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AMENDMENTS TO THE ELECTRICITY MARKET LICENSING REGULATION

This article provides information regarding the recent amendments to the Electricity Market Licensing Regulation¹ (the “Licensing Regulation”). The amendments were published in the Official Gazette and became effective on 5 April 2011² (the “Amending Regulation”).

I. EXECUTIVE SUMMARY

The main features of the Amending Regulation are as follows:

- Generation license applicants (as opposed to holders) can no longer transfer their licenses through a demerger or spin-off; or to a company with the same shareholding structure as the license applicant.
- Wind and solar power based license applicants must submit appropriate wind or solar measurements to the Energy Market Regulatory Authority (“EMRA”) with their license applications.
- Minimum capital requirements applicable for license holders have been increased.
- Changes in the number and capacity of the units of a power plant can be made by an approval of the relevant department of EMRA without the need for an approval of the Board of EMRA (provided that such change in the number and/or capacity of units does not result in a change in either connection point or total installed capacity of the facility subject to the license).
- The dates for submission of progress reports by generation license holders to EMRA (which were previously every January, May and September) have changed to every January and July.
- New grace periods have been granted to license applicants and holders to apply for an Environmental Impact Assessment Report.
- License applicants and holders have been given the right to waive their applications or licenses without foreclosure of their performance bonds.

¹ Published in the Official Gazette No. 24836 dated 4 August 2002.

² Published in the Official Gazette No. 27896 dated 5 April 2011.

II. ANALYSIS

A. Transfer of Generation Licenses

Under the Licensing Regulation transfer of licenses is prohibited as a rule. However, there are certain exceptions to this prohibition as follows:

- (i) In the case where the transfer is being conducted pursuant to the step-in rights provided in favor of lenders as a security for the financing of projects, the rights and obligations arising from the license can be transferred to a third party determined by the lender.
- (ii) Generation and auto-production licenses can be transferred upon EMRA's approval to a company established through a demerger or spin-off of the license holder; or to a company with the same shareholding structure as the license holder.

With respect to item (ii) above, prior to the Amending Regulation, the transferor could be either a license holder or a license applicant. The Amending Regulation narrowed the availability of such transfer opportunity to solely license holders. However, with respect to transfer requests that have already been approved by the Board of EMRA before the effective date of the Amending Regulation, such transfer requests shall be finalized in the name of the transferee.

Another amendment introduced by the Amending Regulation with regard to transfer of licenses refers to license fees. Prior to the Amending Regulation, no license fee (except for the amount of one percent thereof) was collected from the legal entities, which applied for obtaining a license in order to establish a generation facility based on domestic natural resources or renewable energy resources. Pursuant to the Amending Regulation, in cases where generation and auto-production licenses are transferred to a company established through a demerger or spin-off of the license holder or to a company with the same shareholding structure as the license holder, the whole amount of the license fee shall be paid to EMRA regardless of whether such generation or auto-production license is based on domestic natural resources or renewable energy resources.

B. Review and Evaluation of License Applications

Pursuant to the Amending Regulation, for license applications with respect to generation facilities based on wind and solar energy, an appropriate measurement report shall be submitted to EMRA with the application. The standards, periods and methods of the measurement requirement will be determined by a Communiqué to be issued by EMRA.

The Amending Regulation also introduced a new provision with respect to license applications based on natural gas, solar energy and imported coal. Pursuant to the Amending Regulation, if a license application is filed by the legal proprietor of the entire immovable property, on which the facility subject to such license application is to be constructed, no other license application for the area will be accepted by EMRA until the already filed application is finalized.

Prior to the Amending Regulation, information regarding various license applications had to be announced on the official website of EMRA. The Amending Regulation, however, exempts wholesale license applications from the announcement requirement. Based on unofficial information we have been provided by an EMRA official, the exemption was introduced on the grounds that third parties do not have any legal interest in the announcement of wholesale license applications.

C. Increased Minimum Capital Requirements

The Amending Regulation has introduced an increase in minimum capital requirements with which license applicants have to comply in order to obtain licenses.

The minimum capital of a generation facility shall be, at minimum, equal to the amount corresponding to 20% of the total investment amount of the generation facility envisaged by EMRA. This ratio was 15% prior to the Amending Regulation.

The minimum capital of a wholesale license applicant has been increased to TL 2,000,000 from TL 1,000,000; and the minimum capital of a retail sale license applicant has been increased to TL 1,000,000 from TL 500,000.

With respect to applications for a retail sale license only for the purpose of performing retail sale services, the minimum capital of the applicant has been increased to TL 200,000 from TL 100,000 for each distribution region where the activity shall be performed.

However, with respect to license applications which have already been approved by EMRA prior to the effective date of the Amending Regulation, the above-mentioned increases in minimum capital requirements will not apply.

D. Amendments to Licenses

Prior to the Amending Regulation, certain information stated in the “specific provisions” section of licenses (such as the address, trade name and corporate type of the company and information regarding shareholders) could be amended by the relevant department of EMRA without the approval of the Board of EMRA. The Amending Regulation added new categories of information which can be amended without the Board’s approval. These new categories are (i) number of units, and (ii) capacity of units (provided that such change in the number and/or capacity of units does not result in a change in either connection point or total installed capacity of the facility subject to the license).

Pursuant to the Amending Regulation, should there be amendment requests for extension of facility completion dates set forth by EMRA, the current license fee, stipulated at the time of such request for the facility subject to the amendment request, shall be paid to EMRA by the license holder as an amendment fee.

E. Reporting to EMRA

Prior to the Amending Regulation, generation license holders were obliged to submit progress reports every January, May and September to EMRA regarding their activities until the completion date of the facility. With the Amending Regulation, the reporting obligation of generation license holders is decreased to two progress reports; the first one being in July

(referring to the first half of the year) and the second one being in January (relating to the second half of the prior year).

F. EIA Report Requirement

Pursuant to an amendment of the Licensing Regulation introduced in 2009³, once a license application was found appropriate by EMRA, license applicants were required to obtain an environmental impact assessment (“EIA”) approval or an “EIA not Required Decision” from the Ministry of Environment for submission to EMRA before the issuance of a license, in addition to other requirements such as capital increase, payment of license issuance fees, and, for generation companies, submission of a performance bond. Pursuant to that amendment, an EIA Approval or an “EIA not Required Decision” was required to be submitted to EMRA within 300 days while the other conditions, such as capital increase and submission of a performance bond, were required to be fulfilled within a 90-day period. With the same amendment introduced in 2009, companies, which had already obtained a license or whose license applications had already been found appropriate, but had not yet applied to the Ministry of Environment for the EIA decision as of 30 September 2009, were required to apply to the Ministry of Environment within 60 days as of the effective date of the amendment.

The new Amending Regulation grants these companies another period of 60 days as of the effective date of the Amending Regulation to apply to the Ministry of Environment. Accordingly, “EIA not Required Decisions” shall be submitted to EMRA within 90 days as of the effective date of the Amending Regulation, whereas the stipulated period for EIA approvals is 300 days. Such periods can be extended by EMRA upon the occurrence of conditions that are not attributable to the concerned legal entities. In case legal entities fail to duly submit such decisions or approvals, their licenses will be terminated.

G. Termination of Licenses and Waiver of Approvals

The Amending Regulation introduces a new opportunity for license applicants and license holders who have not been able to fulfill their requirements as set forth either by law or by EMRA.

Pursuant to the Amending Regulation, legal entities whose facilities have not yet been granted a temporary approval within the scope of their licenses, may request termination of their licenses, with a written notification directed to EMRA within one month as of the effective date of the Amending Regulation.

Moreover, pursuant to the Amending Regulation, legal entities whose generation license applications have already been approved, may waive such approvals, with a written notification directed to EMRA within one month as of the effective date of the Amending Regulation.

³ Published in the Official Gazette No. 27362 dated 30 September 2009.

In both cases, performance bonds submitted to EMRA will be returned to license holders and license applicants; regardless of whether they have fulfilled the obligations required either by law or by EMRA, on the condition that they waive their right to use related sources, granted within the scope of the license application. ⊕