

## Current Topics in the Energy Sector #9

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# Electricity Market Regulations Brought Before the Courts

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The electricity market in Türkiye is a highly regulated sector. In recent years, both the changing dynamics of the Turkish electricity market and the developments in the global economy due to the pandemic, military conflicts, the climate crisis and green energy transition has led to even more interventions by the regulator. In this article, we review the electricity market regulations that have been brought before the courts in recent years.

### 1. Resource-Based Support Mechanism

In March 2022, the Energy Market Regulatory Authority ("EMRA") has adopted the Procedures and Principles on Determination and Implementation of Resource-Based Support Pricing<sup>1</sup> ("Procedures and Principles"), to incentivize the producers with higher generation costs through the income obtained by the pricing applied to producers with lower generation costs, based on the type of resource used in electricity generation. When the Procedures and Principles were first introduced, the amounts subject to bilateral agreements were also included in the calculation of the support price. However, fixed-price bilateral agreements have been exempted from the resource-based support price by a subsequent amendment. Energy Markets Operation Corporation's ("EPIAŞ") request for documents demonstrating that such fixed price is applied up to the end consumer in exemption applications has caused controversy as to whether the exemption regulation requires that the fixed price shall be applied to the end consumer. In response to these debates, EMRA has amended the Procedures and Principles and added the wording "end consumer" to align the legislation with EPIAŞ's practice. This practice and legislative amendment has been brought before the courts by various companies.

In a lawsuit filed within this scope, the plaintiff claimed not to having received a fair payment under the resource-based support mechanism for a certain period, due to the unlawful amendment made by EMRA. Ankara 10<sup>th</sup> Administrative Court has accepted such claim and stated that it is contrary to the principles of legal security and legal certainty to make retroactive amendments, since the phrase "end consumer" was not included in the relevant article of the Procedures and Principles at the date of the transaction subject to the lawsuit.

EMRA has appealed against the decision of the Ankara 10<sup>th</sup> Administrative Court defending that the purpose of the regulation is to protect consumers by providing resource-based support to high-cost resources in order to prevent the excessive increase in prices in the market and to protect the purchasing party, especially the consumers, and that it is natural to exempt the fixed-price agreements between the producer and the end consumer from the resource-based support price, even if the wording "end consumer" is not

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<sup>1</sup> Published in the Official Gazette dated 18 March 2022 and numbered 31782.

added to the relevant article. The 8<sup>th</sup> Administrative Law Chamber of Ankara Regional Administrative Court has accepted EMRA's request for an injunction relief against Ankara 10<sup>th</sup> Administrative Court's decision and has not yet decided on the merits yet.

## **2. Restrictions to the Sale of Excess Electricity in License-Exempt Electricity Generation**

Pursuant to the amendments to the Regulation on License-Exempt Electricity Generation in the Electricity Market<sup>2</sup> dated 1 August 2022, for the persons entitled to receive an invitation letter to sign a connection agreement after an application made after 12 May 2019, the excess amount of generation that can be subject to sale cannot exceed the total amount of electricity consumption of the associated consumption facility, and the electricity fed into the grid above such amount will be deemed as a free contribution to the Renewable Energy Resources Support Mechanism.

This regulation has been criticized by investors and especially industrialists who committed to their investments with the expectation of generating income by selling the excess electricity, defending that the retroactive application of the regulation is unlawful. Various license-exempt electricity producers have initiated lawsuits requesting the cancellation of the relevant regulation; however, no decision on the merits of the disputes have been rendered yet.

## **3. Retail Sale and Distribution Tariffs**

Although retail sale and distribution tariffs are frequently subject to disputes, it is known that the courts conduct a limited review of the relevant tariffs, considering them to be within EMRA's discretion. The recent decision<sup>3</sup> of the Council of State in the case filed against EMRA Decision No. 9754<sup>4</sup> on retail sale and distribution tariffs ("Decision") shows that this position is maintained.

The plaintiff argued that the Decision increases the financial burden of the consumers due to the addition of a repeating multiplier under the name of General Quality Indicator while there is already a multiplier named as Quality Factor in the relevant calculation formula, and requested the Decision to be annulled on the grounds that, among others, it is unlawful to reflect the cost items included in the related regulation to the consumers without justification, regulations imposing financial obligations should be adopted by laws and the service for which the payment is made should be clearly identified.

The Council of State stated that as per the Law on the Organization and Duties of the Energy Market Regulatory Authority<sup>5</sup>, EMRA has the authority to determine the pricing principles to be applied in sales and distribution of electricity by taking into account the market needs and to revise them in line with the relevant license provisions when necessary. In this respect, the Council of State has concluded that there is no violation of law by the provisions of the Decision considering the purpose of the EML, as they aim to encourage electricity distribution companies to conduct their business by in-house staff instead of outsourcing, which would create more benefit for the consumers in the long term by lowering the operation costs.

## **4. Sanctions Imposed under Article 16(1)(b) of the EML**

Another category of matters brought before the courts in the electricity market is the sanctions imposed pursuant to Article 16(1)(b) of the EML due to violation of the legislation and non-compliance with the decisions and instructions of EMRA. The sanctions that have been the subject to the most of the disputes in recent years can be categorized as follows:

### ***Payment and Providing Security***

The securities that the system users are required to provide to the grid operators pursuant to the Electricity Market Connection and System Usage Regulation<sup>6</sup> and the provisions of the relevant connection and

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<sup>2</sup> Published in the Official Gazette dated 12 May 2019 and numbered 30772.

<sup>3</sup> 13<sup>th</sup> Chamber of the Council of State, decision no. 2020/3737 E. 20202/2737 K. dated 21.06.2022.

<sup>4</sup> Published in the Official Gazette dated 8 December 2020 and numbered 31328.

<sup>5</sup> Published in the Official Gazette dated 20 February 2001 and numbered 24445.

<sup>6</sup> Published in the Official Gazette dated 28 January 2014 and numbered 28896.

system usage agreements have been subject to disputes between the parties. EMRA considered the failure to fulfill the obligations to provide security within the scope of Article 16(1)(b) of the EML. For example, in a dispute that was brought before the Council of State, the plaintiff company, which was imposed an administrative action due to its failure to provide the securities arising from the system usage agreement to the distribution company, filed a lawsuit for the cancellation of EMRA's action. The Council of State upheld the decision of the court of first instance, which ruled that the action was lawful on the grounds that the security was not provided and that the violation was repeated despite the written notice.<sup>7</sup>

### **Submitting Progress Reports**

Generation license holders are required to submit a progress report to EMRA every year on the activities carried out within the related year, until the date of the taking over of the total installed capacity of the generation facility set out in the license. Reviewing the lawsuits filed against the administrative actions imposed in this context, we note that the form of submission of these reports is also important. For example, in one of its decisions, the Council of State upheld the decision to reject the plaintiff's request for the cancellation of the administrative action against the plaintiff on the grounds that the progress reports submitted in the form of "Work Progress Status Chart" should have been submitted to EMRA in the required format.<sup>8</sup>

### **Preparation of Geographical Information Systems**

The requirement for electricity distribution companies to prepare geographical information systems ("GIS") foreseen under the Regulation on Electricity Distribution System<sup>9</sup> was regulated under Provisional Article 1 of the repealed Procedures and Principles for Determining the Regulatory Investment Expenditures for the Electricity Market Distribution System and Monitoring Their Realization<sup>10</sup> prior to the entry into force of the Regulation on Electricity Distribution System. During the period when the repealed procedures and principles were in force, EMRA imposed administrative sanctions under Article 16(1)(b) of the EML against those who failed to prepare a GIS.

In a case where EMRA's sanction was challenged, the Council of State assessed that the repealed Provisional Article 1 was not a detailed regulation in terms of scope and nature and that EMRA notified the GIS criteria and standards to the plaintiff distribution company for the first time on the date of the notification of the action, which was against the principles of legal certainty and security.<sup>11</sup> In 2017, the Procedures and Principles for the Improvement and Standardization of Geographical Information Systems Set Up by Electricity Distribution Companies determined the minimum standards for GISs.

### **Compliance with EMRA Instructions**

Pursuant to Article 16(1)(b) of the EML and Article 29(3) of the Licensing Regulation, license holders are required to comply with all instructions of EMRA given under the relevant legislation. When the sanctions imposed due to non-compliance with the instructions are brought before the courts, it is observed that the courts focus on the concrete determination of the instruction and the non-compliance. For example, in a dispute subject to a decision dated 2019 of the Council of State, EMRA instructed 21 electricity distribution companies to publish a chart on their websites regularly on a monthly basis, and imposed an administrative fine on the plaintiff company that did not comply with this instruction. The Council of State stated that, to issue an administrative fin, EMRA must determine which aspects of the information published on the website are not in compliance with EMRA's instructions and concretely set out whether the non-compliance has been remedied or not. In this respect, the Council of State declared the action unlawful on the grounds that it is against the principles of legal certainty and security to proceed without making a concrete determination of the published information's incompliance with EMRA's instructions.<sup>12</sup>

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<sup>7</sup> 13<sup>th</sup> Chamber of Council of State, decision no. 2016/2084 E., 2017/1122 K. dated 21.04.2017.

<sup>8</sup> 13<sup>th</sup> Chamber of Council of State, decision no. 2020/2166 E., 2020/3782 K. dated 22.12.2020.

<sup>9</sup> Published in the Official Gazette dated 15 April 2022 and numbered 31810.

<sup>10</sup> Published in the Official Gazette dated 17 June 2011 and numbered 27967.

<sup>11</sup> 13<sup>th</sup> Chamber of Council of State, decision no. 2019/1389 E., 2019/2526 K. dated 11.09.2019.

<sup>12</sup> 13<sup>th</sup> Chamber of Council of State, decision no. 2019/1978 E., 2019/4140 K. dated 05.12.2019.

## 5. Decisions Regarding Preliminary Licensing for Energy Storage Power Plants

The amendments to the Electricity Market Law<sup>13</sup> ("EML") that entered into force on 5 July 2022 allowed persons undertaking to establish electricity storage facilities to install wind power plants and solar power plants without being subject to a tender procedure. The implementation side of these amendments has continued to be discussed this year as well. In particular, the amendments to the Electricity Market Licensing Regulation<sup>14</sup> ("Licensing Regulation") dated 19 November 2022, have been criticized. On one hand, it was regulated that the applications will be sent to Turkish Electricity Transmission Corporation ("TEİAŞ") "in the order of their evaluation" and TEİAŞ will issue a connection opinion in accordance with this order. On the other hand, supply license holders having obtained the right to include a stand-alone storage plant in their licenses have been granted with the opportunity to apply for a preliminary license until 19 February 2023 using the affirmative connection opinions provided for these stand-alone storage plants. The fact that such a right has been granted to license holder has been a matter of discussion on its own. In addition to this, some of the applicants whose applications were rejected by not being granted with affirmative connection opinion claimed that capacity was allocated to applicants with later application dates in the same region. Some of the decisions of the EMRA in this regard have been brought before the courts by the applicants, with no decisions that had a general impact to the sector yet.<sup>15</sup>

## 6. Conclusion

In a market which is both highly regulated and dynamic, it is inevitable that sector-specific regulations are occasionally brought before the courts. In the cases brought before courts, legal certainty, legal security, and non-retroactivity appear to be the key themes. The courts, on the other hand, tend to interpret EMRA's discretionary powers broadly and usually refrains from intervention.



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<sup>13</sup> Published in the Official Gazette dated 30 March 2023 and numbered 28603.

<sup>14</sup> Published in the Official Gazette dated 2 November 2013 and numbered 28809.

<sup>15</sup> Enerji IQ Energy Market Report, no: 2023-15/536.