# Turkish Energy & Infrastructure

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#### **Recent changes in legislation**

## Administrative fines in the energy sector applicable in 2016

Four Communiqués¹ have been promulgated by the Energy Market Regulatory Authority ("**EMRA**") to set forth the applicable administrative fines in the energy sectors for 2016. The administrative fines have been adjusted in accordance with the revaluation value of 5.58%, which was determined with the Tax Procedural Law General Communiqué No. 457.²

The ranges of administrative fines for each sector in 2016 are as follows:

- ☐ from TRY 604,000 to TRY 1,209,000 under the Electricity Market Law No. 6446;
- □ from TRY 531,000 to TRY 1,063,000 under the Natural Gas Market Law No. 4646:
- □ from TRY 173 to TRY 885,100 under the Liquefied Petroleum Gas Market Law No. 5307; and
- from TRY 239 to TRY 1,209,000 under the Petroleum Market Law No. 5015.

<sup>1</sup> All Communiqués were published in the Official Gazette No. 29570; dated 22 December 2015.

<sup>2</sup> Published in the Official Gazette No. 29528; dated 10 November 2015.

## Amendments to the Electricity Market Licensing Regulation

The Electricity Market Licensing Regulation has been amended on 23 December 2015 (the "Amending Regulation"). The major amendments to the Licensing Regulation are as follows:

- Transfer of license: Transferring a license through a demerger is no longer permitted.
- Prohibited persons: The scope of the prohibited persons which cannot be a shareholder, board member, chairman or director (if it is a limited liability company) of preliminary license applicants has been extended. Accordingly, a legal entity, shareholders having 10% or more of the shares of a legal entity, or board members or directors of a legal entity whose license has been cancelled by EMRA (within the last three year period), cannot be a direct or indirect shareholder, board member or director of a preliminary license applicant. Board members, chairman and directors cover those who have left their job within one year prior to the cancellation too. However, the Amending Regulation introduces a recovery period regarding the above mentioned prohibition. If any shareholder, board member, chairman, or any director of a license or preliminary license applicant company is one of the prohibited persons, a 90 day period will be granted to the applicant for recovery. If the applicant fails to remedy within 90 days, the application will be rejected.
- Approval for capital decrease: Preliminary license holders must receive an approval from EMRA for the amendments to be made to their articles of association which result in any capital decrease.
- Environmental impact assessment: Except for wind, solar and geothermal projects, the environmental impact assessment (the "EIA") decision is required to be in place at the time of the preliminary license application, i.e., before the pre-construction period. For applications filed for wind, solar or geothermal type generation facilities, the relevant EIA decision can still be obtained by the end of the pre-construction period.

However, in respect of preliminary license applications for projects other than wind, solar or geothermal that are under the evaluation of EMRA at the time of the Amending Regulation's entry into force (i.e., 23 December 2015), a 24-month period is granted for the provision of the relevant EIA decision.

- □ **Priority among the renewables:** According to the Amending Regulation, in the event that there is more than one application pertaining to the same area in respect of renewable energy resources, the priority among these applications will be as follows: (i) geothermal, (ii) hydraulic, (iii) wind, and (iv) solar power.
- **Service purchase:** Authorized supply companies will become entitled to purchase services for all activities of the consumer services centers for regions which have a population less than 50,000. Also, distribution companies will have the right to purchase services regarding the operation of the automatic meter reading system.
- □ Change in the shareholding structure: Two new exceptions to the prohibition of any direct and indirect transfer of shares of generation companies during the preliminary license period are introduced: (i) direct or indirect share transfers in the preliminary license holder or in its direct or indirect shareholders to be made in the scope of a public offering and (ii) direct or indirect share transfers between the current shareholders within the scope of the privilege rights.

## Extended deadlines under the Electricity Market Law

The Council of Ministers Decree No. 2015/8317 dated 14 December 2015³ (the "**Extension Decree**") extended the deadlines of the (i) price equalization mechanism for distribution companies; 50% discount on the transmission system utilization fee for the first five years of operation of generation license holders; and exemption on stamp taxes and duties during the investment period of generation license holders, until 31 December 2020; and (ii) payment of the lightning costs from the allowance allocated to the Ministry of Energy and Natural Resources and general budget tax incomes of the municipalities and provincial special administrations, until 31 December 2017. The Extension Decree became effective on 1 January 2016.

## Recent changes in the consumer protection legislation

The Ministry of Customs and Commerce, with its two Communiqués in December 2015, has (i) determined the minimum monetary limit for disputes to be heard before consumer courts in 2016 as TRY 3,480 and (ii) adjusted the administrative fines applicable under Article 77 of the Consumer Protection Law to a range between TRY 232 and TRY 116,254,127.

<sup>3</sup> Published in the Official Gazette No. 29572; dated 24 December 2015.

### Updated thresholds under the Public Procurement Law

The new Public Procurement Communiqué No. 2016/1<sup>4</sup> (the "**Communiqué**") entered into force on 2 February 2016. The Communiqué stipulates threshold values and monetary limits set out in the Public Procurement Law (the "**Law**") applicable in 2016:

- □ Upper limit for exemptions from the scope of the Law in the course of procurement of goods and services: TRY 8,168,201.
- □ Thresholds which will be considered as a basis for calculations in the tender process: between TRY 976,465 and TRY 35,804,003.
- □ Threshold for approximate cost values, which will identify the procedure for tender notices: between TRY 106,531 and TRY 1,775,686.
- □ Threshold value for the tender procedure in form of negotiations: TRY 177,556.
- Upper threshold for direct supply: TRY 53,261 for the needs of administration located within metropolitan municipalities, and TRY 17,744 for the needs of other administrations and representation/entertainment expenses.
- □ Contract value, where the Public Procurement Authority will receive part of the contract value is TRY 355,126.
- Pecuniary limits: between TRY 3,372 and TRY 16,864,973 where a fixed cost for complaints brought to the Public Procurement Authority will be collected.

#### Amendments to the EIA Regulation

The Regulation Amending the Environmental Impact Assessment Regulation was published in the Official Gazette and entered into force on 9 February 2016.

The prominent novelties introduced are as follows:

□ The cure period that may be provided to companies that have failed to obtain an environmental impact assessment ("EIA") decision (i.e., either an "EIA Positive" or an "EIA is Not Required" decision) has been limited to one year.

□ Article 24(1)(f) of the Environmental Impact Assessment Regulation<sup>5</sup> stipulates that the Ministry of Environment determines the procedures pertaining to the capacity increase or expansion of a project (that already obtained an EIA decision) has been repealed; and a new provision providing that such procedures will be set forth in a communiqué to be issued by the Ministry of Environment and Urbanization has been introduced.

## Amendments to the Council of Ministers' decision regarding determination of companies to be subject to the independent audit requirement

The Council of Ministers, via its decision No. 2012/4213, dated 19 December 2012 had set forth the criteria (i.e., thresholds regarding asset value and net sales proceeds and number of employees) to determine which companies will be subject to mandatory independent audit. These criteria were previously amended in March 2014 and February 2015.

With a new decision published in the Official Gazette No. 29685, dated 19 March 2016, the Council of Ministers once again reduced the thresholds regarding assets value and net sales proceeds, with retroactive effect as of 1 January 2016. The thresholds regarding number of employees of the companies are not amended and remain the same. With this amendment, the number of companies being subject to independent audit requirement has been increased.

Now, companies fulfilling at least two of the belowmentioned criteria during two consecutive financial years shall be subject to independent audit requirement:

- companies whose assets value amounts to TRY 40 million or above (previously TRY 50 million)
- companies whose net sales proceeds reach TRY 80 million or above (previously TRY 100 million)
- companies that employ at least 200 employees (this criteria remains the same).

For companies with affiliates and subsidiaries, these thresholds should be calculated based on the sum of all financial figures of the group companies and average of the number of employees employed by all the relevant group companies.

<sup>4</sup> Published in the Official Gazette No. 29608; dated 29 January 2016.

<sup>5</sup> Published in the Official Gazette No. 29186; dated 25 November 2014.

It should be noted that for certain companies specified in the Decision, such as newspaper companies, the Decision envisages different thresholds; whereas certain companies, such as insurance companies, are subject to independent audit requirement without fulfillment of any criteria.

#### Law on the protection of personal data

The right of protection of personal data was introduced to the Turkish Constitution on 7 May 2010. According to the last paragraph of Article 20 of the Turkish Constitution, principles and procedures regarding the protection of personal data shall be regulated in laws. Works on preparing a draft law were ongoing since 2012 and the draft was brought before the Parliament on 18 January 2016 for discussion and adoption. The Law on the Protection of Personal Data (the "Law") No. 66986 was adopted on 24 March 2016 by the Parliament and entered into force on 7 April 2016.

The Law aims to provide detailed provisions on the protection of personal data with the main objective to protect individuals' right to privacy and other fundamental rights, and to regulate the obligations of individuals and legal persons that are authorized to process data.

The major novelties proposed by the Law can be summarized as follows:

- □ The definitions "Personal Data", "Data Processing", "Data Processing System", "Data Subject", "Data Processors" and "Data Controller" are introduced to Turkish law by the Law.
- □ The Law envisages establishment of a "Personal Data Protection Authority" as a financially and administratively independent organization and a "Personal Data Protection Board" (the "Board") under this Authority.
- Although the Law provides that personal data cannot be processed or transferred without the express consent of the related person, it also envisages wide exceptions to this principle, which limit the requirement of such consent.
- □ The Law introduces "Special Personal Data" concept, which includes data regarding people's race, ethnic background, political stance, philosophical thoughts, religion, clothing, appearance, memberships of associations, foundations or unions, health, sexual life, criminal conviction and protection measures and biometric as well as genetic information.

- □ Pursuant to the Law, a public Registry of Data Controllers (the "Registry") will be established under the supervision of the Board. Data controllers are required to be registered to the Registry before processing data within the time period to be announced by the Board. However, the Board may provide exemptions to registration obligation based on objective criteria, which will be set out by the Board.
- □ The Law requires that personal data processed prior to the entry into force of the Law must be brought in compliance with the requirements of the Law within two years of its publication. Otherwise the relevant criminal offenses provided in Articles 135 140 of the Turkish Criminal Code and administrative fees under the Law may be applicable.
- □ Furthermore, in the meantime, the Convention on Protection of Persons against Automatic Processing of Personal Data has been ratified by the Republic of Turkey with the Council of Ministers' Decree No. 2016/85767, however the Convention has not entered into force yet.

#### **Draft legislation**

#### **Draft procedures and principles concerning** the Land Allocation Procedures of EMRA

On 29 December 2015, the Energy Market Regulatory Authority ("**EMRA**") published the "Draft Procedures and Principles concerning Land Allocation Procedures of EMRA" (the "**Draft Principles**") on its website for review and comments of the public.

The Draft Principles aim to be a practical guideline that embody the rules and procedures applicable to land allocation for energy market activities, which are envisaged in various pieces of law, such as expropriation and energy market legislation as well as the legislation pertaining to specific lands (such as forestry, pasture, and agricultural lands) as well as those lands owned by the Treasury.

Below are some of the main provisions of the Draft Principles:

■ The relationship between land usage rights and utilization purpose: On the basis of the utilization purpose of the facilities to be built on State-owned lands, the Draft Principles clarify question as to which type of usage rights will be granted to the license holders as follows:

<sup>6</sup> Published in the Official Gazette No.29677, dated 7 April 2016.

<sup>7</sup> Published in the Official Gazette No. 29656, dated 17 March 2016.

Type of usage right	Utilization purpose
Superficies right (üst hakki) and Easement right (irtifak hakki)	Permanent facilities (e.g., power plant, natural gas pipeline, refinery transformer building, storage facility)
Lease	Temporary facilities (e.g., service road, excavation dump site)

- □ **List of documents for land allocation:** The Draft Principles provide the lists of documents to be produced to EMRA for relevant land allocation transactions. These lists also include the documents needed to certify the completion of the land allocation formalities during the preliminary licensing period.
- □ Accelerated expropriation: The Draft Principles stipulate that preliminary license and electricity generation license holders should apply to the Ministry of Energy and Natural Resources for their accelerated expropriation requests. On the other hand, the Draft Principles require the natural gas market participants to apply to the Prime Ministry for the same request. Please note that the accelerated expropriation decision is ultimately issued by the Council of Minsters pursuant to the Expropriation Law No. 2942.
- Other details: Depending on the type of the energy projects and the lands, the Draft Principles provide detailed provisions in relation to the land allocation procedures.

#### Draft Regulation on Domestic Production Incentives for Electricity Generation Activities from Renewable Energy Resources

Renewable Energy Resources Support Mechanism (i.e., YEKDEM), the primary electricity sale mechanism for renewable energy projects, provides domestic production incentives for the projects to be commissioned on or before 31 December 20208 whose mechanical and/or electromechanical parts have been produced in Turkey. This is applicable for a period of five years from the date of commencement of commercial operation.

This domestic incentive mechanism is currently regulated pursuant to the Law on Renewable Energy Resources for the Generation of Electrical Energy, No. 53469 (the "Renewable Energy Law") and the Regulation on the Domestic Production of the Components Used in Facilities Producing Electric Power from Renewable Energy Resources<sup>10</sup> (the "Domestic Production Regulation").

During early February 2016, the Ministry of Energy and Natural Resources published a draft of a new Domestic Production Regulation (the "**Draft Regulation**") for public views and comments. Once published, the Draft Regulation will repeal the Domestic Production Regulation. Prominent novelties provided under the Draft Regulation are as follows:

□ **Definition of "domestic component":** The Domestic Production Regulation defines "domestic component" as "the component which composes of sub-components that have been produced by using minimum of 55% domestic added value". Please note that the wording "domestic added value" is not clearly defined under the Domestic Production Regulation.

However, the Draft Regulation ascribes a clearer meaning to the term "domestic". According to this, generation license holders that wish to benefit from the domestic production incentive must submit a "domestic product certificate" pursuant to the Communiqué on Domestic Products<sup>11</sup> (the "**Communiqué**") which confirms that the domestic contribution percentage in that particular product is at least 51%. Under this Communiqué, the domestic contribution percentage is calculated on the basis of the following formula:

\* Cost in TRY

In view of this, if the Draft Regulation is enacted in its current form, the sub-components having a foreign country of origin will not be taken into account for the domestic contribution percentage calculation.

Calculation of the incentive amount: The Renewable Energy Law provides a chart indicating the amounts of incentives applicable to each domestic component. However, the Draft Regulation provides a formula for

<sup>8</sup> As extended by the Council of Ministers Decision No. 2013/5625 published in the Official Gazette No. 28842, dated 5 December 2013.

<sup>9</sup> Published in the Official Gazette No. 25819, dated 18 May 2005.

<sup>10</sup> Published in the Official Gazette No. 27969, dated 19 June 2011.

<sup>11</sup> Published in the Official Gazette No. 29118, dated 13 September 2014.

calculation of domestic production incentives. This formula is based on "domestic contribution percentage" calculated pursuant to the Communiqué, meaning that domestic component incentives will be calculated *pro rata* to the applicable domestic contribution percentage. In other words, only a 100% domestic component for the purposes of the Draft Regulation will be able to fully benefit from the domestic component incentive envisaged under the Renewable Energy Law.

□ Transition period: Draft Regulation provides a transition period for renewable energy projects that benefited from the domestic contribution incentive during the preceding YEKDEM period. Under the Draft Regulation, the domestic contribution percentage for operational projects which have been commissioned prior to 31 October 2015 and which has an actual domestic contribution percentage of less than 51% will be deemed as 51%. Yet, in any case, the above-mentioned calculation method under the Draft Regulation will apply to all operational projects that currently benefit from the domestic production incentive mechanism.

#### **Article**

#### COP 21: A different kind of revolution?

Av. Özlem Kızıl Voyvoda and Av. Hüseyin Emre Eney

Ever since the nations around the globe first started to acknowledge one of our planet's most hazardous issues to date—climate change—only small efforts to tackle this issue have been made. Although some might say that this has been due to "top-down" legal drafting methods, which have caused parties to refrain from any legally binding obligations, it is an undeniable fact that the international community has done little to prevent the disastrous outcomes likely to materialize. However, as awareness among people evolved on the severity of the issue, a solid plan of action has started to be demanded from the negotiators of the parties to the UN Framework Convention on Climate Change ("UNFCCC" or the "Convention").<sup>12</sup>

According to Article 7(4) of the UNFCCC, parties that have ratified the Convention have agreed to attend ordinary sessions of the Conference of Parties ("COP") to be held annually for finding ways to fight climate change, through their representatives. Over the years, many of the iconic preventive attempts—such as the adoption of the Kyoto Protocol<sup>13</sup>—were outcomes of COPs. At COP 17, parties adopted the Durban Platform for Enhanced Action ("Durban Action Plan"), calling for a "protocol, another legal instrument or an agreed outcome with legal force, under the Convention applicable to all parties" to be adopted at COP 21 in Paris<sup>14</sup>. This mandate was accepted because of Kyoto Protocol's failure to answer to the drastic increase of greenhouse gas emissions ("GHG Emissions") worldwide, as well as the expiry of the first commitment period of the Kyoto Protocol in 2012. Indeed, currently, the countries that have ratified the Kyoto Protocol correspond to less than 15% of global emissions. With Canada's announcement of withdrawal, and Australia and United States' avoidance of even ratifying the Kyoto Protocol, it is almost impossible to claim that the Kyoto Protocol reached its objective.

Nonetheless, ferocious negotiations took place at the COP 21 held in Paris between 30 November and 12 December last year, where high level representatives of 195 countries (each "Party" and together "Parties") have agreed to materialize the Durban Action Plan by adopting an international agreement (the "Paris Agreement"). Thereby, a clear goal to combat climate change has been set as the motto of the Paris Agreement, that is: "holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels." <sup>15</sup>

Some of the most important outcomes of the Paris Agreement include:

Introducing a written undertaking called "Nationally Determined Contribution" ("NDC") to establish binding commitments from each Party that include its solid strategies to mitigate its GHG Emissions which has to be renewed every five years in a way to set more progressive goals. All NDCs will be subject to monitoring and revision by an international body.

<sup>12</sup> United Nations Framework Convention on Climate Change is an environmental international treaty which has entered into force on 21 March 1994. The objective, which is established in Article 2, is "[...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

<sup>13</sup> The Kyoto Protocol is an international treaty which extends the scope of UNFCCC, adopted on 11 December 1997 and entered into force on 16 February 2005. The treaty recognizes that the current high levels of GHG emissions are partly caused by the heavy industrialization of the developed countries. The main objective of the treaty is to "reduce the current greenhouse gas emissions to a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2). The treaty introduces the "common but differentiated mechanisms", where it puts the obligation to reduce the greenhouse gas emissions on developed countries, since they are responsible historically of the high level of increase.

<sup>14</sup> Bodansky, Daniel, Sandra Day O'Connor, and Lavanya Rajamani. Key Legal Issues in the 2015 Climate Negotiations. C2ES. Center for Climate and Energy Solutions, June 2015.

<sup>15</sup> Article 2, Paragraph 1, Sub-paragraph 1 of the Paris Agreement, FCCC/CP/2015/L.9.

- Extending the use of the Green Climate Fund<sup>16</sup> of US\$100 billion from 2020 to 2025; providing financial and technical support to help developing countries by prioritizing least developed countries and island countries that would be most affected by adverse climate changes.
- □ Forming a collective process to achieve and monitor the target of the Paris Agreement by envisaging meetings of the Parties every five years and a global stock take to take place in 2023.
- □ Establishing a carbon market, where a carbon budget enables countries to engage in international emissions trading<sup>17</sup>.

The agreement has opened for signature as of 22 April 2016 and signed by 175 countries on the same date, including Turkey. With regard to its entry into force, the Agreement has adopted a double trigger method, where "...at least 55 Parties to the Convention accounting in total for at least an estimated 55% of the total global greenhouse gas emissions have deposited their instruments of ratification..." 18

### Legal character and binding provisions of the Paris Agreement

The Durban Action Plan had in fact mandated a legal instrument with a legal force to be adopted by the end of 2015. However, based on the disappointing experience from the Kyoto Protocol and the failed Copenhagen Accord in 2009, both experts and representatives were aware that the Parties would be unwilling to adopt an agreement consisting entirely of binding provisions. Thus, the Paris Agreement provides for a "hybrid" approach, combining legislative flexibility with numerous crucial legally binding obligations (such as the implementation of NDCs, as mentioned above). This approach makes the core provisions robust and permanent, while the content of the Agreement is left open to progressive development and updates throughout upcoming COPs. <sup>19</sup>

The Paris Agreement, as mentioned above, provides that each Party to the Agreement shall "prepare, communicate and maintain" an NDC to be subject to adjustment every five years and provide necessary information for its transparency. Yet, the Agreement tries to establish a balance by neither dictating to the Parties on how to implement such NDCs to their domestic legislation, nor providing any punitive measure in case of failure to meet the NDCs to be set. However, this approach has received heavy criticism from certain climate experts and representatives of non-governmental organizations.

#### Position of Turkey

Turkey submitted its Intended Nationally Determined Contribution ("INDC") on 30 September 2015, following the invitation of the ad hoc working group in Durban to all Parties to the UNFCCC to initiate and/or intensify their preparations and to draft their INDC.

The main goal of Turkey set in its INDC foresees the reduction of GHG Emissions by 21% of the envisaged increase in its GHG Emissions in accordance with the Business as Usual<sup>20</sup> level by 2030.<sup>21</sup> In its INDC, Turkey has listed a series of plans and policies to mitigate the increase of its GHG Emissions in order to fulfill the objective of the Agreement. These policies are divided into seven sectors: comprising of energy, industry, transport, construction, agriculture, waste and forestry.

Whilst listing the plans to be implemented in the energy sector towards 2030, Turkey establishes some ambitious policies. These could be illustrated as increasing capacity of electricity from solar power to 10 GWh and from wind power to 16 GWh.<sup>22</sup> In fact, considering that by the end of 2015, the capacity of electricity in Turkey from wind power was 956.2 MW<sup>23</sup> and 290 MW from solar power<sup>24</sup>, it can be stated that Turkey has been promoting the generation of electricity from the respective sources. Along with these progressive policies, Turkey is also planning to tap its full hydroelectric potential, commissioning a nuclear power plant by 2030 and rehabilitating the state owned power plants.

<sup>16</sup> The "Green Climate Fund" is a fund aimed to support projects, programs and other activities in developing countries that is in line with the UNFCCC's objectives. Green Climate Fund was first introduced in COP 16 in Cancun. Industrialized and developed countries have undertaken to provide funds rising to \$100 billion per year by 2020 to support mitigation actions, which would be raised both from public and private sources.

<sup>17</sup> Center for Climate and Energy Solutions, Outcomes of the U.N. Climate Change Conference in Paris. C2ES. December 2015.

<sup>18</sup> Article 21, Paragraph 1 of the Paris Agreement, FCCC/CP/2015/L.9.

<sup>19</sup> Maljean-Dubois, Sandrine and Spencer, Thomas A. and Wemaere, Matthieu, *The Legal Form of the Paris Climate Agreement: A Comprehensive Assessment of Options*, February 1, 2015. CCLR, Forthcoming. Available at SSRN: http://ssrn.com/abstract=2616421

<sup>20</sup> This phrase is defined in the Business Dictionary as referring to the normal conduct of business regardless of current circumstances, especially difficult events which pose a potential negative impact. It also means "maintaining the status quo".

<sup>21</sup> Republic of Turkey's Intended Nationally Determined Contribution, 30 September 2015, Available at: http://www4.unfccc.int/submissions/indc/Submission%20 Pages/submissions.aspx

<sup>22</sup> Please see the footnote 10.

<sup>23</sup> Turkish Wind Energy Statistics Report, January 2016, Turkish Wind Energy Association, Available at: http://www.tureb.com.tr/files/bilgi\_bankasi/turkiye\_res\_durumu/turkiye\_ruzgar\_enerji\_istatistik\_raporu\_ocak\_2016.pdf

<sup>24</sup> For information, visit: http://www.enerjiatlasi.com/gunes/

Although at first glance, the current INDC of Turkey may give the impression that Turkey is moving away from its long-established trend to generate electricity from fossil fuels towards renewable energy sources, this is not exactly the case. Indeed, it seems that while Turkey's economic development will continue (which is 5% real gross domestic product growth on a yearly basis in the medium term)<sup>25</sup>, Turkey will also keep on encouraging the production of electricity generation facilities based on fossil fuels. This argument is also supported by Turkey's long debated plan to increase the capacity of coal-fired electricity generation plants by 18.5 GWh by 2023<sup>26</sup>, which makes the country the third largest planned investor in coal.<sup>27</sup> The plan to increase the capacity of coal-fired energy plants is also mentioned in the 2016 budget presentation of Ministry of Energy and Natural Resources.28

Unlike countries like China, instead of projecting a peak in its GHG Emission, Turkey, in its INDC, has only projected a decrease in total increase of its GHG Emission.

#### Conclusion

The Paris Agreement is still at the very heart of international debate. Although many still argue that, for the Agreement to be successful, its provision should have been mandatory, an unprecedented willingness of 195 nations at COP 21 is an indication of the contrary. It is true that this is only the beginning of tackling climate issues and even with the successful implementation of the Paris pledges, average warming will reach up to 2.7 degrees Celsius by 2100. Thus, there is no doubt that a lot still has to be done and for countries like Turkey it is time to adapt new technologies for the efficiency of renewable power plants. For energy sector investors both in Turkey and abroad, the Paris Agreement should not be perceived as a potential threat for the continuity of their operations. On the contrary, with the €500 million injection of the European Bank for Reconstruction and Development into an energy financing facility focused on renewables and energy efficiency in Turkey, this should be seen as a step towards the increase of efficiency and development of the future energy market in Turkey.29

#### Other recent developments

## Stay order regarding the Circular of the Prime Ministry No. 2012/15 with respect to Mining Licenses

As known, although it is not explicitly stipulated in its wording, the General Directorate of Mining Affairs had been requesting the Prime Ministry's permission for issuance of mining licenses pursuant to the Prime Ministry Circular No. 2012/15<sup>30</sup> (the "**Circular**"). This relates to the use of immovable properties at the ownership or disposal of State institutions and organizations (excluding Municipalities and special provincial administrations) or companies 50% of whose shares are held by State institutions or organizations to the Prime Ministry's approval. We have been witnessing that the Prime Ministry, occasionally, has not granted permission to some license applications which the General Directorate of Mining Affairs had previously approved.

A company whose mining license application had been rejected by the Prime Ministry filed a lawsuit for the cancellation of the Circular before the Council of State (*Danıştay*), stating that pursuant to Article 7 of the Mining Law No. 3213, all limitations to the mining activities can solely be regulated by law, and mine explorations cannot be subject to any other permission but to those already stipulated under the Mining Law.

On 11 November 2015, the 8th Chamber of the Council of State issued an order of stay on the Circular with respect to its application to issuance of mining licenses. The Chamber reasoned its decisions by stating that it was against the law for the Circular to stipulate an additional permission mechanism not defined in the Mining Law as per the hierarchy of the laws. It is, however, unclear whether this stay order also covers the forestry permit applications made within the scope of mining activities.

<sup>25</sup> Republic of Turkey Ministry of Development, 10th Development Plan Between 2014 – 2018.

<sup>26</sup> Kömürcüler, Güneş, Questions rising over Turkey's overemphasis on coal resources, Hurriyet Daily News, March 4, 2016.

<sup>27</sup> Crisp, James, Turkey to double coal capacity in four years. EurActiv, May 20, 2015.

<sup>28 2016</sup> budget presentation of Ministry of Energy and Natural Resources to the Turkish Parliament Plan and Budget Commission, available at:
http://www.enerji.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fB%c3%bct%c3%a7e+Konu%c5%9fmas%c4%b1%2fSay%c4%b1n+Bakan+B%c3%bct%c3%a7e+Sunu%c5%9f+Metni.pdf

<sup>29</sup> Tsanova, Tsvetomira, EBRD boosts by EUR 500m clean energy financing programme in Turkey. SeeNews, February 11, 2016.

<sup>30</sup> Published in the Official Gazette No. 28325; dated 16 June 2012.

## **Establishment of the Energy Investments Monitoring and Coordination Board**

With Circular No. 2016/6, which was promulgated and entered into force on 24 February 2016, the Prime Ministry has decided on the establishment of a Board of Monitoring and Coordination for Energy Investments (the "**Board**").<sup>31</sup> The Board will be composed of representatives of public and private authorities who play a role in relation to permits required for energy investments. Its duty will be to accelerate investment processes by ensuring coordination among such authorities.

## Recent changes on monitoring of capital outflows

On 30 December 2015, the Undersecretariat of the Treasury amended the Communiqué No. 2008-32/34 on Decree No. 32 regarding the Protection of the Value of the Turkish Lira ("**Decree No. 32**").<sup>32</sup> The amendments cover the following:

- People travelling abroad with Turkish Lira or documents that can be used for payment with Turkish lira (i.e., commercial bills, promissory notes, credit letters, credit cards, travel checks etc.) exceeding TRY 25,000 or foreign currency exceeding the equivalent of €10,000 are required to notify the customs administrations via a cash declaration form. Failure to submit such forms or making misleading statements on such forms will result in notification of the Financial Crimes Investigation Board and the public prosecutor and retention of the aforementioned funds by the customs administration until the end of investigation.
- □ Customs administrations are required to inform the Turkish Central Bank of Turkish lira and foreign exchange outflows exceeding US\$50,000 on a monthly basis. Also Turkish banks are required to inform the Turkish Central Bank of outflow transactions in the same amounts within 30 days of such transaction. Import, export, non-deliverable and invisible transactions are exempt from this requirement.

□ In line with these amendments, the Ministry of Economy has to be notified also of capital outflows for establishment of a company or a branch abroad, for becoming a shareholder in such an entity or liquidation procedures or share transfers of those entities. Furthermore, annual reporting of capital outflows will be filed to the Ministry of Economy, instead of the Treasury.

## Obligation to obtain ISO 27001 Certificates under certain Licensing Regulations

Amendments made to the licensing regulations within the scope of electricity, gas and petroleum markets ("**Licensing Regulations**") by EMRA have made it necessary to obtain an ISO 27001 Certificate on information security management systems this requires fulfillment of certain standards that assist organizations in managing the security of sensitive company information related to, for example, intellectual property, processes and IT systems.

The amendments published in the Official Gazette (No. 29217 dated 26 December 2014) oblige license holders to acquire an ISO 27001 Certificate from institutions accredited by the Turkish Accreditation Agency (TÜRKAK) until 1 March 2016.

Relevant license holders under each respective energy market that must have obtained such certificate by 1 March 2016 are as follows:

- Electricity generation, transmission, market operation and distribution license holders;
- Natural gas transmission and distribution license holders; and
- □ Refinery license holders.

Moreover, it is important to note that a Draft Regulation on the Amendment of the Electricity Market Licensing Regulation (the "**Draft Amendment**") has been prepared, which is currently accessible on EMRA's website for public consultation until 25 March 2016. The proposed amendments all relate to the obligations of different license holders and include provisions on the requirement to

<sup>31</sup> Published in the Official Gazette No. 29634; dated 24.02.2016.

<sup>32</sup> Published in the Official Gazette No. 26801; dated 28 February 2008.

obtain ISO/IEC 27001 certificates. One of the provisions on the obligation of transmission license holders would require demonstrating—within 24 months of obtaining the transmission license—that operations are conducted in accordance to the ISO standards.

#### **Decision of the Constitutional Court on Health PPP Law**

A cancellation lawsuit was filed before the Constitutional Court against certain provisions of the Health Public Private Partnership Law No. 6428, which was amended in 2014. The Constitutional Court rejected such cancellation request by its decision published in the Official Gazette on 3 March 2016. The provisions which were requested to be cancelled are related to the amendment of the project agreements (Article 4/9) and the applicability of the law (Provisional Articles 1/1 and 1/3). With such decision, the compliance with the Constitution of the 2014 amendments to the Health Public Private Partnership Law has been confirmed by the Constitutional Court. The decision was taken by the majority of votes with some judges giving dissenting opinions.

## Recent and upcoming conferences and events

- 19 November 2015, London: Globalizing the PPP model, A Case Study of the Opportunities and Challenges in Turkey organized by White & Case LLP London Office. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, participated as panelist.
- 25 26 November 2015, Ankara: 4<sup>th</sup> Annual PPP in Turkey Forum organized by E.E.L. Events. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated the panel "Funding of Turkish PPP projects".
- 9 11 February 2016, Istanbul: 2<sup>nd</sup> Annual PPP Airport Investments Summit organized by the Directorate General of State Airports Authority of Turkey. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated the panel on the "Istanbul New Airport Project".
- 29 30 March 2016, Istanbul: Conference on International Construction Contracts and Dispute Resolution organized jointly by the ICC and FIDIC.
- 30 31 March 2016, Istanbul: 4th Annual Airport Development & Expansion Summit organized by Noppen. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated a panel on the Istanbul New Airport Project.
- 26 28 April 2016, Istanbul: 2<sup>nd</sup> PPP Healthcare Summit organized under the auspices of Turkey's Ministry of Health. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, will speak on a panel on the legal aspects of health PPPs.
- 24 25 May 2016, Istanbul: 4<sup>th</sup> Annual Turkish Energy and Infrastructure Expo and Conference organized by Green World Conferences. Av. Naz Bandik Hatipoğlu, associate at Çakmak Avukatlık Bürosu, will moderate a debate on Turkish Energy and Infrastructure PPPs.

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