding structure of the project will be established during this phase. The financial strategy, financing plans, term sheets and other documents concerning the funding structure will be prepared. Then the project will be presented to the credit rating agencies, who will conduct a separate investigation to determine the final rating of the project.

This phase usually takes between four to five weeks.

### 3) Marketing and Closing

Finally, the roadshow, pre-marketing and marketing procedures will start after the rating process is completed. A separate evaluation will be carried out to determine the ideal window for the market entry, following which the transaction will be announced to the market.

This phase may vary between two to three weeks, depending on the size of the project and other factors.

### V. THE EUROPE 2020 PROJECT BOND INITIATIVE

The Project Bond Initiative was launched in 2012 by the European Commission and European Investment Bank ("EIB") to promote the financing of strategic infrastructure projects in Europe from the capital markets. The initiative particularly aims to attract institutional investors such as pension funds and insurance companies. Therefore, the goals of the initiative actually coincide with the European Union's 2020 objectives to obtain €2 trillion investment in sectors such as transport, energy, communication systems and technology.

Under this initiative, EIB provides projects with instruments for enhancing the credit rating of projects either in the form of a subordinated loan in addition to the bond financing or a guarantee for the senior debt service payment obligations to make the respective projects more attractive to institutional investors.

### VI. GREEN BONDS

Green bonds are project bonds that are used to finance environmentally friendly (*green*) projects initiated by Climate Bonds Initiative, which is a non-profit international organization founded to establish a credible standard for green bonds and to promote the green bonds market globally. These bonds are usually issued in fields such as renewable energy, clean transportation, sustainable water and waste management.

Green bonds are usually more attractive to companies because they increase the credit reputation of the issuers and enable companies to reach investors who fund only green projects. From the investors' stance, green bonds promote green projects and create a diversity of projects for the investors to choose from.

In the near future, green bonds are expected to become an important instrument in project financing.

### VII. PROJECT BOND PRACTICE IN TURKEY

There is no definitive data source for the project bond market in Turkey. However, a health PPP Project, the Elazığ Şehir Hastanesi PPP Project, was recently financed with a green bond, which was the first in Turkey

<sup>36</sup> Ibid, p. 2.

to be issued entirely to foreign investors. This issuance is expected to be a pioneer in the project bond market in Turkey.

## Recent YEKA Projects

In October and November, the Ministry of Energy and Natural Resources (“**MENR**”) announced new tenders wind and solar projects based on the renewable energy resource area model:

- **New Solar Power Projects:** On 5 October 2018, MENR announced tenders<sup>37</sup> for three solar power projects with a total of 1,000 MWe in Şanlıurfa-Viranşehir (500 MWe), Hatay-Erzin (200 MWe) and Niğde-Bor (300 MWe) regions. The bidders will submit a one-year performance bond in the amounts of USD 3 million, USD 1.5 million and USD 2 million, and the winning bidders will submit a ten-year performance bond in the amounts of USD 15 million, USD 8 million and USD 12 million for each of the projects respectively. The ceiling price for the projects is set as USD 6.50 cent/kWh. The purchase guarantee for the winning bidders will be available for 15 years commencing from the signing of the project agreements. The application deadline for the tenders is 31 January 2019<sup>38</sup>.
- **New Wind Power Projects:** On 7 November 2018, MENR announced tenders<sup>39</sup> for four wind power projects in Balıkesir, Çanakkale, Aydın and Muğla regions, each with a capacity of 250 MWe. The bidders will submit a one-year performance bond in the amount of USD 2.5 million for each of the projects. The winning bidders will then submit a ten-year performance bond in the amount of USD 12.5 million for each of the projects. The ceiling price for the projects is set as USD 5.5 cent/kWh. The purchase guarantee for the winning bidders will be available for 15 years commencing from the signing of the project agreements.

## Natural Gas Organized Wholesale Market is Now in Operation

The Natural Gas Organized Wholesale Market (“**Market**”) became operational as of 1 September 2018. The main features of the market are as follows:

- Prior to the Market’s establishment, the natural gas market players could trade pipeline gas only by way of long-term supply agreements or spot trading under the “Transmission Network

Operation Principles” of BOTAŞ, the state-owned natural gas utility (“**Network Code**”). Under this structure, the spot trade could not be conducted through a formal market but rather an over-the-counter market where the parties conclude agreements by way of e-mails, or even by telephone. The Market complements the bilateral agreements between market participants. The Market also enables the market participants to remedy their imbalances.

- The legal framework of the Market is mainly set out under the Natural Gas Organized Wholesale Market Regulation<sup>40</sup> and the Energy Market Regulatory Authority’s (“**EMRA**”) Market Operation Principles and Procedures for Natural Gas Organized Wholesale Market<sup>41</sup>.
- The Market is operated by Enerji Piyasaları İşletme Anonim Şirketi (“**EPIAŞ**”) through an electronic platform called the “continuous trading platform” (“**CTP**”). EPIAŞ is also responsible for financial settlement activities.
- Wholesale, import, and export license holders can transact in the CTP as market participants. Although eligible consumers and local distribution companies do not have direct access to the spot market, they can access it through wholesalers. In addition to the additional instruments it holds under the Network Code, BOTAŞ can also transact in the CTP as the “additional balancing unit”.
- The main contractual framework for the market participants are as follows: (i) transportation agreement with BOTAŞ; (ii) participation agreement with EPIAŞ; and (iii) participation agreement with Takasbank, the central settlement bank.
- EPIAŞ will carry out settlement activities through Takasbank. Takasbank is also responsible for the management of securities posted by the market participants.
- Under the market delivery agreement between EPIAŞ and BOTAŞ, EPIAŞ communicates the trading orders to BOTAŞ, and BOTAŞ transports the deliveries pursuant to the Network Code through either physical or virtual delivery points on the basis of its standard transportation and delivery agreements with the market participants.

<sup>37</sup> Published in the Official Gazette No. 30556, dated 5 October 2018.

<sup>38</sup> Please [click here](#) to see our Client Alert for further details.

<sup>39</sup> Published in the Official Gazette No. 30588, dated 7 November 2018.

<sup>40</sup> Published in the Official Gazette No. 30024 dated 31 March 2017.

<sup>41</sup> Published in the Official Gazette No. 30189, dated 23 September 2017.

- The natural gas must be priced and third-party access must be facilitated on an objective, transparent, and non-discriminatory basis. EPIAŞ publishes reference prices every day. The reference prices are calculated based on the weighted average of transaction values in the relevant day.

The offers to be placed in the CTP must be multiples of TL 0.25. According to EMRA's decision No. 8030-2<sup>42</sup>, the minimum offer is currently 0 TL/1000 Sm<sup>3</sup> and the maximum offer is 2000 TL / 1000 Sm<sup>3</sup>.

## Health Public Private Partnership (“PPP”) Projects in the Pipeline

The tender bids were received for the PPP projects of Aydın City Hospital (800 bed capacity), Antalya City Hospital (1,000 bed capacity), Diyarbakır Kayapınar Hospital (750 bed capacity), Ordu City Hospital (900 bed capacity), Samsun City Hospital (900 bed capacity), Denizli City Hospital (1000 bed capacity) and Trabzon City Hospital (1000 bed capacity). The dutch auction dates will be announced as the next step.

The prequalification applications for İstanbul Sancaktepe City Hospital (4200 bed capacity) will be received on 11 December 2018.

## Canal Istanbul

The Presidential Decree on the Organization of Communication Directorate, published in the Official Gazette on July 24, 2018, included a new regulatory arrangement paving ground for the Canal Istanbul Project to be realized by Infrastructure Investments General Directorate (AYGM) on the Build-Operate-Transfer (“BOT”) model.

- The Ministry of Transportation and Infrastructure was assigned with the duties of realizing the Canal Istanbul and similar waterway projects with the BOT model. In this regard, the Ministry will realize the projects by tendering the works to companies with the BOT model in the event that these projects necessitate advanced technologies or significant financial resources.
- With the amendments introduced to the Law on Investments and Services to be Realized by BOT Model<sup>43</sup> on 26 July 2018, the scope of this law now covers: "the Canal Istanbul and similar other facilities connecting seas, lakes and rivers so as to serve as waterway for cruising ships, logistic activity areas, rail transportation systems and facilities and areas to meet the maintenance,

repair, operation and maneuvering, accommodation requirements.”

- Considering the sheer size of waterway projects, such as the Canal Istanbul, the BOT model was chosen by the government to employ the private sector's ability to raise significant financing and use advanced technology.

## Conferences & Events

- The 11<sup>th</sup> Annual McGill University/PEOPIL Conference on International Aviation Law was held on 20 October 2018 in Dublin. Our partner Serap Zuvın spoke on the “Challenges of Aircraft Lease & Finance”.
- The 2018 International Bar Association Annual Conference was held on 7-12 October 2018 in Rome. Our partner Serap Zuvın attended.
- The Istanbul Arbitration Centre Leading Arbitrators' Lecture on the Presentation of Evidence in International Arbitration: Witnesses & Expert Witnesses was held on 2 November 2018 in Ankara.
- The 11<sup>th</sup> Energy is Future (“EIF”) International Energy Congress and Exposition was held on 8-9 November 2018 at the Congressium meeting hall in Ankara.
- The 2018 Public-Private Partnership Healthcare Summit 2018 was held on 13-14 November 2018 at the Shangri-La Bosphorus in Istanbul. More information is available at <http://www.ppphealth.com>.
- The Fifth International Conference for a Euro-Mediterranean Community of International Arbitration will be held on 19-20 November 2018 in Madrid. Our counsel Courtney Kirkman-Gücük will attend.
- The 3<sup>rd</sup> International Conference and Exhibition on Occupational Health and Safety in Mines: Road Map of Safe Mining will be held on 1-4 December 2018 at the Hilton Convention Center in Istanbul. More information is available at <http://www.tmdconference.org/en/>.
- The ENIPE 11<sup>th</sup> Energy Efficient Products Fair will be held on 10-12 January 2019 at the Istanbul Exposition Center (Istanbul Fuar Merkezi). More information is available at <http://www.enipe.org/en/homepage>.

<sup>42</sup> Published in the Official Gazette No. 30526, dated 5 September 2018.

<sup>43</sup> Published in the Official Gazette No. 21959, dated 13 June 1994.

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