

BODEN LAW OFFICE



REGULATORY REPORT – ENERGY APRIL – MAY – JUNE 2012

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1 April 2012

Increase in the Retail Electricity Tariffs

Energy Market Regulatory Board increased the retail electricity tariffs with its decision dated 31 March 2012 which was published in the Official Gazette on 1 April 2012. The increase in the tariffs shall apply as of 1 April 2012. While for the residential users the increase rate is 9.26%, the increase rates in industrial users and commercial users are 8.71% and 4.33 % respectively.

For your questions please contact Değer Boden (dboden@boden-law.com) or Seda Gümüş (sgumus@boden-law.com).

7 April 2012

Electricity Market Eligible Consumer Regulation Amended

On 7 April 2012, an amendment in the Electricity Market Eligible Consumer Regulation was published in the official gazette. As per Article 7 of the Electricity Market Eligible Consumer Regulation, an eligible consumer, when changing its supplier, shall document to the new supplier that it has no remaining obligations to its previous supplier. As per the amendment, if an eligible consumer requests from its previous supplier a document showing that no such obligation exists, the supplier must provide a document to that effect in two working days following the date of such request.

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9 May 2012

EMRA's Decision Regarding the Calculation of TRT Fund Announced

According to the Law on the Income of Turkish Radio-Television Stations, legal entities selling electricity must include a contribution corresponding to 0.2% of the electricity sale price in their invoices and transfer such amount to Turkish Radio and Television Authority ("TRT"). This is referred to as the TRT Fund.

EMRA has issued a decision in February 2011 and amended the rules for calculating the TRT Fund contribution, against which, TRT filed a lawsuit in



the Council of State. Following TRT's lawsuit and the stay of execution decision issued by the Council of State, EMRA announced on 2 December 2011 that its February 2011 decision will not be taken into consideration when calculating the TRT Fund. EMRA has finally announced on 9 May 2012 its latest decision on the TRT Fund (dated 1 March 2012). Accordingly, the TRT funds shall be retroactively collected from the electricity market suppliers and calculated over the theft and loss ratio for the period after 1 February 2011, as stated in the stay of execution decision of the Council of State (dated 26 October 2011).

For your questions please contact Değer Boden (dboden@boden-law.com) or Seda Gümüş (sgumus@boden-law.com).

18 May 2012

Amendments Made to the Land Registry Law regarding Acquisition of Immovable Properties By Foreigners

Amendments made to the Land Registry Law No. 2644 ("Law") were published in the Official Gazette dated 18 May 2012. With the amendments made to Articles 35 and 36 of the Law, which are the two main articles which regulate the foreigners' right to acquire property in Turkey, some of the restrictions imposed on foreigners' right to acquire property in Turkey have been removed. The amendment to Article 35 of the Law lifts the reciprocity requirement for the acquisition of immovable property and limited rights *in rem* in Turkey by foreign real persons. As per the amendment, the foreign real persons who are citizens of certain countries (to be determined by the Council of Ministers) may acquire immovable properties and limited rights *in rem* in Turkey. The Council of Ministers will determine these countries by considering foreign bilateral relations and national interests.

Another amendment of the Law expands the maximum surface area of immovable property and limited rights *in rem*, which can be acquired by a foreign real person from 2.5 hectares to 30 hectares. The Council of Ministers is authorized to increase this amount up to 60 hectares if the national benefits require so.

As a result of the amendment made to Article 36 of the Law, the requirement to obtain administrative permits for acquiring ownership or limited rights *in rem* will apply only to companies majority shares of which are owned or where the majority of the management is controlled by foreign real or legal persons or international institutions. This requirement formerly applied to all companies with foreign shareholders.



The amendment made to Article 36 will enter into force three months after its publication, and the other articles are effective as of their publication date, i.e 18 May 2012.

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29 May 2012

Regulation on the Contest regarding the License Applications for Establishing Power Plants Based on Solar Power Published

According to the Law No. 5346 on the Utilization of Renewable Energy Resources for the Purpose of Generating Electrical Energy ("Renewable Energy Law"), in license applications for establishing power plants based on solar power, if the landowner, where the solar power plant is to be established, applies for a license, no other license application can be made for the relevant land. In the absence of an application made by the owner of the land, and when there are multiple license applications for the same region or the same transformer station or both; the applicant to be awarded the license will be determined by a contest.

On 29 May 2012, the Regulation on the Contest regarding the License Applications for Establishing Power Plants Based on Solar Power ("Regulation") which was drafted by TEIAS (Turkish Electricity Transmission Corporation) was published in the official gazette. Pursuant to the regulation, if EMRA determines that an application meets all criteria set forth in the Regulation, then EMRA notifies TEIAS that the project is eligible to be announced among the wind power plant projects that may participate in the contest.

TEIAS invites the applicants to submit their bids. The bids will be given by reducing the feed-in tariff for solar power ("Reduction Bids") in closed envelopes at the date stated by TEIAS. The Reduction Bid is defined as the amount to be deducted from the minimum guaranteed price (feed-in tariff) under the Renewable Energy Law in USD cents/kWh per unit kWh of the net electricity generated by the power project, starting from the provisional acceptance of the first unit of the generation facility, until the expiration of the guarantee period under the Renewable Energy Law (USD Cent 13.3 kW/h for solar power plants during the first 10 years following the start of their operations). If two or more projects correspond to the same area, then all projects, except the project placing the highest Reduction Bid are eliminated. If there is an intersection in the project area of two or more projects, then the applicant placing the higher Reduction Bid obtains the



right to use the intersecting area. In the event that there are equal bids, the bidding procedure is repeated -during the same session- between the applicants that place the equal bids. As a result of this procedure, the applicants placing the highest reduction in the feed-in tariff (Reduction Bids) are granted the right of connection to the system. Following EMRA's approval for an applicant's eligibility for a license, the applicant signs a Solar Power Plant Reduction Fee Contract with TEIAS.

For your questions please contact Seda Gümüş (sgumus@boden-law.com) or Murat Yörükoğlu (myorukoglu@boden-law.com).

4 June 2012

Competition Board Decision on the Contests regarding the License Applications for Establishing Power Plants Based on Wind Energy Published

As per the Regulation regarding the Contest regarding the License Applications for Establishing Power Plants based on Wind Energy ("Regulation"), if there is more than one generation license application for a power plant based on wind energy for the same area or for a particular transformer station, those companies wishing to establish a wind power plant must participate in a tender process in which they will submit their "contribution bids". "Contribution bid" is defined as the amount that will be paid to TEIAS (Turkish Electricity Transmission Corporation) per unit kWh of the net electricity generated by the power plant, starting from the provisional acceptance of the first unit of the generation facility, until the expiration of 20 years starting from the provisional acceptance of the entire generation facility. According to the Regulation, the companies shall place their contribution bids in closed envelopes at the date stated by TEIAS. These projects shall be ranked from highest to lowest bid, and the company or companies placing the highest contribution bids are granted the right of connection to the system.

Following the completion of the tenders relating to connection points of 6, 9, 10 and 11; Gamares, Topres, Akres, Mares and Antares ("Applicants") applied to the Competition Board ("Board") on the grounds that the companies that bid for these connection point tenders have violated the the Act on the Protection of Competition No. 4054 ("Act No. 4054").

The Applicants stated that they had submitted license applications to the Energy Market Regulatory Authority ("EMRA") for the regions of İzmir-Havza 200 MW, Antakya-İskenderun 80 MW, Osmaniye 50 MW, İzmir-Urla 10 MW and İzmir-Havza 45 MW and bid for such regions in the relevant



tenders. The Applicants argued that:

(i) Some of the TEIAS requirements were unreasonable, such as a letter of guarantee for the excessively high amount of TL 10.000 for each MW as well as some additional technical information and documents from the applicants of the tenders.

(ii) The Regulation violates the vested rights of such companies because it was published after the companies have already submitted their license applications.

(iii) Since the companies which operate in the sectors such as iron, steel and textile and generate electricity solely for their own use also participated in such tenders, it restricts the competition in the market to the disadvantage of the generation companies which desire to generate electricity only for sale.

(iv) There is a big difference between the bids placed in the contests in several regions and it is against the general principles of competition law and also damages TEIAS.

(v) The companies which won the bid did so by colluding with their competitors to underbid and share the power output. Board evaluated the arguments of the Applicants and decided that it was not necessary to initiate an investigation under the Act No. 4054.

The Board stated in its decision (dated 14 March 2012) that the reason for the difference between bids is attributable to the wind efficiencies of the relevant regions, which vary depending on the geographical and physical features of each region. The Board further stated that the transmission capacity of the region, capacity of the project and the results of the field studies are also important elements which affect the bids. As a result of the examination conducted in response to the claim that the bidding companies violated the Act No. 4054 by colluding to allocate the transmission capacity and submitting low bids, the Board decided that it was not necessary to initiate an investigation under the Act No 4054.

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14 June 2012

EMRA's Decision on the Generation Plants based on Solar Power Announced

The Law No. 5346 on the Utilization of Renewable Energy Resources for the Purpose of Generating Electrical Energy ("Renewable Energy Law") provides a renewable energy support mechanism that covers different incentives and benefits for renewable energy projects including feed-in tariffs. The Renewable Energy Law provides different feed-in tariffs (fixed minimum electricity sale prices) depending on the type of the renewable energy projects and limits the total established capacity of solar power generation facilities that will opt into the system with 600 MW until 31 December 2013 (the Council of Ministers is authorized to determine the future limits).

In its decision dated 24 May 2012 (No. 3842) which was published in the official gazette on 14 July 2012, EMRA decided that generation license applications for the generation plants based on solar power (for the total installed capacity of 600 MW), shall be made between 10 June 2013 and 14 June 2013. The decision contains an attachment that lists the data and documents required from the applicants.

EMRA's decision further states that generation license applications shall not be made for project sites on:

- absolute agricultural lands,
- special product lands,
- planted agricultural lands,
- irrigated agricultural lands, and
- lands that affect the agricultural usage integrity of the nearby lands negatively.

As per the decision, the legal entities applying for generation licenses shall choose only one region among the regions announced for the connection point of each of the plants. The decision further provides that the connection points and voltage level shall be determined by TEIAS and/or the distribution license holder legal entity.

EMRA's decision also states that license applications shall be made for maximum 20,000 m² of plant sites for each MW and only one license application can be made with each measurement station report for each plant site.



As per EMRA's decision, the license applications which cannot meet the requirement of the lower limit of the total solar radiation on horizontal surface (1620 kWh/m²-year), shall not be accepted.

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19 June 2012

Council of Ministers Decision on the Government Aids for the Investments Published

Council of Ministers Decision on the Government Aids for the Investments (no. 2012/3305) came into force on 19 June 2012. The aim of the decision is to determine the procedures and principles for (i) diverting the savings to investments with high added value, (ii) increasing production and employment, (iii) encouraging regional large scale investments and strategic investments which will promote international competitiveness and has a high research and development content, (iv) increasing direct international investments, (v) decreasing regional development differences, (vi) supporting investments on convergence and environmental protection and research and development activities; in accordance with the objectives projected with the state development plans and annual programs.

The decision provides incentives such as customs duty indemnity, VAT exemption, VAT return, withholding tax exemption, support to the employers for their share of the insurance premium obligations, tax deduction, investment place allocation and interest support to foreign and local investors. According to the decision, there are 6 separate regions, and different investment schemes apply to each region as well as to different provinces within the same region. The sectors to be supported in each province, such as textile, tourism and livestock farming, are determined pursuant to the potentials of the provinces, the scale of their economies which differs depending on the regions' development levels in Annex 1 of the decision. As per the decision and its annexes, the investments must be at least TL 1 million or TL 500,000 depending on the regions determined in the Annex 1 of the decision.

The investors who have already obtained incentive certificates between 1 January 2012 and 19 January 2012 will benefit from the favorable provisions of the new decision.

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1 July 2012

New Turkish Commercial Code came into force

The new Turkish Commercial Code (“New TCC”), which was passed by the Turkish parliament on 13 January 2011 came into effect on 1 July 2012. The New TCC introduces major changes to Turkey’s corporate law system, especially to the corporate governance structures of limited liability and joint stock companies. Below is a brief summary of some of the most important changes that are introduced by the New TCC:

- Flexibilities with respect to organizational structure of companies: Single shareholder companies will now be permitted (the former Commercial Code (“Old TCC”) required joint stock companies and limited liability companies to consist of five and two shareholders respectively).
- The Old TCC’s requirement to have a minimum of three members in joint stock companies’ Board of Directors (“Board”) has been abolished. A Board can now be composed of only one member. On a related note, in contrast to the Old TCC, the New TCC does not require Board members to be shareholders.
- The “ultra vires” rule which required the articles of association (Articles) of companies to be very detailed has been relaxed. Accordingly, the companies will be able to carry out actions that are not specifically stated in the scope of activity section of their Articles.
- Board’s appointment and decision-making processes have also been eased. Furthermore, the Board members will now be able to delegate their management duties to professional managers. With respect to the duties that have been delegated, the Board members’ responsibilities will be limited to overseeing the individual whom the duties have been delegated to.
- Legal entity shareholders will be allowed to act as Board members in their own capacity; allowing them to replace their representatives by notifying the company. The Old TCC required General Assembly or Board meetings to change the Board members that represented legal entity shareholders.
- Certain restrictions have been set forth for shareholders’ and Board members’ indebtedness to joint stock companies.
- There is now a prohibition on financial assistance (advance, loan or security) to be provided by companies to third parties for the purpose of the acquisition of their own shares (Leverage-buy-out restrictions).



- Another reforming improvement that the New TCC introduces is the alignment of Turkish accounting and auditing standards with the international accounting and auditing standards. The relevant provisions of the New TCC will come into force on 1 January 2013.

Since its enactment by the parliament, the New TCC had been subject to a great deal of criticism. It was argued that certain provisions of the New TCC resulted in the “overregulation” of corporate actions and contained excessive disclosure requirements. Taking into account these criticisms, the parliament passed a new law on 26 June 2012 –less than a week before the effective date of the New TCC– and amended some of the most controversial provisions of the New TCC (Law No. 6335, published in the Official Gazette on 30 June 2012). As a result of the amendments, some provisions of the New TCC, which were believed to be “a little too harsh” have been softened. The provisions that have been amended include:

- The requirement to have at least one Turkish national (who also resides in Turkey) Board member in joint stock companies and a Turkish resident manager in limited liability companies;
- A transaction auditor’s report requisite for various corporate actions such as company establishment, capital increase/decrease, merger, de-merger;
- Very tight restrictions on shareholders’ and Board members’ indebtedness to joint stock companies; and
- Serious penalties (including jail sentences) for non-compliance with the provisions of the law.

The law will apply to all companies, commercial enterprises and commercial transactions. Companies are required to amend their Articles in accordance with the New TCC by 1 July 2013.

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1 July 2012

New Turkish Code of Obligations came into force

The New Turkish Code of Obligations numbered 6098 ("New TCO") which was passed by the Turkish parliament on 11 January 2011 came into effect on 1 July 2012 and abolished the Code of Obligations numbered 818 ("Old TCO"). The New TCO introduces many noteworthy changes to standard terms and conditions, electronic signature, interest rates, suretyship and lease agreements. Below is a brief summary of some of the most important changes that are introduced by the New TCO:

- The New TCO provides a new set of rules for "Standard Terms and Conditions". "Standard Terms and Conditions" are the pre-drafted agreements in the ex parte model contracts drafted by institutions such as banks, insurance companies and supply companies which can be used in numerous transactions. The New TCO sets forth restrictions on such standard terms that are not subject to any negotiation. The new TCO also provides a detailed definition and conditions on the validity of such terms. As per the New TCO, the standard terms are valid, only if the party whose interests are violated is aware of and has the opportunity to get information regarding the standard terms of the relevant contract. Otherwise, those standard terms will be deemed invalid. Even if the party whose interests are violated has been informed of and accepted such terms, if such standard terms are against the nature and the main characteristics of the relevant contract such terms will be deemed invalid. As per the New TCO, in the event that a standard term in a contract is not explicit and sufficiently clear or if it could have different meanings, such provision will be interpreted against the party who has drafted it and in favor of the counter party. Moreover, the standard terms in a contract shall not contain any provision which is against the interest of the counter party, or breaches the principle of good faith and which puts such party in a difficult position.
- In accord with the Electronic Signature Law, the New TCO recognizes electronic signature as an original signature in written forms of agreements.
- The New TCO introduces a restriction on the rates of both contractual and default interests for all types of agreements where the contract parties have not determined the annual contractual or default interest. As per the New TCO, the annual rate of contractual interest cannot be more than 50% above the annual interest rate determined in the Law on Legal Interest and Default Interest numbered 3095. Pursuant to Article 120 of the New TCO, the default interest rate cannot be more than twice the contractual interest rate.

- The New TCO also provides several articles which introduce important changes to suretyship, such as those related to the form requirements of the suretyship agreement and the requirement for the consent of the spouse. According to the New TCO, the following elements must be handwritten by the surety: (a) the maximum amount of the responsibility of the surety, (b) the date of the contract, and (c) the expression stating whether joint or several liability is assumed. Moreover, the New TCO brings a new condition for the validity of the suretyship contracts if the real person surety is married, the written consent of the surety's spouse is mandatory for the valid execution of a suretyship contract.
- Before the New TCO came into force, lease agreements regarding "covered" immovables within the borders of municipalities were regulated under the Law No.6570 on the Lease of Immovables ("Law No. 6570"), while the lease agreements regarding all immovables outside the scope of Law No. 6570 were regulated by the Old TCO. As it has abolished Law No. 6570, the New TCO now regulates all lease relationships for any immovables, whether covered or not. Lease agreements executed before 1 July 2012 continue to be subject to the Old TCO and Law No. 6570. However, the issues of default, termination and liquidation arising out of such previously executed agreements are subject to the New TCO. The New TCO provides several articles which introduce important changes to term of the lease, rent amount and termination. Please note that certain lease-related provisions of the New TCO will not apply to leases where the lessee is a legal entity (or a real person who is deemed as a merchant under the Turkish Commercial Code) until 1 July 2020. Furthermore, implementation of some lease- related provisions are also postponed to 1 July 2017.

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Updates & Trends

5 July 2012

EEX and TEIAS sign Memorandum of Understanding for a co-operation on the establishment of an organized energy market

The European Energy Exchange (“EEX”) and TEİAŞ sign Memorandum of Understanding (“MoU”) for co-operation on establishing an organized Turkish energy market.

By way of background; the plans for establishing a market operator (which will have financial and administrative autonomy for operating in and carrying out the financial settlement transactions of the day-ahead and futures markets) was declared in the Strategy Document regarding the Power Market and Supply Security (dated 18 May 2009). Accordingly, the operator will be distinct from Turkish Electricity Transmission Company (“TEİAS”), a unit of which -Market Financial Settlement Center (“PMUM”)- operates the day-ahead market.

Turkish Government’s intention for establishing of a separate legal entity to operate the day-ahead market and the derivatives market for power trade was also announced in the Annex of the Council of Ministers decision dated 18 October 2011 (published in the Official Gazette on 30 October 2011).

To top it off, the draft Electricity Market Law (the “Draft Law”) (published by the Ministry of Energy and Natural Resources) abolishes PMUM and call for the establishment of a new entity, namely the Energy Markets Operation Joint Stock Company (“EPIAS”). According to the Draft Law, EPIAS will separate from TEİAS and operate the organized wholesale markets (except for the balancing power market and ancillary services market which will still be operated by TEİAS). The Draft Law defines organized wholesale markets as “day-ahead market, real-time market, balancing power market, ancillary services market, over-the-counter (OTC) markets and derivative markets where wholesale and retail sale and purchase of power and capacity, and derivate products of these will be made and which are organized and operated by an intermediary legal entity which holds a market operation license, and power markets such as balancing power market and ancillary services market which are organized and operated by TEİAS”. The Draft Law provides that financial settlement of transactions made in organized wholesale markets including the markets operated by TEİAS (i.e. balancing power market and ancillary services market) will be made by EPIAS.

According to the announcement made by EEX, the MoU that has been signed between TEİAS and EEX aims the co-operation of both parties for

the establishment of an organized energy market in Turkey. There is no timeline set for materialization of the energy exchange yet.

The Undersecretariat of the Turkish Ministry of Energy and Natural Resources, Metin Kilci, states that the establishment of a Turkish Energy Exchange is crucial for the successful liberalization and further growth of the electricity markets.

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