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Turkish Energy & Infrastructure

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Recent changes in legislation

Recent developments in the renewable energy legislation

The late spring and early summer of 2016 witnessed important developments in respect of the Renewable Energies Support Mechanism ("**YEKDEM**"), and the balancing requirements applicable to renewable sources based power plants with the amendments introduced to the Law on Renewable Energy Resources for the Generation of Electrical Energy, No. 5346[1] (the "**Renewable Energy Law**"), and the Regulation on Certification and Support of the Renewable Energy Resources[2] (the "**YEKDEM Regulation**").

The prominent aspects of these changes can be set out as follows:

- Prior to the changes, YEKDEM was operated by way of sales to "YEKDEM portfolio" whereby each YEKDEM participant was able to sell its electricity output only to this portfolio. Under this structure, the suppliers could not sell electricity on the open market or sign bilateral energy sale/purchase agreements during the year for which they elected to participate in the YEKDEM mechanism.
With the recent amendment to the YEKDEM Regulation on 29 April 2016, power plants eligible for YEKDEM may now sell their output in (i) spot markets, such as to day-ahead or intraday markets; or (ii) under bilateral agreements over the market price. EPİAŞ will pay the difference between the YEKDEM price and the market price (assuming that YEKDEM price is higher). So, ultimately, YEKDEM participants still earn the guaranteed purchase price, but practically, part of this income will come from EPİAŞ, and the remaining part will come from the sales through the spot markets or bilateral agreements.

- By virtue of the recent amendments to the Renewable Energy Law and the YEKDEM Regulation, renewable sources based power plants will no longer be exempt from the ancillary services and balancing requirements. As a mitigating factor in respect of the costs that may arise from the imbalances, YEKDEM participants will now be able to join to a syndication for balancing purposes (*dengeden sorumlu*

1 Published in the Official Gazette No. 25819 dated 18 May 2005.

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

grup) where a participant of this syndication can shoulder the liabilities related to the imbalances.

Incentives on Domestic Components Used in Renewable Sources Based Power Plants

Regulation Regarding Incentives on Domestic Components Used in Facilities Generating Electric Power from Renewable Energy Resources (the "**New Regulation**") was published in the Official Gazette on 24 June 2016. The New Regulation replaces the former regulation on the same subject[3] (the "**Repealed Regulation**").

By way of background, the Ministry of Energy and Natural Resources ("**MENR**") published a draft text of this regulation in February 2016[4] (the "**Draft Regulation**"), which proposed more comprehensive changes to the Repealed Regulation when compared with the New Regulation.

Please see below our brief explanations on the (i) prominent novelties brought with the New Regulation; and (ii) the material issues where the New Regulation deviated from the framework of the Draft Regulation:

- Under the New Regulation, the domestically produced sub-components must compose at least 55% of the relevant component. This does not essentially change the test under the Repealed Regulation in respect of determination of the "domestic component". On the other hand, it is noteworthy that the New Regulation did not incorporate the stricter test under the Draft Regulation, which was based on the formulae in the Communiqué on Domestic Products[5] (the "**Communiqué**"). The test under the Draft Regulation ruled out the possibility for a sub-component having a foreign country of origin to be taken into account for the purposes of domestic contribution percentage calculation.
- The New Regulation also did not adopt the formulae under the Draft Regulation which stipulated that the domestic component incentive will be calculated pro rata to the applicable domestic contribution percentage. In other words, under the Draft Regulation, only 100% domestic components for the purposes of the Draft Regulation were able to fully benefit from the domestic component incentive. However, under the New Regulation (as well as the Repealed Regulation), the generation facilities are able to benefit from the entire incentive as long as they satisfy the 55% domestic component threshold, sub-component ratios, and other relevant conditions.
- With the novelty introduced in the New Regulation, the "domestic production status certificate", which certifies the domestic nature of the components, will now be initially issued for a period of one year. During the five years of the domestic incentive certificate eligibility period, for each year, the generation facilities must represent towards MENR that the domestic component percentages have not changed. On the other hand, if there is a capacity increase or a modernization/renewal in the generation facility, then such facility must, once again, pursue the procedure that is applicable during the initial application to the domestic component incentive.
- Unlike the Repealed Regulation, the New Regulation does not enable the license-exempt generation facilities to benefit from the domestic production incentives.

Additional financial obligation on coal imports

Decree of the Council of Ministers No. 2016/9073 ("**Decree**"), which introduces an additional financial obligation on import of coal to be used in power plants, was published in the Official Gazette on 2 August 2016. Accordingly, an additional financial obligation of USD 15/ton is introduced on such coal imports. However, imports from certain states listed in the Decree[6] are excluded from the scope of additional financial obligations. The Decree may be considered as part of the government's efforts to incentivize domestic coal.

Law on Improvement of the Investment Environment in Turkey

The Law on Improvement of the Investment Environment (the "**Law**") was adopted by the Parliament on 15 July 2016 and entered into force on 9 August 2016. As an omnibus bill, the Law includes amendments to various laws with an objective to create a more favorable investment climate. The main novelties relate to (i) the deferral of bankruptcy (*iflasın ertelenmesi*) and the composition of debts (*konkordato*), (ii) simplified company formation, and (iii) amendments to tax legislation.

3 The Repealed Regulation was published in the Official Gazette No. 27969 dated 19 June 2011.

4 Please see the **Winter 2016** issue of our Newsletter for this draft.

5 Published in the Official Gazette No. 29118 dated 13 September 2014.

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

Amendments to the Enforcement and Bankruptcy Law

- One of the most important novelties that the Law envisages introducing is the prevention of easy recourse to the "deferral of bankruptcy" proceedings by the companies. Pursuant to the current provision of the Enforcement and Bankruptcy Law[7], if a company is under financial distress and its representative or one of the creditors (in case the company is in liquidation) submits a recovery project to the court, which establishes a specific approach for the company to overcome its adverse financial position, the company could benefit from the deferral of bankruptcy. The Law amended deferral of bankruptcy provisions in order to prevent the abuse of this process by the companies, taking into consideration the rights of the creditors. Some of the major amendments are as follows:

- In order to apply for deferral of bankruptcy, a company must submit, along with a recovery project, additional documents proving that the recovery project is feasible and credible and must provide lists that indicate the identities and the rights of their creditors, as well as providing practical solutions on how to meet their working capital throughout this phase. Failure to submit these documents will result in rejection of the deferral of bankruptcy request.

- A company which has already benefited from the deferral of bankruptcy cannot reapply for one year starting from the expiry of the deferral period.

- Following the deferral of bankruptcy request, creditors are granted the right to oppose to request after it has been published in the Trade Registry Gazette. However, such rejection needs to be raised within a period of two weeks and only in cases where the creditors allege that the conditions of deferral of bankruptcy are not met.

- In order to protect the assets of the company, the court is entitled to stop all ongoing enforcement proceedings which were initiated prior to the deferral request by an interim relief and prevent new enforcement proceedings, including proceedings which were initiated for the collection of public receivables. This interim decision can first be objected and then challenged before the intermediate court of appeal (*istinaf mahkemesi*).

- Deferral of bankruptcy may be extended only for another year, as opposed to the current provision, which stipulates that the period could be extended to a total of four years after taking the legal administrator's reports into consideration.

- Deferral of the bankruptcy decision given by the commercial court can be first contested before the intermediate court of appeal within ten days following the notification of the decision, or following the announcement for third parties. The decisions of the intermediate court of appeal can also be challenged before the High Court of Appeals in line with the same principles and time limitations.

However, following the coup attempt and the declaration of the state of emergency in Turkey, the Council of Minister adopted the Statutory Decree No. 669[8]. The Statutory Decree restricts companies and cooperatives from applying for a deferral of bankruptcy and stipulates that such applications will be rejected by the court. This regulation will continue to be effective until the end of the state of emergency, which has been set as 90 days starting from 21 July 2016.

The Law further reforms the "composition" proceedings with creditors by amending the relevant provision in the Enforcement and Bankruptcy Law. One of the main reasons why requesting a composition with creditors has been unpopular among debtors was the short period of protection granted by courts, i.e. three months plus a maximum of two months of extension. This leaves debtors vulnerable to enforcement proceedings in cases where the validation proceedings (*tasdik yargılaması*) exceed this deadline. The Law attempts to solve this issue and grants courts with the authority to stop ongoing enforcement proceedings and block new proceedings, so that the debtor is protected during the composition validation process.

Amendments to the Turkish Commercial Code

- Under the Law, it becomes possible to sign a signature declaration or articles of association before the trade registry rather than a notary public. The Law further annuls the provision which introduced the document of "founders' declaration", a declaration given by the company's founders during the formation process. Also, during the enactment debates in the Parliament, an additional amendment was introduced, pursuant

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7 Enforcement and Bankruptcy Law No. 2004, published in the Official Gazette No. 2128 dated 19 June 1932. Published in the Official Gazette No. 297 87 dated 31 July 2016.

8 Published in the Official Gazette No. 297 87 dated 31 July 2016.

to which the articles of association will not be subject to valuable paper fee (*değerli kağıt bedeli*) during the formation of the company. The amendments aim to reduce the company formation costs.

- In relation to checks, the Law introduces a barcode system, which provides check holders with various information regarding the check issuers and requires that banks will not provide to the check account owners check pages without a barcode after 31 December 2016. The Law also makes certain amendments in the Check Law[9] regarding the obligation of the beneficiary to register the check and the bank's liability for payment.
- With regards to checks, the most important change that the Law foresees is the return of the criminal liability in case the check is worthless. The Law prescribes that upon complaint, a person who issues a bad check will be punished by a judicial fine up to 1,500 days[10]. Such fine will not be less than the combination of the uncovered amount itself, its commercial default interest starting from the submitting date of the check and the litigation and enforcement expenses.
- Throughout the lawsuit process, the court is entitled to prohibit the defendant from opening a check account or issue checks. If the bad check is issued on behalf of a company, the mentioned prohibition equally applies to the managing body and company executives who are registered in the company's trade registry. Once rendered, the prohibition decision is notified to the Risk Center of the Turkish Central Bank and the Central Registration System. These persons cannot assume roles in the managing body of a company until the end of their respective penalty period. In the event of failure to pay the judicial fine, such fine will be directly transformed into a jail sentence.
- If the claimant withdraws his claim during the prosecution process, or if the person who is prosecuted pays the entire amount of the check (including interest), the lawsuit will be dismissed. A person may request the court to remove the prohibition to issue checks or open a check account after three years and in any case ten years after the rendering of the prohibition have passed as of the date of the execution of the sentence.

Amendments to Tax Legislation

The Law also includes various amendments to the tax legislation on a wide range of issues. Main novelties include certain stamp tax exceptions and favorable applications to reduce the stamp tax costs on some transactions and investments, including share transfer agreements and exemption from real estate tax for the lands assigned to the investors or acquired by the investors during the investment incentive certificate period.

Capacity increase in the projects with Environmental Impact Assessment Decisions

Treatment of capacity increases within the scope of environmental impact assessment ("**EIA**") legislation has always been a dynamic topic. The recently published "Communiqué on the Planned Capacity Increases and/or Expansions in the Projects Having an EIA Affirmative and/or EIA is Not Required Decision"[11] (the "**Communiqué**") brought a new change in respect of one of the tests applicable to the capacity increase.

Prior to the amendments introduced to the Environmental Impact Assessment Regulation[12] (the "**EIA Regulation**") on 9 February 2016, the EIA Regulation had stipulated that the Ministry of Environment (the "**MoE**") was responsible for determination of the procedures pertaining to the capacity increase and/or expansion of a project that had already obtained an EIA decision. Based on this Regulation, the MoE issued a circular with No. 2015/03, dated 8 April 2015 (the "**Circular**"). With the amendments dated 9 February 2016, the said provision of the EIA Regulation was repealed; and a new provision providing that such procedures will be set forth in a communiqué to be issued by the MoE was introduced. The awaited Communiqué came into effect on 8 June 2016.

The Communiqué reiterates the procedures set out under the Circular with respect to the capacity increase or expansion with the exception of a rule pertaining to capacity increases in the projects that hold an "EIA is not Required Decision". On the other hand, the issues regulated under the Circular concerning the matters other than the capacity increase and/or expansion (such as the interplay between the lay-out of solar panels and EIA procedures) remain to be in force since there is no provision in the Communiqué envisaging the abolishment of the Circular.

To represent the nature of this change better, it would be useful to briefly outline the relevant framework under the EIA Regulation. Under the EIA Regulation, projects that are

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9 Law of Checks No. 5941, published in the Official Gazette No. 27438 dated 20 December 2009.

10 A judicial fine is a sanction that is regulated in the Turkish Criminal Code No. 5237. The amount of a judicial fine ranges between TRY 20-100 per day and is determined by the court considering the private and economic conditions of the person in question.

11 Published in the Official Gazette No. 29736 dated 8 June 2016.

12 Published in the Official Gazette No. 29186 dated 25 November 2014.

listed in Appendix-I of the EIA Regulation are presumed to have a more considerable impact on the environment, and such projects must file an "EIA Application File" to obtain an "EIA Affirmative Approval". On the other hand, if a project is listed under Appendix-II of the EIA Regulation, then a "Project Description File" must be filed for an "EIA is Not Required Decision". If, however, the authorities deem that the environmental impacts of such project must be further analyzed, then such applicant must pursue the procedure envisaged for the projects listed under the Appendix-I.

Under the Circular, subject to certain other tests, an EIA Application File must be lodged, if the capacity increase (itself) in a project with an "EIA is Not Required Decision" exceeds the threshold in Appendix-I. Pursuant to the Communiqué, however, an EIA Application File procedure will now need to be pursued if and when not only the capacity increase but also the new capacity (i.e. prior capacity + the capacity increase) exceeds the threshold in Appendix-I. To illustrate this difference with an example, under Appendix-II of the EIA Regulation, the wind energy power plants having an installed capacity between 10-50 MWm must submit a Project Description File to obtain an "EIA is not Required Decision". In this example, if a power plant with 30 MWm capacity plans a capacity increase of 25 MWm, under the Circular; such project had to pursue the Project Description procedures, as the capacity increase "itself" does not trigger the threshold under Appendix-I of the EIA Regulation. On the other hand, pursuant to the Communiqué, the same project would now need to pursue an EIA application procedure to obtain an "EIA Affirmative Decision", since the new total installed capacity exceeds the threshold under the Appendix-I.

Electricity Market Connection and System Utilization Agreements

Regulation Amending the Electricity Market Connection and System Utilization Regulation (the "**Regulation**") was published in the Official Gazette on 30 July 2016. Significant changes brought by the Regulation are as follows:

- In cases where connection to the transmission system requires an expansion of the existing transmission lines or a new investment due to inadequate capacity for system usage and where sufficient financing is not available, such investment can be made by the system user (i.e., generation license holder or consumer) on behalf of TEİAŞ (the state-owned electricity transmission company) and the license holder is reimbursed for the investment amount it has incurred over a maximum period of ten years. The new version of the Regulation specifies that such reimbursement will be made by way of deductions from the transmission fees payable by the license holder to TEİAŞ after the plant becomes operational.
- These deductions do not affect obligations related to value added tax. In other words, the persons, whose system utilization fees are being deduced from the repayment amount, are obliged to pay the value added tax deriving from the system utilization fee.
- If TEİAŞ fails to reimburse the full amount within ten years, the remaining amount will be paid in lump sum at the end of the ten year period.
- Regarding power cut measures by TEİAŞ or distribution companies, the prior notification period is extended from "five days" to "five business days".
- Within three months from the publication date, TEİAŞ will call for the consumers; whose power capacities indicated in system utilization agreements do not correspond to those in connection agreements, to increase the power capacity in system utilization agreements with the purpose of evening it out with the power capacity in connection agreements. Revised versions of these agreements must be signed within three months from TEİAŞ's call. The connections of consumers, who do not apply for such signing, to the transmission system will be cut by TEİAŞ with a notification to be served five business days before the expiry of the three months period.

Revised form of EPİAŞ Receivables Assignment Agreement

On 13 June 2016, Energy Markets Operation Co. ("**EPİAŞ**") published on its website a revised version of its standard form "EPİAŞ Receivables Assignment Agreement", which is a typical security used in financings in the electricity sector. The revised form can be accessed **here** in Turkish. For the agreements to be signed following this date, lenders and market participants should now take this standard form as a basis. Together with some linguistic and cosmetic changes, it is possible to observe an effort to incorporate into this revised form the provisions which are commonly proposed to EPİAŞ by the lenders and borrowers in practice.

Electricity purchase by TETAŞ from domestic coal fired power plants

With a recent amendment made on 4 June 2016 to the Electricity Market Law No. 6446 (the "**Electricity Market Law**"), TETAŞ, the state-owned electricity wholesale company, has been empowered to hold tenders for the procurement of electric power primarily from domestic coal fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ.[13] The amendment had mentioned that the amount, period and price of the aforementioned purchase will be determined by a Council of Ministers' decree. This decree, No. 2016/9096, was published in the Official Gazette on 9 August 2016 (the "**Decree**").

The Decree reiterates the added clause to Article 27 of the Electricity Market Law and explains the scope of its application. Accordingly, electricity distribution companies and the authorized supply companies are to submit to TETAŞ their conciliation period-based demands for the subsequent year by no later than September in order for TETAŞ to form a demand profile for the subsequent year. The Council of Ministers will then determine for each year the amount of electricity to be procured from private companies operating domestic coal fired power plants (the "**Providers**") based on the aforementioned demand profile. TETAŞ will be authorized to obtain ±10% of the power determined as such by the Council of Ministers whereas the remaining amount will be supplied by EÜAŞ. The period, amount (MWh) and price per unit (TRY/MWh) for the power to be procured as such will also be determined by the Council of Ministers in October of the preceding year.

The announcement regarding the amount of power to be procured from the Providers and the necessary information, documents and other notices pertaining to the application process will be disclosed via the official website of TETAŞ. Upon such announcement, the Providers will prepare and submit offers along with a temporary performance bond effective for 60 days in the amount of 3% of their offer. The Providers' share in the power purchased as such by TETAŞ will be determined in accordance with their offers for the relevant year as well as TETAŞ' needed supply based on the demand profile. This being the case, the Providers will be able to reserve their right to withdraw their offers, in which case the withdrawn offers will be removed and the reevaluation will continue for the remaining ones. Upon finalization of such process, the Providers will be invited by TETAŞ latest within three business days to sign energy sales agreements, which will be prepared as a standard uniform agreement. The temporary performance bonds will be returned to the Providers on the first business day following the signing of the energy sales agreements.

Within the Decree, the amount of energy to be purchased by TETAŞ from domestic coal fired power plants in 2016 is determined as 6 billion kWh and the price per unit as TRY 185 per MWh.

Regulation Amending the Electricity Market Consumer Services Regulation

As mentioned in the 2015 **Summer Issue** of our Newsletter, draft of Regulation Amending the Electricity Market Consumer Services Regulation ("**Regulation**") was published by the Energy Market Regulatory Authority ("**EMRA**") for review and comments of the market players on its website. After approximately one year, the Regulation entered into force on 4 August 2016.

The Regulation is mostly in conformity with the draft which was published by EMRA. However, different from the draft which stated that distribution companies would no longer be entitled to cut-off the electricity of eligible consumers due to their outstanding debts; the Regulation states that distribution companies are entitled to cut-off the electricity of eligible consumers due to their outstanding debts, provided that they purchase electricity and/or capacity from authorized supplier company through regulated tariffs.

Law on Restructuring of Certain Receivables

Law on Restructuring of Certain Receivables (the "**Law**"), which offers taxpayers a broad amnesty for most types of unpaid taxes and for unpaid social security insurance premiums relating to the period up to 30 June 2016, was published in the Official Gazette on 19 August 2016.

The Law addresses restructuring of certain public receivables, repatriation to Turkey of assets held abroad by individual and corporate Turkish taxpayers without risk of any inspection or tax penalty, adjustment of unrecorded assets and adjustment of assets that are recorded but which do not exist or are not available.

Please click **here** for a Client Alert prepared by Hakan Eraslan, tax counsel, for details of such amendments to the tax legislation.

13 Please click **here** for detailed information on these changes as summarized in our previously published Client Alert.

Formation of the Sovereign Wealth Fund of Turkey

Law on the Formation of Turkey Asset Management Joint Stock Company and Amendments to Specific Laws No. 6741 (the "**Law**") was adopted by the Parliament on 19 August 2016 and entered into force on 26 August 2016. As an omnibus bill, the Law foresees amendments to various laws and, more importantly, establishes the Sovereign Wealth Fund of the Republic of Turkey (the "**Turkish SWF**"), a state-owned investment fund. The establishment of the Turkish SWF is expected to expedite the growth of capital markets and to be instrumental in the funding of major infrastructure projects. Main features of the Turkish SWF as envisaged in the Law are as follows:

- The Turkish SWF will be formed and administered by Türkiye Varlık Yönetimi Anonim Şirketi (*Turkey Asset Management Joint Stock Company*) (the "**Company**"), to be incorporated as a joint stock company affiliated to the Prime Ministry and subject to private law provisions. The Company will be incorporated ex officio once the Law enters into force. The founding capital of the Company will be TRY 50 million. The entire amount will be covered by the Privatization Fund and the shares will be owned by the Privatization Administration. If deemed necessary, sub-funds may also be established under the Turkish SWF. The Council of Ministers will determine the procedure and principles of the structure and operations of the Company.

- The Company's board of directors will consist of at least five members. The general manager and the board members, who are required to have at least five years of experience in finance, law, economics or banking, will be appointed by the Prime Minister.

- The Turkish SWF will be initially funded with a certain percentage of income, assets and funds belonging to the Turkish State with the aim of establishing a structure whereby the Turkish SWF will be able to fund itself over time.

- The Company will invest in certain investment instruments enlisted in the Law on behalf of the Turkish SWF in accordance with the strategic investment plan that will be prepared by the Company and approved by the Council of Ministers for a period of three years. Some of these investments instruments are publicly traded shares of Turkish and foreign companies, public and private bonds as well as gold and other precious metals.

- The Turkish SWF and the Company will have separate legal personalities. All assets that are assigned to the Turkish SWF and all values obtained from transactions of the Company will be registered in the name of the Turkish SWF.

- Pursuant to the Law, the assets of the Turkish SWF and the Company will be separate. As such, the assets of the Turkish SWF are secured by the Law. The assets of the Turkish SWF cannot be subject to enforcement proceedings or seizure, including proceedings initiated for the collection of public receivables, and cannot be allocated for any other purposes or provided as security other than in relation to transactions that the Turkish SWF or its sub-funds are authorized to conduct.

- The financial statements of the Company and the Turkish SWF will be audited by independent auditors. None of the entities will be subject to audit by the Turkish Court of Accounts (*Sayıştay*). At least three auditors will be appointed by the Prime Minister and these auditors will prepare an audit report on the financial statements and activities of the Company and the Turkish SWF. The report will be presented to the Council of Ministers at the end of June each year. Financial tables and operations of the Company, Turkish SWF and sub-companies and sub-funds will also be audited by the Planning and Budget Commission of the Parliament in October each year based on the reports shared by the Prime Ministry.

- The Law also grants numerous exemptions to the Company, the Turkish SWF and their subsidiaries. These include exemptions relating to income and corporation tax as well as stamp taxes and fees pertaining to the documentation of their transactions.

Draft legislation

Proposed changes to Natural Gas Market legislation

As mentioned in the **Spring 2016 Issue** of our Newsletter, the Law Amending the Electricity Market Law and Certain Other Laws (the "**Amending Law**") entered into force on 17 June 2016. In addition to other amendments to the energy market legislation, the Amending Law brought some significant changes to the Natural Gas Market Law No. 4646[14] (the "**Natural Gas Market Law**") as well. Further to the Amending Law, EMRA published

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

three draft regulations reflecting the said amendments to the secondary legislation including the Natural Gas Market Licensing Regulation (the "**Draft Regulation**") on its website for public views and comments.

Some of the major amendments to the Natural Gas Market Law related to the natural gas storage obligation amount to be determined by EMRA for import license holders, and on the rearrangement of the natural gas distribution regions.[15] Regarding the storage obligation, the Draft Regulation limits EMRA's authority to determine the annual storage obligation of import license holders with an upper threshold of 20% of each import license holders' import amount for a period of five years. In respect of rearrangement of natural gas distribution regions, the Draft Regulation, in parallel with the Amending Law, enables merger or demerger of the natural gas distribution licenses within a distribution region provided that such variation is requested by the relevant distribution license holder and is approved by EMRA taking account of technical and economic requirements of the relevant distribution region.

A significant amendment proposed by the Draft Regulation pertains to the documents to be submitted in applications for the approval of share transfers. The Draft Regulation decreases the number of documents to be submitted for review by the Board. Finally, the Amending Law brought an exception for natural gas distribution license holders from the prohibition of holding shares in another legal entity pursuing the same activities. According to the Amending Law, natural gas distribution license holders can hold shares in another distribution license holder provided that such shareholding is approved by EMRA taking into account the technical and economical justifications for such shareholding. The Draft Regulation sets forth the criteria for EMRA to follow in evaluating such requests: (i) a reasoned request letter must have been submitted, (ii) all obligations within the scope of Law No. 4054 on Protection of Competition[16] must be fulfilled, (iii) documents and information required pursuant to Article 42 (Share Transfer) of the Natural Gas Market Licensing Regulation must have been submitted and (iv) any other documents and information which may be requested by EMRA must have been submitted by the applicant.

Draft regulation on Renewable Energy Resource Areas

The concept of "renewable energy resource areas" ("**RERA**") was introduced with the Law on the Use of Renewable Energy Resources for the Generation of Electrical Energy No. 5346[17] (the "**Renewable Energy Law**") with an aim to identify the feasible areas for renewable energy generation. Currently, RERAs are regulated under the Regulation on the Determination, Gradation, Protection and Utilization of Renewable Energy Resource Areas for Electricity Generation[18] (the "**RERA Regulation**"). This regulation mainly sets out the rules for determination, and preservation of RERAs (e.g., by way of depicting them in the relevant zoning plans).

The recent amendments introduced to the Electricity Market Law No. 6446[19] (the "**Electricity Market Law**") on 4 June 2016 provided a more comprehensive regime for RERAs. With these changes in mind, on 1 July 2016, the Renewable Energy General Directorate of the Ministry of Energy and Natural Resources published the "Draft Regulation on Renewable Energy Resource Areas" (the "**Draft Regulation**") on its website to receive the comments of the interested parties.

The material aspects of the Draft Regulation can be summarized as follows:

- The Draft Regulation provides a "full picture" in respect of RERAs, whereas, as noted above, the RERA Regulation only governs the initial phases. Namely, under the Draft Regulation, rules and procedures pertaining to (i) determination of potential RERAs; (ii) feasibility and infrastructure studies in respect of RERAs, (iii) publication of final RERAs in the Official Gazette, and *ex officio* registration of RERAs in the relevant zoning plans; (iv) prerequisites and procedures for the applicants that wish to invest in these RERAs, (v) auction procedures where there are multiple applications for a RERA; (vi) the requirements that the investors of the RERAs should comply with during the preliminary license as well as the generation license stages.

15 Please click **here** for detailed information on these changes as summarized in our previously published Client Alert.

16 Published in the Official Gazette No. 22140 dated 13 December 1994.

17 Published in the Official Gazette No. 25819 dated 18 May 2005.

18 Published in the Official Gazette No. 28834 dated 27 November 2013.

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

- Reiterating the requirement introduced with the recent amendments to the Electricity Market Law, the Draft Regulation requires usage of domestic products in the generation facilities to be established on the RERAs. The Draft Regulation further stipulates that, during the preliminary licensing period, the generation license holders that wish to benefit from the domestic production incentive must obtain a "domestic product certificate" pursuant to the Communiqué on Domestic Products (the "**Communiqué**") which confirms that the domestic contribution percentage in that particular product is at least 51%. Pursuant to the formula set out in the Communiqué, the sub-components having a foreign country of origin are not taken into account for the domestic contribution percentage calculation.[20]

- Under the RERA Regulation, only the state-owned lands can be subject to the RERA procedures. However, the recent amendments introduced to the Electricity Market Law stipulates that privately owned lands can be subject to expedited expropriation procedures, if such lands are determined as RERAs. In parallel, the Draft Regulation recognizes that the RERA studies can be conducted on privately owned lands.

- Based on the lowest bid submitted per kilowatt, the Draft Regulation stipulates specific rules pertaining to the auction procedures regarding the RERAs in the event of multiple applications. This auction procedure is in parallel to the recent relevant amendments introduced to the Electricity Market Law on 4 June 2016.

Draft Regulation Amending the Electricity Market Licensing Regulation

The Draft Regulation Amending Electricity Market Licensing Regulation (the "**Draft Regulation**") was published by the Energy Market Regulatory Authority ("**EMRA**") on 1 July 2016 for public review and comments. Main novelties foreseen in the Draft Regulation are as follows:

- **Preliminary licensing period.** According to the Electricity Market Licensing Regulation[21], a preliminary license may be granted for a period of maximum 24 months with a possible extension to 36 months depending on the type of resource and installed capacity. The Draft Regulation provides a different wording stating that preliminary license will be granted for a period between 24 to 36 months and does not speak of an extension.

- **Renewable Energy Resource Areas.** The notion of "Renewable Energy Resource Areas" defined in the Law on Use of Renewable Energy Resources for the Generation of Electrical Energy No. 5346[22] is envisaged to be integrated to the Electricity Market Licensing Regulation for the first time through this Draft Regulation and following provisions are brought in relation to these areas: (i) a longer preliminary licensing period may be granted, (ii) they are exempted from solar and wind measurements, (iii) domestic product usage percentage determined by the Ministry of Energy and Natural Resources must be reached by the end of the pre-licensing period (please see the heading "Draft Regulation on Renewable Energy Resource Areas" in Draft Legislation section).

- **Domestic Coal.** In parallel with the recent amendments brought to the Mining Law[23] and Electricity Market Law[24], reference to domestic coal is envisaged in the Draft Regulation. According to the Draft Regulation, when applying for preliminary license for electricity generation from domestic coal, an environmental impact assessment decision is not required, and it will be sufficient to obtain such decision by the end of the pre-license term.

- **Nuclear energy generation facilities.** Again, in parallel with the recent amendments to the Electricity Market Law, the Draft Regulation provides that, except requirement of application for connection agreements, the required permits and approvals (including construction licenses) may be obtained on a date determined by EMRA, following the issuance of the generation license. In addition, the construction of buildings which are not directly related to the generation facility may begin prior to the issuance of the nuclear power generation license.

- **Facilities completing their economic lives.** Draft Regulation introduces the term "facilities completing their economic lives" and brings a provision to the advantage of the investors willing to appraise these idle facilities. According to the Draft Regulation, during the applications

20 It is noteworthy that a lighter "local component" test is envisaged under the local component incentives legislation regarding the renewable energy generation facilities. Please see "Incentives on Domestic Components Used in Renewable Power Plants" in Recent Legislation section.

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

22 Published in the Official Gazette No. 25819 dated 18 May 2005.

23 Published in the Official Gazette No. 18785 dated 15 June 1985. (Please click **here** to read our Client Alert regarding this issue for more information.)

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

for the amendment of license concerning the installation of new unites or facilities replacing these idle facilities, the requirement of minimum capital and security provision will be limited to the additional capacity to be installed.

- **Consequences of cancellation of license.** Electricity Market Licensing Regulation prohibits the board members and directors of the companies of which the licenses are canceled, to apply for a license and to directly or indirectly hold share or to become a board member in the companies which applied for license. The Draft Regulation envisages reducing this sanction only to the case where the license is canceled due to failure to complete the construction within the term set out in the license.

- **Share transfer restrictions.** Draft Regulation foreseen additional exceptions to share transfer restrictions to which license holder companies are subject. Accordingly, share transfer restrictions will not apply to; (i) acquisition of the shares (provided that it does not exceed 25% of the total of the shares) of a generation facility by the funder who provided funding for the construction of such generation facility, (ii) changes as result of which indirect shareholders included in the pre-licensing period become direct shareholders without having their shareholding ratios altered, and (iii) concerning legal entities which are included in the privatization programme, changes occurred in the shareholding structure as a result of sale or transfer of the shares belonging to public entities.

Draft Regulation on Certification and Support of Renewable Energy Resources

On 1 July 2016, the Energy Market Regulatory Authority published the Draft Regulation Amending the Regulation on Certification and Support of Renewable Energy Resources (the "**Draft Regulation**") for public review and comments.

The main change envisaged under the Draft Regulation concerns hybrid facilities benefiting from Renewable Energy Resources Support Mechanism (i.e., YEKDEM). While in the current legislation, hybrid facilities (except for solar power facilities) which have their generation amount calculated by a single meter cannot benefit from YEKDEM, the Draft Regulation provides that when the generation amount obtained from different resources can only be calculated through the same meter, the amount obtained from renewable energy resources will be calculated separately and the facility will benefit from YEKDEM for this amount. The Draft Regulation foresees a formula in order to calculate the amount of generation which is not obtained from renewable energy resources, so that the remaining can benefit from YEKDEM. According to the Draft Regulation, in order for a hybrid facility to benefit from YEKDEM, the ratio of generation from renewable energy must not be less than 80% of the total generation.

The Draft Regulation also excludes license-exempt generation from the scope of domestic components incentive.

Draft amendments to the License-Exempt Electricity Generation legislation

On 1 July 2016, the Energy Market Regulatory Authority ("**EMRA**") published the Draft Regulation Amending the Regulation on License-Exempt Electricity Generation (the "**Draft Regulation**") and the Draft Communiqué Amending the Regulation on License-Exempt Electricity Generation (the "**Draft Communiqué**"). Prominent changes envisaged under the Draft Regulation are as follows:

- References to domestic component incentives are deleted, as also envisaged in the Draft Regulation regarding Incentives on Domestic Components Used in Facilities Generating Electric Power from Renewable Energy Resources. Accordingly, once both drafts become effective, license-exempt generation facilities would not be entitled to benefit from domestic component incentives at all.

- Exceptions to share transfer restrictions are provided for license-exempt solar and wind power. Share transfers will be allowed in cases of (i) insolvency, (ii) changes in shareholding structure concerning transfer of public shares of publicly-listed legal entities, (iii) indirect changes in shareholding structure of legal entities due to the changes occurred in the shareholding structure of its foreign shareholders, (iv) changes in the shareholding structure due to public offering, (v) changes in shareholding structure due to the acquisition of the shares (provided that it does not exceed 25% of the total of the shares) of a generation facility by the funder who provided funding for the construction of such generation facility, and (vi) changes as result of which indirect shareholders become direct shareholders without having their shareholding ratios altered.

On the other hand, the Draft Communiqué envisages amendments in parallel with the Draft Regulation.

Article

Debt assumption by Treasury or Public Authorities in infrastructure projects

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Introduction

Debt assumption by Treasury or other public authorities, which is one the state guarantees available for infrastructure projects under Turkish law, basically refers to the assumption of debt and financing costs payable to lenders by the State or the relevant public entity upon termination of the underlying concession agreement.

Debt assumption and other types of state guarantees are commonly used in Turkey and in other countries in the context of project finance. The drivers for such guarantee vary from incentivizing private financing in emerging markets or during the financial crisis to increasing added value.

Although the concept of debt assumption was also available in some of the power sector build-operate-transfer ("**BOT**") projects developed in Turkey in early 1990s, it has gained attraction again in 2010s and has been used in several large scale infrastructure projects since then, such as Gebze-İzmir Highway Project, Eurasia Tunnel Project, 3rd Istanbul Bridge Project and 3rd Istanbul Airport Project.

Statutory Basis

Debt assumption is regulated under different pieces of legislation under Turkish law based on the type and sector of the projects. Article 11/A of the Law No. 3996 Concerning Procurement of Some Investments and Services through Built-Operate-Transfer Model[25] ("**BOT Law**") provides for the possibility of debt assumption by governmental authorities not covered by the central budget, such as the State Airports Administration (DHMI) and the General Directorate of Highways (KGM). In order to regulate the terms and conditions of debt assumption by the Treasury, an additional article (Article 8/A) was introduced to the Law No. 4749 Concerning the Regulation of Public Financing and Debt Management[26] ("**Law No. 4749**") and the detail of such debt assumption mechanism was set forth by the Regulation on Assumption of Debts by the Undersecreteriat of Treasury[27] ("**Debt Assumption Regulation**") in 2014.

Pursuant to Law No. 4749, among other conditions, debt assumption by the Treasury is allowed for BOT model projects with the minimum investment amount of TRY 1 billion and for PPP projects conducted by the Ministry of Health and Ministry of National Education with the minimum investment amount of TRY 500 million. Accordingly, debt assumption by Treasury is dedicated to large-scaled projects, while such a condition is not envisaged for the debt assumption by other public authorities to be made in accordance with the BOT Law.

On the other hand, the total amount for which the Treasury will be allowed for debt assumption is determined each year by the central budget law. For the year 2016, this amount is determined as US$4 billion[28], while it was determined as US$3 billion for the preceding years.

In the health PPP projects, although it is legally possible for the Treasury to assume the debt of the Ministry of Health, there are no precedents of such assumption in practice to date. Instead, there is a contractual senior debt floor concept associated with termination compensation which is guaranteed by the Ministry of Health.

Contractual Structure

In an ordinary public debt assumption mechanism, the contractual structure is basically composed of three main agreement: (i) the project agreement containing a clause regarding the assumption of debt by a public authority (executed between the project company and the administrative authority which has tendered the project), (ii) the debt assumption protocol where the public authority undertakes to assume the debt of another (executed between the administrative authority which has tendered the project and the administrative authority which will be responsible of the debt if such authority fails to perform it, (i.e. the Treasury), and (iii) the debt assumption agreement executed by and between the administrative authority which has tendered the project, the public authority assuming the debt (if different from the tendering authority) and the lenders which provide financing for the project.

Prerequisites

For a debt to be assumed by public authorities, two main conditions need to be fulfilled:

- The funding must be related to the investment and services: the loan must be dedicated to the sole purpose of realization of the public investment project and must only be spent within the same purpose.

25 Published in the Official Gazette No. 21959 dated 13 June 1994.

26 Published in the Official Gazette No. 24721 dated 9 April 2002.

27 Published in the Official Gazette No. 28977 dated 19 April 2014.

28 Central Budget Law for the Year 2016, published in the Official Gazette No. 29655 (repeated edition) dated 16 March 2016.

- The funding must be obtained from abroad: the loan must be obtained from abroad. With respect to this condition, in practice, loans provided by foreign branches of Turkish banks are usually accepted as funding obtained abroad.

Scope

The "debt" in public debt assumption usually comprises (i) the principal debt amount, (ii) costs related to derivative transactions, and (iii) other costs related to the acquisition of the loan. The BOT Law does not provide for a limit to such assumption. However, the debt assumption by the Treasury is subject to stricter conditions. According to the Debt Assumption Regulation:

- The limit of the debt assumed by the Treasury cannot exceed 85% of the principal debt amount if the project agreement is terminated due to the project company's fault; whereas the Treasury will assume the entire debt if no such fault is attributable to the project company;
- The Treasury may also assume the financial costs arising out of the termination of any derivative transactions that are concluded in connection with the loan facility agreement. The Treasury is authorized to determine the limit of such assumption amount to the extent of 10% of the principal debt amount; and
- Debt related to the funding of the capital contribution of the project company, cost increases occurred as a result of a fault attributable to the project company and debt related to the funding of the cash need are not within the scope of the debt assumption.

Conclusion

Debt assumption is an important type of state guarantee for the financing of massive public infrastructure projects. The undertaking to assume the debt may be given by Treasury or another public authority under the debt assumption legislation, or through a contractual mechanism similar to debt assumption, such as the senior debt termination compensation mechanism available in health PPP projects, which is technically not a type of debt assumption but provides for a similar guarantee to lenders. Although the assumption of debt by the Treasury gives remarkable comfort to the lenders and therefore facilitates the financing of the projects, it may also have some disadvantages as compared to debt assumption by other public authorities or the contractual guarantee available in PPP projects, such as limitation of the coverage of compensation as explained above.

Recent and upcoming conferences and events

- 22 September 2016, İstanbul: **8th Turkey Energy Forum & Sponsors Exhibition 2016** organized by EEL Events.
- 22-24 September 2016, Kayseri: **9th International Conference on Sustainable Energy & Environmental Protection** organized by Erciyes University and University of the West of Scotland.
- 9-13 October 2016, Istanbul: **23rd World Energy Congress** organized by World Energy Council.
- 2-5 November 2016 Istanbul: **2nd Istanbul PPP Week** organized by Foreign Economic Relations Board of Turkey.
- 23-24 November 2016, Ankara: **5th Annual PPP in Turkey Forum** organized by EEL Events.
- 8-9 December 2016, Ankara: **3rd Health Economy Congress** organized by Health Economy and Strategies Association. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, will participate as panelist and speak on "PPPs for Sustainable and High Quality Healthcare: City Hospitals".

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