Çakmak Avukatlık Ortaklığı

Newsletter | Spring 2017

Turkish Energy & Infrastructure

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Recent Changes to the Balancing and Settlement Market

The Energy Market Regulatory Authority Decisions No. 7042-5 and 7042-6, both dated 20 April 2017 ("**Amending Decisions**"), were published in the Official Gazette No. 30051, dated 28 April 2017. They introduced certain amendments to two important instruments of the balancing and settlement market, which are the Procedures and Principles Relating to the Structure and Assessment of Day-Ahead Market Bids[1] ("**Day-Ahead Market Procedures and Principles**") and the Security Procedures and Principles[2]. Subsequently, the Electricity Market Balancing and Settlement Regulation[3] ("**Regulation**") was also amended by the Regulation regarding the Amendment of Electricity Market Balancing and Settlement Regulation[4] ("**Amending Regulation**") in line with the Amending Decisions to harmonize all the instruments of the electricity market. The highlights of these amendments are:

Amendments to the Day-Ahead Market Procedures and Principles

- Before the Amending Decisions, under Article 6 (4) of the Day-Ahead Market Procedures and Principles, block offers had to cover a minimum of four consecutive hours. The Amending Decisions decrease this minimum time period to three hours.

[1] Published in the Official Gazette No.29725 dated 28.05.2016.
[2] Published in the Official Gazette No.29725 dated 28.05.2016.
[3] Published in the Official Gazette No.27200 dated 14.04.2009.
[4] Published in the Official Gazette No.30068 dated 16.05.2017.

- The Amending Decisions increased the number of the block offers that can be submitted at three levels of depth. Now, a maximum of three block offers can be submitted at the second and third levels if the total number of block offers connected to each other does not exceed six.

Amendments to the Security Procedures and Principles

- The Amending Decisions eliminated the requirement to submit 25% of the initial security (*başlangıç teminatı*) in cash.

- With the Amending Decisions, an additional security control on each business day has been introduced for the day-ahead market. Now, the securities submitted for the day-ahead market will also be controlled at 5:00 p.m., in addition to the control that is conducted at 11:00 a.m, which brings the day-ahead market into line with the intra-day market.

- While making the required security calculations for the second and following days of weekends or official holidays and, with respect to the day-ahead market, for the first business day following those holidays, the minimum cash security and total security amounts which are announced by Enerji Piyasaları İşletme A.Ş. (*Market Operator*) on the day before the weekends or official holidays at 2:30 p.m. shall be taken into consideration instead of the total security amount calculated at 11:00 a.m. security control.

- The days during which İstanbul Takas ve Saklama Bankası A.Ş. (*Takasbank, the central settlement institution*) does not provide exchange or security management services will be accepted as a "holiday". It is unclear, however, if the regulations regarding weekends and/or official holidays will also apply to these days.

- The market participants on the selling side who do not complete the required security amounts at the 11:00 a.m. security control (for weekends and/or official holidays at the 5:00 p.m. security control to be conducted on the business day before the weekend and/or official holiday) will not be allowed to notify any new bilateral agreements and any prospective bilateral agreement notifications that they had already made will be cancelled. Before the Amending Decisions, these sanctions applied only to insufficiency of the initial security and additional security (*ek teminat*) amounts.

- The additional securities determined on risk basis will be taken into account for the total security calculation on the same day when the participant is notified. Any failure to provide these additional securities will trigger the application of the additional sanctions that are mentioned in the paragraph above.

Amendments to the Regulation

- In addition to the amendments made to harmonize the Regulation in line with the Amending Decisions, the Amending Regulation provides that the license-exempt generation facilities from which the authorized supply companies purchase electricity will be recorded under a separate category for settlement purposes.

Recent Changes to the Nuclear Legislation

In March and April 2017, the Turkish Atomic Energy Authority ("**TAEK**") adopted four new regulations: (i) Regulation on the Construction Supervision of Nuclear Facilities[5] ("**Construction Supervision Regulation**"); (ii) Regulation on the Management System for the Nuclear Facilities[6] ("**Management System Regulation**"); (iii) Regulation Repealing the Nuclear Definitions Regulation[7]; and (iv) Regulation on the Operation Organization, Qualifications and Training of Operating Staff, and Operating Staff Licenses of Nuclear Facilities[8] ("**Organization Regulation**"). The regulations' main features are:

1) Construction Supervision Regulation

Previously, the supervision of the construction of nuclear facilities was regulated by the Construction Law No. 3194[9] ("**Construction Law**") and Construction Supervision Law No. 4708[10] ("**Construction Supervision Law**"). Then Additional Article 1 was added to the Turkish Atomic Energy Authority Law No. 2690[11] ("**TAEK Law**") by the Amending Law No. 6719[12], which stated that the provisions of the Construction Law regarding scientific responsibility and the provisions of the Construction Supervision Law will not apply to nuclear facilities. It further stated that the construction supervision for nuclear facilities would be conducted by legal entities authorized and licensed by TAEK, who was to adopt a regulation about this subject within 1 year of the effective date of the Amending Law No. 6719, which was 4 June 2016. The Construction Supervision Regulation became effective on 31 March 2017, before the deadline in the TAEK Law.

5 Published in the Official Gazette No.30024 dated 31.03.2017.
6 Published in the Official Gazette No.30032 dated 08.04.2017.
7 Published in the Official Gazette No.30024 dated 31.03.2017.
8 Published in the Official Gazette No.30029 dated 05.04.2017.
9 Published in the Official Gazette No.18749 dated 09.05.1985.
10 Published in the Official Gazette No.24461 dated 13.07.2001.
11 Published in the Official Gazette No.17753 dated 13.07.1982.
12 Published in the Official Gazette No.29745 dated 17.06.2016.

i. Execution of an agreement with an Authorized Construction Supervision Company

The owners of nuclear facilities must execute an agreement with a construction supervision company authorized by TAEK ("**Authorized Supervision Company**") before starting construction. The owners must notify these agreements to TAEK within 30 days of execution.

ii. Construction license and building use permit requirement

Under the Construction Law, the owners of nuclear facilities must obtain a construction license and building use permit. These permits will be prepared by the Ministry of Environment and Urban Planning, who takes TAEK's opinion into account.

iii. Liabilities of the owner

Nuclear facility owners' strict liability will not be mitigated by any of the following: (i) the verification and/or approval by a public institution or Authorized Supervision Company of a facility's preliminary studies and final designs; (ii) the issuance of permits, licenses, or similar authorizations for a facility's activities; or (iii) the supervision of a facility's activities by public institutions or Authorized Supervision Companies. Neither public institutions nor Authorized Supervision Companies will be jointly liable with nuclear facility owners.

iv. Powers of the Authorized Supervision Companies

The Authorized Supervision Companies cannot transfer their authority but they can outsource the construction supervision activities if the total value of the agreement signed for outsourced services (except laboratory services) does not exceed 30% of the value of the service agreement executed with the facility-owner. The Authorized Supervision Company remains responsible for the outsourced services.

The Authorized Supervision Companies can suspend a nuclear facility's activities if they discover discrepancies and defaults.

v. Existing Nuclear Facilities

a. The following procedures apply to service agreements executed before the Construction Supervision Regulation's effective date for the works that started within the same period:

   - ☐ the nuclear facility owner must notify TAEK of the service agreement within 30 days of the Construction Supervision Regulation's effective date;
   - ☐ the supervision company must obtain an authorization certificate from TAEK within one year of the Construction Supervision Regulations' effective date; and
   - ☐ the existing service agreement must be amended to comply with the Construction Supervision Regulation within six months of the supervision company's authorization from TAEK.

b. For works that will start in the six months following the Construction Supervision Regulation's effective date, the nuclear facility owner can also execute a construction supervision agreement with an unauthorized supervision company. Here, the same procedures as those listed immediately above will also apply following the service agreement's execution.

2) Management System Regulation

The Management System Regulation repeals the Regulation on the Basic Requirements of Quality Management for the Safety of Nuclear Facilities and became effective on 8 April 2017. It outlines the basic requirements for developing a management system that prioritizes safety and security and supports a powerful safety culture within the legal entity that will construct, operate, decommission, and close a nuclear facility, and continuously augment the system ("**Authorized Legal Entity**").

According to the Management System Regulation, the Authorized Legal Entity is responsible for ensuring safety in all activities and for taking all precautions necessary for safety and security. The Authorized Legal Entity will also be responsible for the safety and security of all outsourced services or products.

The Authorized Legal Entity of an existing nuclear facility will prepare and implement an action plan within two years to safeguard its compatibility with the Management System Regulation. If an Authorized Legal Entity declares within this two year period that its nuclear facility is not compatible with the Management System Regulation, the former regulation will apply for that nuclear facility.

3) Regulation Repealing the Nuclear Definitions Regulation

The Regulation Repealing the Nuclear Definitions Regulation entered into force on 31 March 2017 and repealed the Nuclear Definitions Regulation[13] in its entirety by stating that any references made to the Nuclear Definitions Regulation will be deemed made to the relevant regulations adopted by TAEK.

[13] Published in the Official Gazette No.20986 dated 09.09.1991.

4) Organization Regulation

The Organization Regulation became effective on 5 April 2017 and sets out detailed provisions on business organization, qualities and training of operating staff, and licensing of operating staff of nuclear facilities.

Amendments to the Electricity Generation Facilities Acceptance Regulation

On 14 April 2017, the Ministry of Energy and Natural Resources ("**MENR**") introduced amendments to the Electricity Generation Facilities Acceptance Regulation[14] ("**Regulation**"). This amending regulation ("**Amending Regulation**")[15] entered into force retroactively as of 1 April 2017.

The main reason for this retroactive application relates to the effectiveness date of the new preliminary acceptance regime introduced with the Regulation. Briefly, under this regime, control firms authorized by MENR conduct a technical capability test, and then issue a preliminary acceptance certificate for the generation facilities that pass the test. With this certificate, the facilities can start operations. They must complete their temporary acceptance formalities within six months of the issuance of the preliminary acceptance certificate.

Previously, the Regulation had stipulated the preliminary acceptance regime did not apply until 31 March 2017. Now, the Amending Regulation provides that, as of 1 April 2017, only the facilities which will be responsible for executing an agreement with a MENR-authorized control firm will be subject to the temporary acceptance procedures. MENR will determine the scope of such responsibility.

The Amending Regulation also clarifies that the final acceptance procedure for electricity generation facilities envisaged under the former legislation will no longer apply to facilities that already completed their temporary acceptance under the old regime.

Regulation on the Implementation of Industrial Property Law

The awaited Regulation on the Implementation of Industrial Property Law ("**Regulation**") entered into force on 24 April 2017.[16] The Regulation sets out the principles and procedures for the acquisition and maintenance of industrial property. It mainly specifies the documents to be submitted to the Turkish Patent and Trademark Institution ("**Institution**") and determines the scope of the information to be included in the relevant journals, registers and licenses.

The highlights of the Regulation are:

- **Attachments & Pledges:** Trademarks, designs and patents can be subject to attachment or pledge. Although these encumbrances must be recorded in the registry and published in the journal, they do not prevent the transfer of the right or the cessation of the right due to lack of documents required or nonpayment of fees. Under the Law No. 6750 on Movable Pledges on Commercial Transactions[17], the pledges registered will be communicated to the Registry of Pledged Movables.

- **Transfers:** If a trademark, patent, or design is fully or partially transferred, the change in the ownership right must be registered and published in the journal. For partially transferred rights, the protection period and the commencement date of the protection does not change. For patent transfers, the transfer value must be specified in either the transfer contract or the request form.

- **Trademarks**: In addition to the detailed provisions related to the application and registration processes, the Regulation provides the procedure and conditions required for the exchange of national and international applications under the Madrid Protocol[18]. It also sets out the principles for any objections to be made against registration applications published in the journal, exemplifies the types of evidence to be used, and lists the stages of a possible reconciliation.

- **Geographical signs and traditional product names**: The Regulation provides that within 6 months of the date on which a geographical sign or traditional product name is published in the journal, the producers of the products or the suppliers who contributed to the production will notify the relevant applicant that they are making a production that falls within the scope of the geographical sign or traditional product name to be registered. For the geographical signs and traditional product names that were registered before the effective date of the Regulation, the notification must be made by 10 July 2017, and the audit reports prepared by the auditor appointed in accordance with the conditions specified in the Regulation, which confirms that

[14] Published in the Official Gazette No.29524 dated 06.11.2015.

[15] Published in the Official Gazette No.30038 dated 14.04.2017.

[16] Published in the Official Gazette No.30047 dated 24.04.2017.

[17] Published in the Official Gazette No.29871 dated 28.10.2016.

[18] The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks adopted on June 27, 1989 (as amended on November 12, 2007).

the produced goods are in compliance with the specifications of the registered product, must be submitted to the Institution by 10 January 2018.

- **Patents**: In addition to other provisions regarding patents, the Regulation prescribes the request for substantive examination irrevocable. The number of notifications to be made to the applicant for correction and amendment of the application where the application and/or the relevant discovery is found to be inconsistent with the Law No.6769 on Industrial Property[19] is limited to three by the Regulation. Furthermore, the Regulation facilitates the continuity of the procedures by providing the mechanisms for "maintaining the operations" and "re-establishment of the rights" for operations that were not conducted within the statutory period and the consequent forfeitures. It also mentions the exceptional cases where such mechanisms are not applicable.

Natural Gas Organized Wholesale Market

On 31 March 2017, the Energy Market Regulatory Authority ("**EMRA**") published the Natural Gas Organized Wholesale Market Regulation[20] ("**Regulation**"). As envisaged under the Electricity Market Law, No. 6446[21] and the Articles of Association of Enerji Piyasaları İşletme Anonim Şirketi ("**EPİAŞ**"), the Regulation introduces a regulated spot market for natural gas trading that will be operated by EPİAŞ. The Regulation envisages this market to be operational by 1 April 2018.

EMRA also published a draft of the Market Operation Principles and Procedures ("**Draft Procedures**"), which governs the operational details of this new spot market, on its website on 27 April 2017 for review by the sector players.

Currently, the market players trade pipeline gas by way of long-term supply agreements or spot trading under the "Transmission Network Operation Principles"[22] ("**Network Code**") of BOTAŞ, the state-owned natural gas utility. The spot trade, however, is not conducted through a formal market but rather an over-the-counter market where the parties conclude agreements by way of e-mails, or even by telephone.

Similar to the existing electricity market structure, the Regulation aims to create an organized natural gas spot market, which will complement the bilateral agreements between market participants. Accordingly, market participants will be able to sell and purchase natural gas, and remedy their imbalances by way of day-ahead, intra-day, and post day trades. EPİAŞ will manage the operation of this market through an electronic platform called "continuous trading platform" ("**CTP**").

The Regulation and the Draft Procedures provide that the key aspects of this spot market are:

- The natural gas will be priced, and third-party access will be facilitated on an objective, transparent, and non-discriminatory basis.

- Wholesale, import, and export license holders will be able to transact in the CTP as market participants. Although eligible consumers and local distribution companies do not have direct access to the spot market, they will be able to access it through wholesalers.

- The Draft Procedures provide that the maximum offer that may be placed through the CTP will be TRY 2500/1000Sm3. The determination of the price in TRY is noteworthy because, other than the subsidized BOTAŞ prices, gas prices are mainly determined in USD.

- Similar to the spot market that is currently operated under the Network Code, market participants will be able trade in the CTP both through (i) physical transfer entry/exit points on the condition that a capacity reservation is made for the relevant delivery point or region; and (ii) virtual "National Balancing Point" without being subject to a capacity restriction.

- EPİAŞ will carry out the financial settlement activities through Takasbank, the central settlement bank. Takasbank will also undertake tasks related to the management of securities posted by the market participants.

- The main contractual framework for the market participants will be as follows: (i) transportation agreement with BOTAŞ; (ii) participation agreement with EPİAŞ; and (iii) participation agreement with Takasbank.

- In addition to the instruments it holds under the Network Code for ensuring the physical balance of the system, BOTAŞ, in its capacity as the "additional balancing unit", will be able to participate in the market as a market participant. In addition, the system participants will be able to remedy their imbalances through the CTP. Such balancing transactions may be made by way of day-ahead, intra-day, and post day trades.

19 Published in the Official Gazette No.29944 dated 10.01.2017.
20 Published in the Official Gazette No.30024 dated 31.03.2017.
21 Published in the Official Gazette No.28603 dated 30.03.2013.
22 Published in the Official Gazette No.25561 dated 22.08.2004.

The Regulation is a very exciting development towards Turkey's goal of becoming a regional hub for the natural gas trade, which requires a mature natural gas market where the prices are determined on a transparent and competitive basis.

Principles Concerning YEKDEM Periods

On 30 March 2017, the General Directorate of Renewable Energy announced certain principles on its website about the periods for the purchase guarantees and domestic production incentives under the Renewable Energies Support Mechanism (i.e., YEKDEM) ("**Principles**"). On 9 June 2017, the same Principles were also incorporated into the Regulation Regarding Incentives on Domestic Components Used in Facilities Generating Electric Power from Renewable Energy Resources.[23]

YEKDEM legislation provides a purchase guarantee for renewable energy generation facilities for the first 10 years of their operation. In addition, for the first five years of their operation, they may benefit from further incentives if certain mechanical and/or electromechanical parts of the power plant are produced in Turkey. The legislation was not clear, however, about when these periods will start if only a certain part of the installed capacity is taken into operation and the remaining portion becomes operational later.[24]

The Principles clarify that the relevant YEKDEM periods for the entire capacity will start on the date when the first portion is taken into operation. For example, if the licensed capacity is 50 MW, and if initially 20 MW of this capacity is put into operation in 2018, and the remaining 30 MW is taken into operation in 2019, then the 10-year purchase guarantee period the 5-year domestic production incentives period will start in 2018 for the entire 50 MW plant (i.e., these periods will expire for the entire plant by 2028 and 2023 respectively).

Import Implementations on Photovoltaic (Solar) Modules and Panels

On 1 April 2017, the Ministry of Economy ("**Ministry**") imposed antidumping duties against the import of photovoltaic (solar) modules and panels originating from the People's Republic of China by the Communique on Prevention of Unfair Competition in Import No. 2017/6[25] ("**Communique No. 2017/6**"). A total of 16 Chinese exporters received an antidumping duty amounting to USD 20/m^2 while other Chinese exporters (titled simply as "others") received an antidumping duty of USD 25/m^2.

This decision came not long after the completion of the tender for a 1,000 MW solar project in the renewable energy resource areas in Karapınar, Konya on 20 March 2017. Under the tender specifications, the winning bidder must establish a solar panel factory capable of producing at least 500 MW of photovoltaic modules annually. The tender specifications also require the domestic content rate to be 60% for the first 500 MW.

On 12 May 2017, the Ministry imposed another measure by Inspection Implementations Communique No. 2017/3[26] ("**Communique No. 2017/3**"). This provides that photovoltaic (solar) modules and panels can be imported only where the importing party has obtained an inspection certificate from the Ministry. Relevant parties are required to apply to the Ministry to be obtain these certificates.

It is possible to speculate a connection between the tender and the recent communiques concerning import implementations and infer that the Turkish government is taking measures to actively support domestic production in the renewable energy sector.

Law on Restructuring of Certain Receivables

Law No. 7020 on Restructuring of Certain Receivables and Amendments of Certain Laws and a Statutory Decree ("**Law**") was adopted by the Parliament on 23 May 2017, and entered into force on 27 May 2017[27]. In a similar manner to the Law No. 6736 on Restructuring of Certain Receivables[28] that was enacted in August 2016, the Law provides for the restructuring of certain public receivables for the period after July 2016, with the aim of remedying the socio-cultural damage that resulted from the coup attempt of 15 July 2015 and to give another opportunity to the taxpayers and interested parties who could not benefit from the amnesty provided under the Law No. 6736 in 2016.

Important aspects of the Law are:

- The Law enables the restructuring of a variety of public receivables, including tax declarations, motor vehicles tax, customs taxes and other receivables tracked by the Ministry of Customs and Trade; social security premiums and receivables incurred under the Social Security

[23] Published in the Official Gazette No.29752 dated 24.06.2016.

[24] On the other hand, Energy Market Regulatory Authority had previously provided an answer to this question in "frequently asked questions" section of its web site, which reflected the same rule set out in the Principles: http://www.epdk.org.tr/TR/Dokumanlar/Elektrik/Yekdem/YekdemileIlgiliSikcaSorulanSorular

[25] Published in the Official Gazette No.30025 dated 01.04.2017.

[26] Published in the Official Gazette No.2017/3 dated 12.05.2017.

[27] Published in the Official Gazette No.30078 dated 27.05.2017.

[28] Published in the Official Gazette No.29806 dated 19.08.2016.

Law No. 5510[29]; and default interests, delay penalties and tax penalties incurred on these taxes, duties, charges and premiums, that have incurred in the previous periods.

- The Law also applies to the tax declarations submitted with reservation. Under the Law, the amounts payable will be calculated by making an adjustment in accordance with the domestic producer price index, and such amounts will not include the default interests, delay penalty and any penalties, unless the taxpayer pays the determined amounts in compliance with the Law.

- In order to be a beneficiary of the restructuring provisions of the Law, the taxpayers and interested parties must waive their claims filed against the relevant public authorities or not initiate legal proceedings, and must notify the relevant public authorities concerning their intention to enjoy the restructuring opportunities provided by the Law.

- The Law amends the Electricity Market Law No. 6446[30] concerning the scope of TETAŞ's authority to sign electricity sale and purchase agreements. Before the amendment, TETAŞ would enter into electricity sale and purchase agreements within the framework of the existing concession agreements and import and export agreements as part of the intergovernmental agreements. As per the amended wording, TETAŞ will be able to sign electricity export and import agreements, alongside the electricity sale and purchase agreements to be executed under the regime of existing concession and implementation agreements. Moreover, the Law introduces a provisional article concerning the pre-license or license holders which have not yet started operation, stating that the legal entities who wish to terminate their generation or auto-producer licenses may get back their performance bond if they apply to EMRA in two months following the entry into force of the Law.

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

On 11 May 2017, EMRA published a new regulation amending the Regulation on Certification and Support of Renewable Energy Resources[31] ("**Amending Regulation**").

The Amending Regulation provides that the license-exempt generation facilities benefiting from YEKDEM, the renewable energy resources support mechanism, will now be liable for their imbalancing costs. EMRA also amended the Electricity Market Balancing and Settlement Regulation[32] to require that such facilities be registered as a market participant to facilitate the calculation of their settlements on an individual basis.

The Amending Regulation also provides that EMRA will announce its projections for the suppliers' YEKDEM costs. EMRA announced the projections below for 2017 in its decision No. 7085 and dated 16 May 2017, where it emphasized that these figures are indicative and may be revised in parallel with the changes in parameters such as the USD/TRY exchange rate:

(2017)	MWh/TRY
May	37.419
June	33.820
July	30.691
August	26.169
September	26.654
October	25.954
November	27.198
December	25.444

New Tender Regulation on Preliminary License Applications for Wind and Solar Power Plants

On 13 May 2017, EMRA published the new Tender Regulation on Preliminary License Applications for Wind or Solar Power Generation Facilities[33] ("**Regulation**"). The Regulation replaces the former tender regulation on the same subject[34].

The Regulation was prepared in connection with the amendments introduced to the Electricity Market Law, No. 6446[35], on 3 June 2016. These amendments provided that in license tenders for the same project site or connection point, the bidder offering the lowest price for the feed-in tariff would be granted the generation license. Under the previous regime, the bidders were competing based on their offers for the highest contribution fee payable to TEİAŞ, the state owned electricity transmission company. The Regulation provides the following alternative bidding methods:

29 Published in the Official Gazette No.26200 dated 16.06.2006.
30 Published in the Official Gazette No.28603 dated 30.03.2013.
31 Published in the Official Gazette No.28782 dated 01.10.2013.
32 Published in the Official Gazette No.27200 dated 14.04.2009.
33 Published in the Official Gazette No.30065 dated 13.05.2017.
34 Published in the Official Gazette No.28843 dated 06.12.2013.
35 Published in the Official Gazette No.28603 dated 30.03.2013.

- **"Feed-in tariff minus" method**: In this method, the bidders place offers which are lower than the applicable feed-in tariff under YEKDEM, the renewable energy resources support mechanism. The winning bidder will be able to benefit from the YEKDEM purchase mechanism, based on the (lowest) bid it submitted in the tender. It may also be able to benefit from the domestic production incentives under YEKDEM. In addition, it will not pay a contribution fee.

  However, an offer placed by way of a negative offer method, which is explained below, will always prevail over an offer based on the "feed-in tariff minus" method, because the "lowest" bid wins the tender. In other words, a "feed-in tariff minus" offer may be successful in the tender only if no bidder placed a "negative offer".

- **"Negative offer" method**: In this alternative, the bidder submits a negative bid (such as "-2" USD cent/kWh). The absolute value of the bid will be multiplied with the monthly electricity generation, and this will form the contribution fee payable to EPİAŞ, the market operator, for the first 10 years of operation. And, if the winning bidder opts for participating in YEKDEM, the absolute value of this bid will be deducted from the applicable feed-in tariff under YEKDEM to establish the applicable YEKDEM price. In respect of wind projects, for example, the current feed-in tariff is 7.3 USD cent/kWh, and a bidder providing a "-2" offer will be able to sell its electricity output with 7.3 - 2 = 5.3 USD cent/kWh.

The winning bidder may or may not participate in the YEKDEM mechanism. If it does, it may also benefit from the domestic production incentives but, at the same time, it may be exposed to a low feed-in tariff, depending on its offer. On the other hand, the bidder opting not to participate in YEKDEM will sell its output in the market with market prices, but will not be able to benefit from the domestic production incentives.

Amendment to the Natural Gas Market License Regulation

The Regulation Amending the Natural Gas Market License Regulation ("**Amendment**") was published by the Energy Market Regulatory Authority on 24 May 2017. The significant changes brought by the Amendment are:

- The Amendment introduced the following definitions to Article 4 of the Natural Gas Market License Regulation: i) compressed natural gas (CNG) filling facility; ii) AutoCNG filling facility; iii) AutoCNG activity; and iv) AutoLNG filing facility. The Amendment revised the relevant articles of the Natural Gas Market License Regulation in accordance with these additions.

- Transmission license holders are now required to take ISO/IEC TR 27019 Guiding Document as a reference for the operation of their enterprise's computing and industrial control systems, in addition to the TS ISO/IEC 27002 Information Security Management System Standard. This requirement also now applies to distribution license holders who are obliged to build transportation control centers.

CNG supply licenses granted before the Amendment entered into force can be changed to AutoCNG licenses, for a fee, without revision of the issuance and expiration dates of the licenses.

Law on Production Reform Package

After a long period of preparation and negotiation, the Law Amending Certain Laws and Statutory Decrees for the Development of the Industry and Support of Production ("**Law**") which aims to facilitate industrial production and to create new areas for investment was adopted by the Turkish Parliament. The Law envisages several changes in, among others, the Industrial Zones Law No. 4737, the Organized Industrial Zones Law No. 4562, the Pasture Law No. 4342, the Coastal Law No. 3621and the Industrial Registry Law No. 6948. The Law also provides for certain tax exemptions with respect to stamp tax, property tax and the fees to be paid for land transactions in industrial zones. Other prominent changes foreseen by the Law are the possibility for natural gas distribution companies to invest in distribution networks dedicated to organized industrial zones and the exemption of TRT (Turkish Authority of Radio and Television) cut-off from the electricity payments for enterprises registered with the industry registry. The Law is expected to inter into force following its publication in the Official Gazette in the upcoming days.

Draft legislation

Draft Amendments to the Electricity Market Consumer Services Regulation

On 13 April 2017, EMRA published the "Draft Regulation Amending Electricity Market Consumer Services Regulation" ("**Draft Regulation**") on its website to receive comments until 12 May 2017.

Currently, the Electricity Market Consumer Services Regulation[36] ("**Regulation**") does not have specific provisions regarding the bilateral agreements executed by supply companies and eligible consumers. To date,

[36] Published in the Official Gazette No.28994 dated 08.05.2014.

bilateral agreements have not been strictly regulated under the legislation. However, the Draft Regulation envisages detailed provisions concerning bilateral agreements with the aim of protecting eligible consumers and providing reliable, qualified, continuous and affordable electricity services to those consumers, as well as the non-eligible consumers.

The Draft Regulation introduces certain limitations and requirements for the form and content of bilateral agreements. Prominent principles in those provisions can be summarized as follows:

- **Term:** Bilateral agreements can be executed for a definite or indefinite term. Definite term bilateral agreements can be executed for a maximum term of 2 (two) years (even in case of automatic renewals), and unless terminated by any of the parties at the end of the term, it becomes an indefinite term agreement under the same terms and conditions (including the price).

- **Form:** Bilateral agreements must be executed in written form and in two copies, one of which is to be delivered to the consumer at the time of the execution of the agreement. However, if it is not concluded in written form, the supplier is required to send the agreed terms and conditions in writing to the consumer within 7 (seven) days.

- **Price:** Fees to be determined under bilateral agreements may consist only of the following items: (i) active electricity price to be determined by the parties, (ii) fees approved by EMRA which are the amounts falling under the distribution tariffs, and (iii) taxes and funds imposed by law (*i.e.,* value added tax, electricity consumption tax, contribution payment for Turkish Radio and Television Institution, and energy fund payment). However, for the consumers directly connected to the distribution system, the fees to be paid cannot include item (ii). Suppliers are also required to provide an information form as an attachment to the bilateral agreements, which indicates the fee under the last resource supply tariff that is applicable to the same subscriber group as well as the agreed fee under the bilateral agreement, and the ratio of these two fees. Copies of the information forms are to be submitted to EMRA together with the copies of the bilateral agreements if and when requested by EMRA.

- **Amendments to the Terms and Price:** Suppliers cannot change agreement terms unilaterally. Also, unless otherwise agreed in the agreement, suppliers are not entitled to adjust the price unilaterally either. Nonetheless, if a bilateral agreement does include such a provision, the supplier is required to notify the consumer of such change in writing, at least 45 (forty-five) days in advance, stating that the consumer has the right to terminate the agreement anytime if the price is not acceptable. Failure to meet these requirements will result in the invalidity of the proposed change. Furthermore, if and when the agreement price based on indexation exceeds the price under the last resource supply tariff applicable to the same subscriber group, this needs to be notified to the consumer in advance. Otherwise the bilateral agreement is deemed terminated.

- **Default Interest:** Default interest amounts to be determined under bilateral agreements cannot be more than the amount provided in the Regulation (which is currently 1.40% for each month)[37] and accrue on daily basis.

- **Security Deposit:** As in the retail sale agreements, a security deposit may be required by the bilateral agreements. Its amount and the terms and conditions applicable for its return are provided under the agreement.

- **Termination:** Each of the parties to an indefinite term bilateral agreement can terminate the agreement anytime without providing a reason while a definite term bilateral agreement may only be terminated based on certain reasons listed in the Draft Regulation. Regardless of the agreement term and the reason for termination, suppliers are required to send a termination notice to the consumers at least 45 (forty-five) days prior to the termination date which, in any case, must be the last day of a month.

  A bilateral agreement is deemed to have been terminated upon the supplier change of the consumer which can take place (i) anytime during the indefinite term bilateral agreement or (ii) at the end of the agreed period of the definite term bilateral agreement.

- **Penalty:** A penalty may be imposed under a bilateral agreement only in case of termination without just cause. Also, if a penalty is determined for the consumer, the same also automatically applies to the supplier. The penalty amount cannot exceed the average monthly consumption amount of the consumer.

- **Jurisdiction:** Supply companies are not allowed to restrict consumers' rights to apply to competent courts.

[37] Determined with reference to Law No. 6183 on Collection of Public Receivables as adjusted by the Council of Ministers Decision No. 2010/965, published in the Official Gazette No. 27734 dated 19.10.2010.

- **Consumer Complaints:** Supply companies are required to provide a communication platform in order to receive, record and follow up on consumer claims. Such claims are required to be assessed and finalized within 15 (fifteen) days.

- **Invoices and Additional Accruals:** The provisions of the Regulation regarding invoices and additional accruals which are currently applicable under the retail sale agreements shall also apply to bilateral agreements.

Under the Draft Regulation, the proposed amendments pertaining to the term of the bilateral agreement, amendments to the terms and conditions of the agreement and its novation, the penalty clause and deposit fee to be included, and the provision concerning termination of the agreements will apply also to the bilateral agreements executed prior to the entry into force of the Draft Regulation. Furthermore, it is foreseen that the supply companies are required to return the security amounts they collected from the consumers which are exceeding the limits provided under the Draft Regulation, if any.

Draft Law on Labor Courts

The Draft Law on Labor Courts ("**Draft Law**") was submitted to the parliament on 25 May 2017. The highlights of the Draft Law are:

- **Mediation:** In respect of claims for labor receivables and damages as well as claims for reemployment, the Draft Law requires the application for mediation as a pre-requisite step before filing a lawsuit, which is envisaged to take maximum 4 weeks. However, this is not compulsory for claims for damages arising from work accidents or occupational diseases. The Draft Law contains detailed provisions on the confidentiality of the mediation negotiations, the mediation procedure, the appointment of the mediators and mediation expenses. These provisions on mediation will become effective 3 months after the Draft Law's publication date and will apply only to disputes that occur after the Draft Law's effective date.

- **Jurisdiction of the courts:** The Draft law stipulates that disputes concerning journalists under the Law No. 5953, shipmen under the Law No. 854, labor contracts under Turkish Code of Obligations No. 6098 and certain disputes arising from the Social Security Legislation will fall within the jurisdiction of the labor courts. Proceedings that were started in other courts before the Draft Law's effective date will be completed by those other courts.

- **Appeal:** The Draft Law replaces the existing 8-day appeal period with 2 weeks for the first appeal before the Regional Courts of Justice and 1 month for the appeal before the High Court of Appeals. The Draft Law also predicates the date of notification rather than the pronouncement of the judgment for the initiation of such appeal periods and lists the decisions that cannot be appealed. Lawsuits that were already pending before the Draft Law's effective date remain subject to the previous rules in terms of their appeal process.

- **Statute of limitation:** The Draft Law amends the statute of limitation to be 5 years for claims arising from annual leave payment, severance pay, damages arising from bad faith, termination of a contract without proper notification, and without observing the principle of equal treatment.

Other recent developments

Competition Board Investigations in the Electricity Sector

The Competition Board has recently initiated a number of investigations in the electricity market. Certain distribution companies have become subject of competition investigations upon complaints in respect of violation of Article 6 (*Abuse of Dominant Position*) of the Law No. 4054 on the Protection of Competition[38]. Competition Board have launched a series of investigations against (i) Akdeniz Elektrik Dağıtım A.Ş., CLK Akdeniz Elektrik Perakende Satış A.Ş., and Ak Den Enerji Dağıtım Ve Perakende Satış Hizmetleri A.Ş. with its Decision No. 16-24/407-M; (ii) Enerjisa Enerji A.Ş. and its group companies with its Decision No. 16-45/715-M; and (iii) ADM Elektrik Dağıtım A.Ş., Aydem Elektrik Perakende Satış A.Ş., GDZ Elektrik Dağıtım A.Ş., Gediz Elektrik Perakende Satış A.Ş., Bereket Enerji Grubu A.Ş. and GDZ Enerji Yatırımları A.Ş. with its Decision No. 17-07/69-M. The underlying allegation in all of these investigations is the abuse of their dominant positions by the respective distribution and retail sale companies belonging to the same corporate groups in violation of the unbundling principles of the electricity market legislation. The investigations signal the Competition Authority's ongoing attention and supervision of the electricity distribution and retail sale markets in the aftermath of the privatizations in recent years.

[38] Published in the Official Gazette No.22140 dated 13.12.1994.

EMRA Decision on Connection Fees for License-Exempt Electricity Generation

Sector players in the license-exempt electricity sector have been concerned about the higher connection fees that were envisaged to enter into force for the facilities that will become operational on or after 31 December 2017. The basis for this concern was EMRA's decision dated 29 December 2016, No. 6838[39], which provided that only the facilities that completed their temporary acceptance before 31 December 2017 would benefit from the 75% discounted connection fees during the period that the facility participates in YEKDEM, the renewable energy support mechanism.

Nevertheless, the EMRA decision dated 11 May 2017, and No. 7070[40], provided a certain level of comfort to the sector players. This decision stipulated that the 75% discount would apply if the relevant network operator issues a letter before 31 December 2017 certifying that the facility is ready for temporary acceptance. In other words, the license-exempt generation facility will be able to benefit from the discounted fees based on this letter, even if the temporary acceptance does not take place before 31 December 2017. This mitigates the practical risk of delay in temporary acceptance procedures (typically due to the competent authorities) beyond the control of the investors.

Court decisions

Turkish Constitutional Court Decisions on Lump-Sum Administrative Fines Applicable in the Petroleum and LPG Markets

The Turkish Constitutional Court **("TCC")** adopted two decisions on 7 April 2016 and 12 October 2016 numbered 2015/109 **("First Constitutional Court Decision")** and 2015/73 **("Second Constitutional Court Decision")** respectively, regarding the implementation of lump-sum administrative fines in the petroleum market and LPG market. In both cases, the applicants challenged the lump-sum administrative fines as unconstitutional. The applicants alleged that the implementation of such a fine without taking into consideration the size and class of the relevant market operations and degree of fault would violate the principles of equity and fairness, which are indispensable to the rule of law.

On the one hand, TCC ruled in the First Constitutional Court Decision that lump-sum administrative fines imposed by regulatory bodies such as the Energy Market Regulatory Authority may place serious burdens on the market players sanctioned due to their exorbitant nature. Accordingly, the First Constitutional Court Decision stressed that the statutory provisions of the Petroleum Market Law No. 5015 allowing the imposition of lump-sum administrative fines on petroleum market dealers procuring petroleum from nonaffiliated distributors is unconstitutional because it overlooks the required proportionality between the action and the applicable sanction and fairness, and these provisions therefore fail to pass the reasonableness test.

On the other hand, TCC rejected the unconstitutionality claim regarding the lump-sum administrative fines applicable in the LPG Market and recognized the discretionary power of the legislator to fix the amount of administrative fines and the principles of implementation relating thereto. According to TCC, public safety concerns outweigh the financial burdens imposed on the LPG market players.

Due to the contradiction between these two decisions discussed above, it remains unclear how TCC will approach other statutory provisions allowing the application of lump-sum fines by the governmental authorities when they are challenged before TCC.

Article

Strategic Environmental Assessment

Dr. Cem Çağatay Orak, Nigar Özbek, Nazlı Başak Ayık

I. Concept

Strategic environmental assessment ("**SEA**") is an administrative process used by the governmental authorities in the regional and local planning, which analyses the possible environmental, social and economic impacts of the governmental plans. It aims to identify and mitigate the interface risks which may arise out of the development and realization of several projects in the same region.

SEA was introduced to European legislation in 2001, with the Directive 2001/42/EC of the European Parliament and the Council of the European Union[41]. Following the adoption of the Directive and in line with the European Union harmonization process, a working group was established in Turkey by the Ministry of Environment and Urbanization of the Turkish Republic ("**Ministry**"). The purpose of this working group was to

[39] Published in the Official Gazette No.29935 (repeated 2) dated 31.12.2017.

[40] Announced on the website of EMRA on 31.05.2017.

[41] Official Journal of the European Communities, L 197/30 dated 21.07.2001.

conduct pilot SEA projects[42] and to prepare the legislative framework for the application of SEA procedures. To provide a base for the working group to develop a piece of legislation, Article 10 of the Environmental Law No. 2872[43] was amended in 2006 to include the SEA concept. With this amendment, a definition of the SEA was included in the Environmental Law No. 2872 and it was stated that the principles and procedures regarding the SEA would be determined by the Ministry. Following this amendment, the Ministry finally adopted and published the Strategic Environmental Assessment Regulation[44] ("**SEA Regulation**") on 8 April 2017.

II. Main Features of the SEA

1. Scope of Application

The plans and programs that are subject to the SEA process are listed in the SEA Regulation as follows: (i) waste management; (ii) fishery; (iii) energy; (iv) coastal management; (v) spatial planning; (vi) forestry; (vii) industry; (viii) water management; (ix) agriculture; (x) telecommunication; (xi) tourism; and (xii) transportation. The application of the SEA Regulation in the waste management, energy, industry, telecommunication and transportation sectors is delayed to 1 January 2023.

The SEA Regulation also identifies the specific types of plans/programs to which SEA procedure shall be applied in its Annex-1[45]. Annex-2 sets forth the criteria, which serve to determine whether a plan/program, which is not listed in Annex-1, should also be approved through a SEA process. Finally, Article 2 (2) of the SEA Regulation provides that the SEA does not apply to the plans/programs relating to national and civil defense, to financial and budgetary plans/programs, to zoning plans, or to transboundary plans/programs.

2. SEA Process

The governmental authority which is authorized to prepare, approve or accept a plan/program subject to the SEA Regulation or which is authorized to coordinate the preparation, approval or acceptance procedures for such a plan/program, is named as the authorized administration ("**Authorized Administration**"). If a plan/program subject to the SEA Regulation is planned to be initiated, the Authorized Administration must prepare or have prepared a SEA report and must submit the report to the Ministry.

The Authorized Administration determines the scope of the SEA report with the contribution of relevant private parties to ensure civil participation. These private parties can be universities, unions and other non-governmental institutions. Representatives of the Ministry and representatives of the Authorized Administration that are preparing the SEA report must also attend the group meetings which will determine the scope of the SEA report. Once the scope of the SEA Report is determined and approved by the Ministry, the draft of the SEA Report will be prepared and consultancy meetings will be held between the Ministry, the Authorized Administration and other relevant entities. The final version of the SEA report will be prepared in accordance with the comments received during these consultancy meetings and it will be published on the official websites of the Ministry and the Authorized Administration.

3. Intersection with EIA and SEA

Once a SEA report is prepared for a specific area, each specific Environmental Impact Assessment ("**EIA**") procedure must conform with the conclusions of the SEA report. This is because the SEA Regulation states that the SEA "*provides a framework for the projects listed in Annex-1 and Annex-2 of the EIA Regulation*". Accordingly, for the projects which are subject to the EIA procedure and which fall within the scope of a plan/program adopted in accordance with a SEA report, the SEA report must be taken into consideration when preparing the EIA report.

III. Differences Between the SEA and Cumulative Impact Assessment

The Environmental Impact Assessment Regulation[46] ("**2013 EIA Regulation**") introduced another concept similar to the SEA concept, which is the cumulative impact assessment ("**CIA**"), in 2013. The new Environmental Impact Assessment Regulation[47] (which repealed the 2013 EIA Regulation) maintains the CIA concept ("**New EIA Regulation**"). The CIA is a mechanism which analyzes not only the environmental

42 Link available at: http://scd.cevre.gov.tr/SeaMenuSayfa.aspx?SeaMenuId=2012

43 Published in the Official Gazette No.18132 dated 11.08.1983.

44 Published in the Official Gazette No.30032 dated 08.04.2017.

45 Types of plans/programs listed in Annex-1 are as follows: (1) regional development authorities action plans; (2) region plans; (3) integrated costal area plans; (4) environmental layout plans; (5) planning studies in energy sector; (6) basin-based waste management plans; (7) basin-based waste water purification action plans; (8) basin protection action plans; (9) basin drought management plans; (10) basin master plans; (11) basin flood management plans; (12) rural development plans; (13) plans concerning culture and tourism protection and development regions and tourism centers (1/100,000 and 1/50,000 scaled); (14) spatial strategic plans; (15) river basin management plans; (16) operational programs; (17) agriculture master plans; (18) tourism coastal buildings master plans; (19) industry strategy of Turkey; (20) tourism strategy of Turkey; (21) transportation and communication strategy; (22) transportation main plans; and (23) national basin management strategy.

46 Published in the Official Gazette No.28784 dated 03.10.2013.

47 Published in the Official Gazette No.20235 dated 25.11.2014.

impact of a single project but also the environmental impacts of several projects located in the same region. Both 2013 EIA Regulation and the New EIA Regulation mention the CIA concept only within their annexes that set out the general format of an EIA report without explaining how to conduct such the assessment. Despite this lack of clarity in the legislation, the judicial authorities released several decisions favoring the CIA in power and mining projects in particular[48].

The major differences between the SEA and CIA are[49]:

- The SEA is conducted by the authorized governmental authority which is responsible for developing a plan/program for a specific purpose, whereas the CIA is a part of the EIA process which is conducted by private investors;
- The SEA assesses the social and economic impacts of interfacing projects in addition to the environment, whereas the CIA considers mainly the environment; and
- The SEA provides environmental and social friendly alternatives to a specific plan/program which is in the pipeline, whereas the CIA only analyzes the interfacing impacts of projects which are either already established or are in the pipeline.

V. Conclusion

The adoption of the SEA Regulation has an undeniable importance for the healthy planning and protection of the environment. However, the results hoped for by the legislation cannot be reached without clarity or its proper application. As a result, the interfaces between the EIA and the SEA should be regulated to bring clarity and foreseeability for the individuals, governmental authorities, and investors.

Projects in Pipeline

The Turkish Stream Project

The Agreement on the Turkish Stream Gas Pipeline Project ("**Project**") between the Governments of the Turkish Republic and the Russian Federation (the "**Agreement**") was executed on 10 October 2016 and ratified by Law No. 6765. The Agreement was published in the Official Gazette No. 29928 dated 24 December 2016 in accordance with the Council of Ministers Decision No. 2016/9646 dated 20 December 2016.

The Circular Note No. 2017/5 of the Prime Ministry was published in the Official Gazette dated 5 April 2017 for the implementation of the procedures to be carried out by governmental authorities for the Project, and for the fulfillment of obligations undertaken by the Turkish Government in due time and in an efficient manner.

Privatization of Yenice HEPP

On 11 May 2017, the Privatization Administration announced the tender for the privatization of Yenice Hydroelectric Power Plant ("**Yenice HEPP**") owned by Electricity Generation Corporation (EÜAŞ) based on the transfer of operation rights model. Yenice HEPP has an installed capacity of 37.89 MWe.

The bid submission deadline is 23 June 2017.

Privatization of Güllük Marina

On 13 May 2017, the Privatization Administration announced the tender for the privatization of the Güllük Marina owned by Türkiye Denizcilik İşletmeleri A.Ş. based on the transfer of operation rights model for 36 years.

The bid submission deadline is 21 July 2017.

Recent and upcoming conferences & events

- **3-5 May 2017, İstanbul**: The 23rd International Energy and Environment Fair & Conference (ICCI 2017) organized by ICCI.
- **16 May 2017, Ankara:** Symposium on Energy Sector-related Disputes organized by Energy Law Research Institute. Dr. Cem Çağatay Orak, a partner of Çakmak Avukatlık Ortaklığı, spoke on the limitation of liability clauses in the energy sector-related contracts.

[48] Please see the following article for an analysis of such court decisions and cumulative impact assessment concept: http://www.cakmak.av.tr/articles/Power/CumulativeImpactAssessment.pdf.

[49] Please also see our Newsletter Fall 2016 Issue for the main distinctions between SEA and EIA procedures at: http://cakmak.av.tr/newsletters/Newsletter2016Fall.pdf.

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