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Turkish Energy & Infrastructure

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Recent Changes in Legislation

Industrial Zones Regulation

The Industrial Zones Regulation ("**Regulation**") entered into force on 9 February 2018 and repealed the Industrial Zones Regulation published in the Official Gazette No. 25672 dated 16 December 2004.

Significant provisions of the Regulation are as follows:

- The Ministry of Science, Industry and Technology ("**Ministry**") may *ex officio*, or upon the request of institutions, organizations or the managing company, propose the establishment of an industrial zone. The requesters shall prepare a feasibility report. If the request is made by the Ministry, the feasibility report shall be prepared by the Ministry itself. Upon the approval of the report by the Ministry, a site selection survey will be carried out to determine the location.

- The Ministry sends a summarized evaluation report of the proposed areas to the Industrial Zone Coordination Board ("**Board**") for its approval. After the Board's approval, the Council of Ministers' decision regarding the establishment of an industrial zone within the relevant area shall be published in the Official Gazette.

- Private properties located in the industrial zone and the areas outside the industrial zone that are indispensable for the infrastructure shall be expropriated. State-owned properties and immovables under the ownership and disposal of the Treasury shall be assigned for the industrial zone by the Ministry of Finance. The Ministry of Finance will grant an easement right on the expropriated property for a period of 49 years in favor of the managing company.

- All master and subdivision plans, infrastructure or superstructure projects prepared by the managing company or the investor, and the permits and licenses concerning those, such as the business operating licenses, will be subject to the Ministry's approval and supervision. The managing company and the investor(s) will be exempt from all duties and charges related to permits and licenses.

- The managing company will be responsible for the establishment and operation of the industrial zone. The chambers under the Turkish Union of

Chambers and Commodity Exchanges, local administrations, banks and finance institutions, and domestic and foreign legal entities that are operating within the zone can be the shareholders of this company. The managing company is obliged to amend its articles of association so as to manage and operate the industrial zone, within two months following the announcement in the Official Gazette of the industrial zone's establishment.

- The Council of Ministers may decide to establish "Individual Investment Areas" upon the request of domestic or foreign investors to carry out an individual industrial investment. The area must also meet the following requirements set out in the Regulation: (i) a fixed investment undertaking amounting to minimum TL 225,000.000 must exist, (ii) the investment must use high/mid-high technology, (iii) the requested land's size must be minimum 150,000 square meters and (iv) the applicant must undertake to invest over the whole land. The individual investment areas cannot be used for purposes other than social, administrative, logistic, commercial, etc. activities necessary for the operation of the area.

- "Specialized Industrial Zones", which use high-technology, determined in the development plans, enable research and development activities and operate in medical technology or agricultural industry, may also be established.

- The Council of Ministers may establish an "Exclusive Industrial Zone" in the proposed area on the following conditions: (i) if there is an industrial plant on the area, the land must be larger than 150,000 square meters; if not, it must be larger than 200,000 square meters, (ii) a new investment undertaking amounting to minimum TL 460,000,000 must exist and (iii) the applicant or investor must own or have easement or usufruct rights over at least 51% of the proposed area.

Economically Attractive Centers Program

At the end of 2017, the Economically Attractive Centers Program ("**Program**") was brought back to the agenda of the Government with the Statutory Decree No. 696, published in the Official Gazette dated 24 December 2017 and No. 30280, which entered into force upon publication. Following this, three other articles of legislation regulating the principles and procedures of the Program were published:

1) The Council of Ministers Decree Numbered 2018/11201 regarding Promotion of Investments within the Scope of Economically Attractive Centers Program ("**Decree**") was published in the Official Gazette dated 25 January 2018 and No. 30312. Some of the significant provisions of this decision are as follows:

- The scope of the Decree includes investments in the manufacturing industry and call center investments that will be carried out in the provinces set out in the Program.

- The minimum fixed investment amount is determined differently for certain provinces, ranging from TL 2-5 million.

- Energy Incentives: 30% of the monthly electricity energy expenses that do not exceed 25% of the fixed investment amount may be covered from the Ministry of Economy's ("**Ministry**") budget for three years; the total limit of the incentives may reach TL 10 million for each enterprise. The Ministry may determine the amount, rate and duration of the incentives within these limitations.

- Investors must apply to the Ministry to benefit from the incentives set out in this Decree. The Ministry submits the projects that passed the pre-assessment to the Economically Attractive Centers Program Evaluation Committee ("**Committee**") for the issuance of the incentive certificate. The Committee consists of the Minister of Economy; Minister of Science, Industry and Technology and Minister of Finance.

- The incentive certificate includes investment expenses other than those made for stock, intermediate goods and operating supplies, used machinery and equipment, road transport vehicles, and all passenger cars.

- If the investments are not completed in the provisioned time, and the investor does not perform its obligations, the incentives will be withdrawn. The unaccrued taxes because of the tax exemptions and withholding income tax will be charged including the default interest.

- The Decree annulled the "Decree on the Principles and Procedure of Implementing the Economically Attractive Centers Program", dated 28.11.2016.

- The provinces listed in Annex 1 of the Decree are as follows: Adıyaman, Ağrı, Ardahan, Batman, Bingöl, Bitlis, Diyarbakır, Elazığ, Erzincan, Erzurum, Gümüşhane, Hakkari, Iğdır, Kars, Malatya, Mardin, Muş, Siirt, Şanlıurfa, Şırnak, Tunceli, and Van.

2) The Communique on the Implementation of Decree Numbered 2018/11201 Governing Promotion of Investments within the Scope of Economically Attractive Centers Program ("**Communique**") was published in the Official

Gazette dated 15 March 2018 and No. 30361, and it entered into force upon its publication. Some of the significant provisions of the Communique are as follows:

- The energy incentive can be utilized only if the completion visa of the incentive certificate is obtained, and the incentive can only be utilized for 3 years.
- Energy Incentive Committees will be established at the provincial level to evaluate the applications from the enterprises located in the respective provinces. The Energy Incentive Committee will carry out monthly evaluations and determine the incentive amounts for each applicant. The energy incentives will be transferred to the investors' bank accounts if they do not have (i) any premium due or administrative fine debts owed to the Social Security Authority and (ii) any debts due to the Ministry of Finance.
- If the investment is transferred, the transferee can utilize the remaining energy incentive.
- The Ministry's opinion prevails in case there is a dispute regarding the application of these provisions.

3) The Decree Amending the Decree Concerning State Aids in Investments was published in the Official Gazette dated 22 February 2018 and No. 30340, and it entered into force upon its publication. The only amendment to the Decree Concerning State Aids in Investments is made in the footnote no. 11 of the Annex 2B titled "Numbers of the Sectors in Provinces which can Utilize Regional Incentives" regarding investments that take place in multiple regions. Investments taking place in multiple regions will utilize incentives from the more developed region.

4) The Bill of Law on the Establishment of New Economically Attractive Centers is currently under debate in the Turkish Parliament. The Bill of Law aims for several cities (namely Adana, Edirne, Eskişehir, Balıkesir, Kayseri, Konya, Antalya, Mersin, Diyarbakır, Van, Trabzon, Samsun, Denizli, Manisa, Erzurum and Şanlıurfa) to become economically attractive centers.

Regulation on Supervision of the Central Bank of the Republic of Turkey on Transactions Affecting Foreign Exchange Position

The Regulation on Supervision of the Central Bank of the Republic of Turkey on Transactions Affecting Foreign Exchange Position ("**Regulation**") was published in the Official Gazette on 17 February 2018 and came into force upon its publication. The Regulation introduces the principles and procedures regarding the gathering of information from the firms designated by the Central Bank of the Republic of Turkey (the "**Central Bank**") in order for the Central Bank to supervise the transactions affecting foreign exchange position. The threshold for the notification obligation is set as USD 15 million in line with the latest amendment to the Decree No. 32 on the Protection of the Value of Turkish Currency[1] ("**Amendment**") regarding the restrictions on the utilization of foreign currency loans[2].

Banks and financial institutions under the Turkish Banking Law No. 5411[3] are exempted from the notification requirement under the Regulation.

The Regulation sets forth a statement form, a data form and a Systemic Risk Data Tracing System (the "**System**"). The statement form is a form in the System and composed of binding rules for submitting the data form. The data form is a form issued by the Central Bank that obliged firms under the Regulation within the scope of the System are obliged to submit. The System is established by the Central Bank and composed of database and regulations in order to improve the efficiency in the exchange risk management. The users of the System are the Central Bank, obliged firms and auditors.

The significant provisions of the Regulation are as follows:

- Firms that have a total foreign currency cash loan and foreign currency indexed Turkish Lira loan amount of USD 15 million or more utilized abroad or in Turkey as of the end of the concerned fiscal period's last business day are obliged to notify the Central Bank the information requested through the data form, in accordance with the statement form starting from the following fiscal period.

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1 Published in the Official Gazette No. 30312, dated 25 January 2018 and this amendment will be effective as of 2 May 2018.

2 Briefly, Amendment restricts Turkish residents without foreign currency income to utilize foreign currency loans abroad or in Turkey. However, one of the exception to this restriction is that having a total loan balance in the amount of USD 15 million or more at the time of the utilization. Therefore, if there is a total loan balance exceeding USD 15 million, the utilization of foreign currency loans will not be subject to the restrictions designated under the Amendment. However, Central Bank could still supervise the foreign exchange position for these utilizations pursuant to the authorization granted by the Regulation.

3 Published in the Official Gazette No. 25983 (bis), dated 1 November 2005.

To calculate the total loan amount to determine if it meets the USD 15 million threshold, the following is taken into account:

(i) Financial statement for the latest fiscal period prepared in accordance with the Turkish Accounting Standards will be taken into account if it is available;

(ii) Otherwise, the balance sheet that is prepared to be submitted to Public Administration pursuant to tax legislation will be taken as a basis.

Note that if the total foreign currency cash loan and foreign currency indexed Turkish Lira loan amount of the firm falls below the USD 15 million threshold, the notification obligation would be terminated, effective as of the following fiscal period.

- Obliged firms must enter into an audit agreement (*denetim sözleşmesi*) within 60 days from the date of the commencement of their notification obligation. Firms' directors are liable for the accuracy and completeness of the information submitted to the Central Bank.
- The notification periods are designated as (i) one month following the termination date for the interim fiscal periods ending as of 31 March, 30 June and 30 September; and (ii) three months following the termination date for the annual fiscal period ending as of 31 December.
- The Regulation requires an audit of the notifications, which will be completed by 31 May of the following year in accordance with the Public Oversight, Accounting and Auditing Standards Authority of the Republic of Turkey ("**KGK**") regulations. The auditor shall upload the audit report and complete the approval procedure by the same date. If there is an inaccuracy regarding the information demanded by the auditor and the firm's directors do not correct it within five business days following the notification of the auditor, the auditor would not give an approval and would issue a negative opinion. This negative opinion would also be uploaded to the System by the same date. The auditor shall give notice to the KGK regarding the audit agreement, reports uploaded to the System and data notifications within the periods designated under the KGK regulations.
- All necessary actions in relation to the System mentioned above shall be taken on the website www.tcmbveri.gov.tr and all verifications, warnings, approval notifications and more of the same are done through SMS and/or e-mail sent by the System.
- A legal action would be commenced in accordance with Article 68 of the Central Bank Law No. 1211[4], which sets forth certain sanctions of judicial fine and imprisonment, in the following cases:

  (i) Data notification is not made;

  (ii) Data notification is inaccurate or incomplete; or,

  (iii) Situations in which the basis for a negative opinion is not corrected.

Amendments to the Transmission Network Operation Principles

On 8 March 2018, the Energy Market Regulatory Authority ("**EMRA**") introduced certain amendments ("**Amendments**") to the Transmission Network Operation Principles ("**Network Code**"), by the decision No. 7727[5]. The Amendments mainly focus on the harmonization of the Network Code with the regulated spot market for natural gas trading ("**Market**"), which became operational on 1 April 2018[6]. The Amendments will enter into force 30 days after the announcement by EMRA that the continuous trading platform ("**CTP**") and the related software for the invoicing procedure are operative, as set out under the Natural Gas Organized Wholesale Market Regulation[7].

With the Amendments, a new section concerning Enerji Piyasaları İşletme Anonim Şirketi's ("**EPİAŞ**") obligations as the system operator has been added to the Network Code. Accordingly, EPİAŞ will:

- Manage the settlement procedures and publish relevant data without discriminating among participants and in compliance with transparency and liability principles,
- Cooperate with Boru Hatları ile Petrol Taşıma Anonim Şirketi ("**BOTAŞ**") for the efficient usage of both the CTP and the transmission system,
- Execute the Imbalances Settlement Protocol ("**Protocol**")[8],
- Calculate the receivables and payables concerning the settlement of the imbalances and act on behalf of BOTAŞ for the notification, collection and payment of the relevant invoices,

[4] Published in the Official Gazette No. 13409, dated 14 January 1970.

[5] Published in the Official Gazette No. 30363, dated 17 March 2018.

[6] Please see our Winter 2018 and Spring 2017 Issues for further details on the establishment and functioning of the Market.

[7] Published in the Official Gazette No.30024, dated 31.03.2017.

[8] The Protocol is an agreement to be executed between BOTAŞ, EPİAŞ and the market participants (suppliers and export companies), regulating the management and settlement of the imbalances. It is drafted by BOTAŞ.

- Transmit relevant information and data on the Market to BOTAŞ,
- Publish the information, data and reports provided by BOTAŞ, and
- Register the relevant participants to the Market and set up the required correspondence system to provide BOTAŞ with necessary information on the market participants.

In addition, the Amendments brought new provisions for the settlement of the imbalances, invoicing and payment mechanisms. These provisions can be summarized as follows:

- In the Market Operation Principles and Procedures ("**Principles and Procedures**")[9], EPİAŞ will regulate the invoicing, payment, interest and default mechanisms, the management of the guarantees to be provided by market participants and the terms governing the relations with the central settlement institution (*Takasbank*). Suppliers and export companies shall fulfil their duties arising from the Network Code in accordance with the provisions in the Principles and Procedures. The Principles and Procedures are already in effect, but there may be some changes to them in view of the Amendments.
- The timing and conditions of the payment to be made to BOTAŞ as a result of the settlement procedure will be regulated under the Market Delivery Agreement[10].
- BOTAŞ will be exempt from submitting any guarantees to EPİAŞ for the activities that it performs as the natural gas transporter in the Market. Given its trading activities, BOTAŞ will also be exempt from submitting any guarantees to EPİAŞ until its vertically integrated company structure is ended.
- In case a Market participant fails to comply with the amount notifications regarding imbalance guarantees, its access to the system to receive natural gas will be blocked.
- In case a Market participant fails to provide required guarantees or to fulfil its financial obligations within the time limit set out in the Principles and Procedures:
  - (i) the agreement between the Market participant and BOTAŞ will be suspended and the access of the Market participant to the information services will cease,
  - (ii) EPİAŞ will notify EMRA of the default, and
  - (iii) the eligible consumers having an agreement with this Market participant will be deemed as the client of another market participant.

Regulation Amending the Natural Gas Market Licensing Regulation

Regulation Amending the Natural Gas Market Licensing Regulation ("**Amending Regulation**") was published in the Official Gazette No. 30394 dated 17 April 2018, and entered into force on the same date.

Novelties brought with the Amending Regulation are summarized as follows:

- The definitions of "license" and "certificate", and the relevant provisions of the Natural Gas Market Licensing Regulation ("**Licensing Regulation**") related to license/license renewal applications are amended so as to include the Energy Market Regulatory Authority ("**EMRA**"), in addition to the Energy Market Regulatory Board ("**Board**") as the competent issuing authority.
- The Amending Regulation specifies the license applications and license renewal requests to be assessed by the Board and EMRA. Accordingly, issuance and renewal applications for the natural gas and auto LNG (Liquefied Natural Gas) wholesale licenses, CNG (Compressed Natural Gas) licenses, and LNG transmission licenses shall be examined by EMRA, whereas the issuance and renewal applications for licenses regarding import, export, distribution and pipeline transmission activities shall be examined by the Board. If the applicant fulfills all the requirements, the new licenses shall be issued based on the Board decision or upon approval of EMRA's Presidency, whichever is the competent authority as per the Licensing Regulation.
- License amendments regarding the transfer of a distribution company's shares to the municipalities or municipal companies will be exempted from the license amendment fee. Also, the applications related to the license amendments concerning (i) the transfer of a distribution company's share to the municipalities or municipal companies, and (ii) the wholesale license amendments are included within the applications to be finalized by the Head of Natural Gas Market Department.

[9] Published in the Official Gazette No. 30189, dated 23 September 2017.

[10] Market Delivery Agreement is an agreement to be executed between EPİAŞ and BOTAŞ regulating the natural gas delivery terms.

- The transfer of privileged shares in the license holder company's capital is included in the transfers that are subject to the approval of the Board. But, (i) the transfers made by a real person and/or legal entity who directly holds privileged shares in the license holder company, regardless of the share amount, to the extent that such transfer does not result in the transferring shareholder's exit from the company, to another natural and/or legal person who currently holds privileged shares at the same company; and (ii) save for the transfers causing a change in shares up to 10% (5% in publicly held companies) of the capital of the license holder entity, the transfer of privileged shares made by legal persons who directly or indirectly hold shares in the license holder company, will not be subject to the approval of the Board. Nevertheless, the license holder must notify the Board of such transfer.

- The following changes in shareholding structure of a license holder are not subject to EMRA's approval: (i) the transfers of a distribution company's shares to municipalities or municipal companies, and (ii) changes in the shareholder structure of the indirect shareholders of a license holder due to capital increase. Nevertheless, the license holder must notify the Board of these changes and request license amendment for the share transfer made to the municipality or the municipal company.

- Concerning the documentation, the Amending Regulation abolishes the provision listing the required documents to be submitted for the share transfer approval applications. But, as per Annex-3 of the Licensing Regulation, the license holder legal entity's share ledger certified by the trade registry or a notary may be submitted as evidence of the new shareholding structure for the share transfer approval applications as an alternative to the certified trade registry records or the trade registry documents showing the current shareholding structure.

Communiqué on Principles and Procedures for Application to Data Controller

The Communiqué on Principles and Procedures for Application to Data Controller[11] ("**Communiqué**") was adopted by the Parliament on 10 March 2018 and entered into force on the same date. In accordance with the Law on the Protection of Personal Data[12], each data subject has the right to apply to the data controller regarding his/her personal data. This Communiqué mainly provides the principles and procedures for data subjects to exercise their rights regarding application to data controller and the corresponding obligations of data controllers who process the data subjects' personal data.

The main provisions introduced in the Communiqué are as follows:

- Data subjects can apply to data controllers via a range of methods, provided the application includes certain specified fundamental personal data. The wide range of application methods includes the following: (i) writing to the postal address of the data controller; (ii) e-mail to the registered e-mail address of the data controller via secure electronic signature; or via mobile signature; (iii) e-mail from e-mail addresses of the data subjects, which are registered in the data controller's system, to the data controller's e-mail address or (v) via software or applications developed for this purpose.

- The data controller may either accept the application or refuse it by stating the relevant reasons. In either case, the data controller's response letter shall be issued as soon as possible and within 30 days at most.

- If the response exceeds ten pages, the data controller can charge one Turkish Lira for each page exceeding the first ten pages. If the response is given through a data recorder (such as a CD, flash memory, etc.), then the data controller cannot charge an amount exceeding the data recorder's price.

Communiqué on Procedures and Principles regarding the Data Controller's Obligation to Inform

The Communiqué on Procedures and Principles regarding the Data Controller's Obligation to Inform[13] ("**Communiqué**") was adopted by the Parliament on 10 March 2018 and entered into effect on the same date. In accordance with the Law on the Protection of Personal Data[14] (**"Law"**), while collecting personal data, the data controller or the person authorized by him is obliged to inform the data subjects regarding (i) the identity of the controller and his representative, if any; (ii) the purpose of the data processing; (iii) to whom and for what purposes the processed data may be transferred; (iv) the method of and legal reason for the collection of personal data; and (v) the rights of the data subject. By publishing this Communiqué, the Turkish Personal Data Protection Board ("**Board**") determined further details about the data controller's obligation to inform and the content and method of disclosures and declarations that shall be made pursuant to this obligation.

[11] Published in the Official Gazette No. 30356, dated 10 March 2018.
[12] Published in the Official Gazette No. 29677, dated 7 April 2016.
[13] Published in the Official Gazette No. 30356, dated 10 March 2018.
[14] Published in the Official Gazette No. 29677, dated 7 April 2016.

The Communiqué provides a wide scope for the methods that can be used to perform the duty to inform, provided that these disclosures and declarations are made in clear, plain and simple language. Pursuant to the Communiqué, remarkably, disclosure shall be made every time a personal data is processed, irrespective of the data subject's request and any legislative exceptions that may apply in connection to obtaining explicit consent under the Law.

In addition to the notable provision stated above, the novelties introduced in the Communiqué are as follows:

- Declarations can be made via physical or electronic mediums, including oral and written methods, voice recordings, as well as call centers.
- If the purpose for processing personal data changes, the data subject must be informed about the new purpose before the data is processed.
- Data controllers bear the burden of proving that they have met the obligations to inform the data subjects.
- If personal data of the data subject is processed in different units of the data collector's business, the obligation to inform shall be performed separately for each business unit.
- If personal data is processed based on the data subject's explicit consent in accordance with the Law, the obligation to inform and obtain explicit consent shall be performed separately.
- If a party is required to register with the Data Controller's Registry, the information given to the data subject must comply with the information disclosed to the Data Controller's Registry.
- The purpose for processing personal data stated in the declaration must be specific, clear and legitimate. Statements shouldn't be ambiguous or general. Expressions that create the perception that personal data could be processed for other purposes that may arise should not be used. Incomplete, misleading, or incorrect information should be avoided while making the declaration.
- Within the scope of the obligation to inform, the purposes for transfer of personal data and the receiver groups to which the processed personal data might be transferred shall be identified.
- If personal data is obtained from a party other than the data subject, the declaration must be made to the data subject within a reasonable period after obtaining the personal data. If the personal data will be used to communicate with the data subject, the declaration should be made during the initial communication. If personal data will be transferred, the declaration must be made to the data subject at the time of the first transfer of personal data, at the very latest.

The Law Amending the Law on Structure and Duties of the General Directorate for State Hydraulic Affairs and Certain Other Laws and Statutory Decree on Structure and Duties of the Ministry of Food, Agriculture and Livestock

The Law Amending the Law on Structure and Duties of the General Directorate for State Hydraulic Affairs and Certain Other Laws and the Statutory Decree on Structure and Duties of the Ministry of Food, Agriculture and Livestock ("**Law**") was published in the Official Gazette on 28 April 2018 and entered into force on the same date. The Law introduces changes mainly to the Law on Structure and Duties of the General Directorate for State Hydraulic Affairs ("**SHA**") No. 6200; two pieces of energy legislation, namely the Electricity Market Law No. 6446 and the Law on the Regulation of the Sale of Energy by Building and Operation of the Electricity Energy Generation Facilities via Build-Operate Model No. 4283; the Statutory Decree on Structure and Duties of the Ministry of Food, Agriculture and Livestock; and various other laws.

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

- Renting suitable locations in barrages, ponds, channels and reservoir fields for building solar energy systems, and making water allocations and conducting land consolidation and on-farm improvement services have been included in the duties and authorizations of the SHA,
- Real persons and legal entities who want to use irrigation within the irrigation areas are now required to sign an irrigation facility utilization agreement in order to benefit from the services of those facilities,
- The allocation of water resources of other state institutions and organizations is subject to the SHA's affirmative opinion and the principles and procedures regarding water allocation will be determined by a regulation to be issued by the SHA,
- The SHA's affirmative opinion shall be received before granting a mining exploration and/or operation license where the site is within the scope of the investment program and the SHA projects that are notified to the General Directorate of Mining Affairs,

- The SHA has the authority to perform both compulsory and optional land consolidations and on-farm improvements upon the Ministry of Forestry and Water Affairs' request and the issuance of the relevant Council of Ministers Decree,
- The other state institutions and organizations may perform land consolidation and on-farm improvement as project administrations, upon the permission of the SHA,
- The activities carried out on the land for land consolidation and on-farm improvement are not subject to permission of the right holders, and the SHA or the permitted project administration is entitled to restrict the agricultural activities on that land,
- The land consolidation results could be challenged within ten years following the registration date,
- The loss and damages of the right holders resulting from the land consolidation are paid by the SHA or the permitted project administrations,
- Legal entities or public institutions such as village legal entities, municipalities, unions or cooperatives may apply to the SHA to conduct land consolidations and/or on-land improvements,
- The SHA is entitled to determine the institution that is going to perform the land consolidation or on-land improvement activities in case there are multiple applications for the same land,
- The SHA has the authority to grant permission for the establishment of irrigation cooperatives and supervise those cooperatives,
- The SHA may have the irrigation facilities operated by third parties through service procurement,
- The transfer agreement of a cooperative operating an irrigation facility of the SHA is terminated upon the SHA's request and approval of the Minister of the Forestry and Water Affairs, in case it is determined that its financial position is unsustainable, and
- Unauthorized water usage from irrigation facilities leads to an administrative fine in the amount of 1.5 times the regular operation and maintenance fee.

As per the amendments made to the electricity legislation:

- The SHA's authority to conduct (i) multi-purpose projects, (ii) the projects within the scope of the bilateral cooperation agreements for the term before the Law No. 4283 entered into force and (iii) the projects within the scope of the investment programs of the previous years, without obtaining a license, has been extended to 31 December 2025, and
- The SHA is now entitled to build and operate electricity generation facilities based on renewable energy resources without obtaining a license to satisfy the needs of irrigation facilities whose electricity subscriber is the SHA, provided that the installation capacity of the generation facility is not more than the capacity set forth in the connection agreement executed for the relevant irrigation facility or the total of the required capacities if there are more than one irrigation facility.

The Law on Improvement of the Investment Environment and the Secondary Legislation

The Law on Improvement of the Investment Environment No. 7099 ("**Law No. 7099**") was published in the Official Gazette No. 30356 on 10 March 2018 and entered into force on the same day (other than certain provisions that entered into force on 15 March 2018). As an omnibus bill, the Law No. 7099 amended various laws, including the Turkish Commercial Code No. 6102 ("**TCC**"), Tax Procedural Law No. 213 (the "Tax Procedural Law") and the Social Security and General Health Insurance Law No. 5510 ("**Social Security Law**"). The Law No. 7099 provides for a number of important amendments that would simplify the incorporation of joint stock and limited liability companies and cooperatives in Turkey. Also, the amendments aim to reduce the company formation costs by eliminating the role of notaries and simplify the incorporation procedure, especially for limited liability companies.

The significant changes concerning the joint stock and limited liability companies are summarized as follows:

- The articles of association of the company will no longer be signed before notaries, but can instead be signed by the authorized representatives in the trade registry.
- The requirement to pay at least 1/4 of the capital committed by the founders of limited liability companies prior to formation of the company is no longer required.
- Annual approvals of the commercial books will be made by trade registries in addition to the notaries. However, according to an amendment to the Tax Procedural Law, in course of incorporation of joint stock companies, limited liability companies and cooperatives, the commercial books will be approved solely by the trade registries.

- After the incorporation of a company, it is required to notify the Social Security Institution for the workplace opening. Previously, the incorporated company was required to make this notification itself. Now, the notification will be made by the trade registries.

- The signature declarations of the company representatives to be issued in the title of the company shall be certified by the trade registry instead of being approved by the notaries. Please see further information below concerning the amendments made to the signature declarations.

In line with the changes brought by the Law No. 7099, the Communiqué Concerning Execution of the Incorporation Articles of Association at Trade Registries was amended by the Amending Communiqué, published in the Official Gazette No. 30359 on 13 March 2018 ("**Amending Communiqué**").

The Amending Communiqué

- Notary certification is no longer required and the signatures of the founders on the articles of association will be approved by the trade registry agents.

- Concerning the signature declaration, the authorized personnel of the relevant trade registry will prepare a form signature declaration online, by using the MERSIS application number received following submission of the online application, and request that the authorized representatives of the company sign this signature declaration form. The declaration will be approved by the authorized personnel at the trade registry, and the approval of the notary will longer be required. Also, the Amending Communiqué permits the issuance of the signature declaration at any trade registry, in addition to the registry where the company will be registered.

- The Amending Communiqué provides the following exceptions where the signature declaration from the founder will not be required: (i) if the founder, who is the authorized representative of the company to be incorporated, executes the articles of association personally before the trade registry agents or authorized personnel, or (ii) if the power of attorney of the proxy who will execute the articles of association includes the "wet ink" signature of the founder, who is the authorized representative of the company to be incorporated. In case the proxy is authorized by a power of attorney issued in a foreign country, the notarized translation of the power of attorney shall be approved by the Turkish consulate of such country or in accordance with the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (i.e., apostilled in the jurisdiction where the power of attorney is issued).

- For an authorized signatory residing in a foreign country, the approval of the signatures by the Turkish consulate of such country will be deemed valid, as if the signature declaration were issued by the trade registries.

Draft Legislation

Draft Amendments to the Electricity Market Licensing Regulation

On 16 April 2018, EMRA published the Draft Regulation Amending the Electricity Market Licensing Regulation ("**Draft Regulation**"), which was open for public views until 2 May 2018.

The Draft Regulation proposes some amendments to the Electricity Market Licensing Regulation[15] ("**Regulation**") with respect to the land usage obligations of the preliminary-license holders and the license holders, as follows:

- Preliminary-license holders and license holders shall not use the immovables that are within the scope of, or directly affected by, the project subject to the preliminary-license or the license, if they did not obtain a usufruct right on such immovables.

- Preliminary-license holders and license holders shall be given six months from the publication of the Draft Regulation to initiate the necessary processes to comply with these obligations. This six-month period shall not change the time periods determined in accordance with Provisional Article 9 of the Electricity Market Law[16] regarding the obligations of the license holders for the period prior to the construction of the electricity generation facility.

Other Recent Developments

Lawsuits Against Preliminary Licenses

A new type of challenge might be on the horizon in the Turkish power sector. According to the Electricity Market Licensing Regulation[17], the Energy Market Regulatory Authority ("**EMRA**") may grant a preliminary license for a maximum period of 36 months depending on the type of resource and installed capacity. A preliminary license is granted for the investors to apply and receive necessary

[15] Published in the Official Gazette No. 28809, dated 02 November 2013.

[16] Published in the Official Gazette No. 28603, dated 30 March 2013.

[17] Published in the Official Gazette No. 28809, dated 02 November 2013.

approvals, licenses and other authorizations prior to the construction of their plants. Several environmental organizations and occupational groups have filed lawsuits for the revocation of the preliminary licenses granted by EMRA for thermic power plants and the nuclear power plant in Akkuyu.

Previously, the local administrative courts in Ankara had declined to consider requests for the revocation of preliminary licenses on the basis that the preliminary licenses did not give rise to concrete rights for the preliminary license holders. The courts found that the preliminary licenses that EMRA granted to investors were not right-granting acts, but were instead merely a preparatory step before the actual license. However, the complainants appealed this decision to the second level of the judicial system, the Regional Administrative Court, who decided that the preliminary licenses are indeed right-granting acts by EMRA that create a change in the legal status of the applicant by granting a time period in which the applicant is required to receive certain authorizations to move forward with its project, and failure to meet the deadline would mean that the applicant cannot continue with the investment. For this reason, the court held that the administrative courts should consider the revocation requests of the complainants.

Recently, in a similar case concerning the nuclear power plant in Akkuyu, the 7th Chamber of the Regional Administrative Court in Ankara decided in its decision no. 2017/725 and 2017/493 dated 15 November 2017 that the preliminary license granted to the company should be analyzed as an independent right-granting act by EMRA. This indicates a new trend in energy projects related administrative litigation.

Amendments to the TEİAŞ Transmission System Connection and Transmission System Usage Agreements

On 7 April 2018, the Energy Market Regulatory Authority ("**EMRA**") published two decisions approving the Türkiye Elektrik İletim A.Ş. ("**TEİAŞ**") Transmission System Connection Agreement[18] ("**Connection Agreement**") and the TEİAŞ Transmission System Usage Agreement[19] ("**Usage Agreement**"). With these two decisions, the previous forms of these agreements were replaced by new ones, mainly reflecting the changes listed below. The agreements that were previously executed shall remain in force until new agreements are executed.

1. The Connection Agreement

Compensation: The provision requiring the users to compensate TEİAŞ for damages caused by their violations of the Connection Agreement or the relevant legislation has been abolished.

Power Quality Measurement Systems: The users are now required to supply, install and operate the power quality measurement systems *(güç kalitesi ölçüm sistemleri)* in accordance with the Electricity Network Regulation[20]. In the previous version of the Connection Agreement, the establishment of such systems by the user was optional, not mandatory.

Termination: Finalization of the decision of bankruptcy of the user is included among the causes for termination of the Connection Agreement. A decision of bankruptcy was included as a cause for termination in the previous version of the Connection Agreement, without the requirement of the finalization of the decision.

Settlement of Disputes: The Courts and Execution Offices of Ankara are competent bodies for the resolution of disputes that may arise between TEİAŞ and the users. The previous version of the Connection Agreement was silent on this subject.

2. The Usage Agreement

Since we had previously reviewed the draft Usage Agreement published by EMRA on 31 July 2017 ("**Draft Usage Agreement**") in one of our previous Newsletters[21], the differences between the Draft Usage Agreement and the Usage Agreement are also mentioned below, as applicable.

Capacity: As foreseen in the Draft Usage Agreement, a new provision is included for the determination of the capacity of the Usage Agreement for different type of users. Furthermore, the users may apply only three times in a tariff year for the increase of the capacity that is determined at the execution of the Usage Agreement. The previous version of the Usage Agreement did not include this restriction.

Exceeding the Capacity: TEİAŞ may cut off the electricity power of the users that do not comply with the capacities determined under the Usage Agreement. In the previous version of the Usage Agreement, TEİAŞ was required to notify the user of the possible cutoff within seven days prior to the implementation of the cutoff.

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18 EMRA Decision No. 7760-1 dated 29 March 2018, published in the Official Gazette No. 30384, dated 7 April 2018.

19 EMRA Decision No. 7760-2 dated 29 March 2018, published in the Official Gazette No. 30384, dated 7 April 2018.

20 Published in the Official Gazette (bis) No. 29013, dated 28 May 2014.

21 Please refer to p. 12 of our Fall 2017 Newsletter, which can be accessed at: http://www.cakmak.av.tr/newsletters/Newsletter2017Fall.pdf

Compensation: Similar to the Connection Agreement, the provision requiring the user to compensate TEİAŞ for damages caused by their violations of the Usage Agreement or the relevant legislation has been abolished.

Penalties: There has been a general increase in the penalties to be applied in the event of the users' breach of the Usage Agreement under Clause 9.

Termination: Similar to the Connection Agreement, finalization of the decision of bankruptcy of the user is included among the causes for termination of the Usage Agreement.

Furthermore, an easier and shorter termination process is introduced as envisaged by the Draft Usage Agreement. Accordingly, the Usage Agreement will terminate within two months following the user's written application to TEİAŞ, unless the parties agree on a different period.

However, the generation license holders cannot request the termination of the Usage Agreement unless and until their licenses are either cancelled or expired.

Guarantees: The amount of security to be provided by the users to TEİAŞ has been increased from the fixed system usage price of two months, to three months. The Draft Usage Agreement had set out a five-month period.

Settlement of Disputes: The Courts and Execution Offices of Ankara are competent bodies for the resolution of the disputes that may arise between TEİAŞ and the users.

EMRA Principles on Immovable Property Acquisition

Procedures and Principles on Immovable Property Acquisition to be followed by EMRA ("**Acquisition Principles**") entered into force on 2 February 2018. The Acquisition Principles govern (i) the procedural aspects for the acquisition of land usage rights by the legal entities holding preliminary licenses or licenses under the Electricity Market Law No. 6446[22] ("**Electricity Market Law**"), the Natural Gas Market Law No. 4646[23] ("**Natural Gas Market Law**") and the Petroleum Market Law No. 5015[24] ("**Petroleum Market Law**"), and (ii) the authority and liability of EMRA in pursuing the acquisition process. In effect, the Acquisition Principles consolidate the acquisition procedures applicable to the immovable property that are regulated under different pieces of Turkish energy legislation.

Procedure

Under the Acquisition Principles, the preliminary license or license holder legal entities (both referred to as "**license holders**") must submit their application in writing to EMRA along with the required documents and information to obtain the usage rights of the respective lands. The Acquisition Principles set different methods based on the status of the immovable and the features of the project:

Expropriation of the lands owned by private parties. If the expropriation request of the license holder is well established under the applicable legislation and the Acquisition Principles, EMRA will initiate the expropriation actions to get either (i) a necessity decision *(lüzum kararı)*, (ii) an expropriation decision *(kamulaştırma kararı)*, (iii) a public benefit decision *(kamu yararı kararı)*, or (iv) any of these decisions attached to accelerated expropriation request. The Acquisition Principles provide for specific provisions concerning the allowed expropriation areas for hydroelectric and wind power plants. For hydroelectric power plants, the expropriation limit will be the maximum water elevation level. The Acquisition Principles also set out that a public benefit decision cannot be obtained for agricultural lands, unless the allocation purpose of the agricultural lands changed before the expropriation process started.

Granting easement right, leasing, or usage permit free of charge for the State-owned lands. Following EMRA's public benefit decision for the easement or leasing of the State-owned lands, the Ministry of Economy will take the prospective steps. The land registry records or the notarized lease agreements shall be submitted to EMRA at the end of the acquisition process. The Acquisition Principles also provide that a free of charge usage permit may be granted for the immovable properties located within the reservoir area of the hydroelectric generation facilities established under the Renewable Energy Law No. 5346[25].

Transfer of the ownership for the lands owned by governmental entities other than Treasury. Following the transfer decision rendered by EMRA, EMRA will follow the procedure set out under the Acquisition Principles, which reflects the procedure provided in Article 30 of the Expropriation Law No. 2942[26] ("**Expropriation Law**"). Accordingly, if the governmental entity declines to consent to the transfer of the ownership of the land, the matter will be resolved by the Council of State.

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

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

24 Published in the Official Gazette No. 25322, dated 20 December 2003.

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

26 Published in the Official Gazette No. 18215, dated 8 November 1983.

Change of allocation purpose of the pastures. If the respective lands are pasture lands subject to the Pasture Law No. 4342[27], the license holder will apply to the local department of the Ministry of Food, Agriculture and Livestock for the change of purpose of the concerned lands and their registration in the name of Treasury. After the change of allocation purpose, the license holders may be granted with an easement right or lease agreement. However, this provision is not applicable to the immovable properties required for the energy transmission lines (except for the lands of transmission poles).

Granting usage rights for the license-exempt electricity generation facilities. No expropriation decision and no usage right granting actions will take place for the license-exempt electricity generation facilities under the Acquisition Principles. Rather, the Acquisition Principles establish specific provisions for license-exempt electricity generation facilities based on renewable resources, which require the relevant governmental entities' affirmative opinion.

The Acquisition Principles distinguish the expropriation process to be pursued by EMRA and to be assigned to other governmental entities. EMRA will assign the pursuit of the acquisition process of the respective lands used for electricity generation to the Ministry of Economy and for electricity distribution to TEDAŞ, and for projects run by governmental entities to the license holder entities. Moreover, the electricity generation and distribution facilities that were already granted an expropriation or accelerated expropriation decision or a transfer decision before entry into force of the Electricity Market Law, *i.e.*, 30 March 2013, will be subject to the Acquisition Principles of EMRA.

Guarantee

The Acquisition Principles hold the license holders liable for the lawsuits or enforcement proceedings filed against EMRA or the competent authority who leads the acquisition process. In order to cover any damage or loss to the government, the license holder shall deposit a cash security in an amount to be determined by taking into account the expropriation or procurement expenses and any damage or contemplated claims of private third parties. If the license holder fails to deposit this security amount, the expropriation or other procurement decisions shall be withdrawn by the competent authority.

Appointment of Legal Counsel

Another feature brought by the Acquisition Principles is that for the immovable procurement process, the license holder shall appoint a legal counsel to represent EMRA in legal proceedings if requested by EMRA. The Acquisition Principles also set out a specific procedure for the selection of the legal counsel, and provide principles applicable to the expropriation proceedings followed by the selected counsel.

Court Decisions & Board Decisions

Constitutional Court Decision on Electricity Loss – Leakage Fees

The Constitutional Court recently rendered a decision concerning the amended provisions of Electricity Market Law No. 6446[28] allowing the collection of electricity loss-leakage fees from consumers.

As detailed in our Winter 2017 Issue, prior to the enforcement of Amendments to the Electricity Market Law and Certain Other Laws No. 6719[29] ("**Amending Law**"), the General Assembly of the Civil Law Chambers of the Court of Appeal had ruled that imposition of electricity loss-leakage fees to consumers was against the rule of law and principle of equity. The Amending Law, which has a retroactive effect, further limited the courts' authority to evaluate whether such fees comply with the existing regulations of the Electricity Market Regulatory Authority ("**EMRA**").

In 2016, following the enforcement of the Amending Law, some chambers of the Court of Appeal changed their position on this issue and ruled that the collection of electricity loss-leakage fees was warranted under the Amending Law, provided that the collection is based on valid EMRA tariffs and decisions. During this period of conflicting Court of Appeal decisions, several first instance courts have raised constitutional objections concerning the Amending Law, and requested that certain parts of the law be reviewed and ultimately annulled by the Constitutional Court.

The Constitutional Court, in its recent decision[30], dismissed the annulment requests concerning the collection of loss-leakage fees from consumers. The Constitutional Court ruled that the practice of collecting electricity loss-leakage fees from consumers is in compliance with the Constitutional values such as public welfare and the principle of legality, and did not violate the state's constitutional duty of protecting the consumers nor the principle of equal treatment. The decision was rendered by a majority vote, with the

[27] Published in the Official Gazette No. 25819, dated 18 May 2005.

[28] Published in the Official Gazette No. 28603, dated 30 March 2013.

[29] Published in the Official Gazette No. 29745, dated 17 June 2016.

[30] Decision of the Constitutional Court No. E. 2016/150, K. 2017/179, dated 28 January 2017; published in the Official Gazette No. 30333, dated 15 February 2018.

dissenting judges arguing that the relevant provisions are contrary to the necessities of a social law state and the principle of consumer protection.

Concerning the provision limiting the authority of courts to a procedural evaluation of whether such fees comply with EMRA regulations, while the Constitutional Court found the collection of fees to be lawful, it annulled this provision by stating that such limitation does not comply with the constitutional right to legal remedy. The Constitutional Court found that while access to a court is a fundamental aspect of the right to legal remedy, a limitation of the courts' authority to solely conduct a procedural review without evaluating other relevant provisions prevent the courts from conducting effective judgment.

Decisions dated 21 December 2017 of the Personal Data Protection Board

The Personal Data Protection Board's ("**Board**") two decisions were published in the Official Gazette dated 25 January 2018: the decision dated 21 December 2017 and numbered 2017/61[31] and the decision dated 21 December 2017 and numbered 2017/62[32].

The decision numbered 2017/61 concerns the personal data protection in websites and applications providing telephone directory services. In this context, the Board decided that all the activities of websites and applications providing telephone directory services, by allowing to search for telephone numbers by name or search for names by telephone number without obtaining the data subjects' explicit consents in violation of the Law on the Protection of Personal Data[33] (**"Law"**), shall be immediately discontinued.

The second decision numbered 2017/62 concerns the protection of personal data in service areas such as counters and desks. Pursuant to this decision, the public and private sector institutions and organizations, especially those active in the banking and health sector, providing services with more than one employee in contiguous areas (service areas such as counter/desk), shall ensure that there are no unauthorized persons in the units such as counter/desk. Furthermore, they shall take the necessary technical and administrative measures to prevent the persons who benefit from services in these contiguous areas from hearing, seeing, learning or obtaining each other's personal data. The institutions and organizations who fail to comply with this decision shall be required to pay an administrative fine of TL 15.000 to 1.000.000.

Personal Data Protection Board's Decision dated 2 April 2018

The Personal Data Protection Board's ("**Board**") decision dated 2 April 2018 and numbered 2018/32[34] concerns the exceptions to the obligation to register with the Data Controller's Registry, which shall be determined by the Board in accordance with Article 16(2) of the Law on the Protection of Personal Data[35] ("**Law**") and Article 16 of the Regulation on Data Controllers' Registry[36].

The exceptions to the obligation to register with the Data Controller's Registry set forth by the Board are as follows:

- Data processors who process personal data by non-automatic means that form a part of a data recording system,
- Notaries public acting under the Notary Public Law dated 18/01/1972 and numbered 1512[37],
- Associations existing under the Law of Associations dated 04/11/2004 and numbered 5253[38], foundations existing under the Law of Foundations dated 20/02/2008 and numbered 5737[39], trade unions existing under the Law of Trade Unions and Collective Bargaining Agreements dated 18/10/2012 and numbered 6356[40] that process personal data of only their own employees, members and donors, in compliance with the relevant legislation and aims, and limited to their fields of activity,
- Political parties existing under the Law on Political Parties dated 22/04/1983 and numbered 2820[41],
- Lawyers acting under the Lawyers' Act dated 19/3/1969 and numbered 1136[42], and
- Independent accountant and financial advisors and certified public accountants acting under the Law on Independent Accountant and Financial Advisors and Certified Public Accountants dated 1/6/1989 and numbered 3568[43].

[31] Published in the Official Gazette No. 30312, dated 25 January 2018.
[32] Published in the Official Gazette No. 30312, dated 25 January 2018.
[33] Published in the Official Gazette No. 29677, dated 7 April 2016.
[34] Published in the Official Gazette No. 30422, dated 15 May 2018.
[35] Published in the Official Gazette No. 29677, dated 7 April 2016.
[36] Published in the Official Gazette No. 30286, dated 30 December 2017.
[37] Published in the Official Gazette No. 14090, dated 5 February 1972.
[38] Published in the Official Gazette No. 25649, dated 23 November 2004.
[39] Published in the Official Gazette No. 26800, dated 20 February 2008.
[40] Published in the Official Gazette No. 26460, dated 18 October 2012.
[41] Published in the Official Gazette No. 18027, dated 24 April 1983.
[42] Published in the Official Gazette No. 13168, dated 7 April 1969.
[43] Published in the Official Gazette No. 20194, dated 1 June 1989.

Recent and Upcoming Conferences & Events

On 29 March 2018, associates Courtney Kirkman Gücük and Can Talaz attended a panel discussion in Istanbul on “Latest Trends in Dispute Resolution” hosted by White & Case LLP and GKC Partners.

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