

License Cancellations By The EMRA Have Put The Turkish Power Market In Limbo

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The Electricity Market Law numbered 6446 (the "**EML**") came into force on March 30, 2013. Along with its many novelties the new law introduced a highly debated provision related to generation licenses, which subsequently resulted in the cancellation of 27 generation licenses by the Energy Market Regulatory Authority ("**EMRA**") in August 2014. It is estimated that more than 500 generation license holders with an estimated total installed capacity of 23,000 MW are within the scope of the provision and may also suffer a similar fate upon the evaluation of their construction status.

The EML's Provisional Article 9 laid out that the legal entities whose pre-construction terms provided under their generation licenses had expired would be granted an additional six-month grace period and further stipulated that any failure to complete the obligations of the pre-construction term, except for force majeure events, would result in cancellation of the generation license. However, because Provisional Article 9 did not set out any timeline in relation to the starting point of the foregoing six-month period, the exact date to complete the obligations remained unclear until the issuance of secondary legislation.

Seven months after the effective date of the EML, the Electricity Market Licensing Regulation (the "**Licensing Regulation**") was published in the Official Gazette No. 28809 on November 2, 2013 and introduced the provisions for the implementation and interpretation of Provisional Article 9. The provisional article of the Licensing Regulation stipulated that legal entities, whose pre-construction term had expired as of the effective date of the Licensing Regulation (November 2, 2013), had to submit all documentation proving that they completed their pre-construction obligations within six months starting from November 2, 2013. In the case that the pre-construction term of the legal entities has not expired, they would be granted an additional six months in addition to their remaining license term. The foregoing period expired on May 2 for the legal entities whose pre-construction terms had already expired by November 2, 2013.

Even though the timeline to complete the obligations and the nature of the sanctions became prominent with the issuance of the Licensing Regulation, the EMRA did not cancel any licenses immediately after May 2. This was regarded as a sign that a new arrangement or evaluation method was being considered by the EMRA. This understanding was further supported by the unofficial statements of the EMRA officials, which indicated that the target of the provision was to prevent the license exchanges and "actual investors" would not be subjected to sanctions.

However, contrary to the general belief by the market players, the EMRA cancelled the licenses of 13 legal entities that were unable to complete their pre-construction phase obligations on August 71. After the initial cancellations, the EMRA cancelled another nine licenses on August 212 and five other licenses on August 273.

The EMRA has reportedly stated that there were 500 projects that failed to complete their pre-construction phase obligations and the status of 132 of the 500 projects, whose construction completion rates are below 5 percent, would be evaluated initially and be made subject to cancellation. In addition to the cancellation of the licenses of the facilities, holders of the cancelled licenses and their board members and the shareholders above 10 percent will be

prohibited from obtaining new licenses in the electricity market for three years. Furthermore, the bank letters of guarantees provided by the license holders gets recorded as revenue by the EMRA as a result of the cancellations.

The major criticisms raised against the Provisional Article 15 of the Licensing Regulation are in relation to the scope and nature of obligations that should be accomplished during the pre-construction phase. Below is a list of these obligations, which will then follow a look into the background of the criticisms:

- The legal entity must acquire the property and/or usufruct rights pertaining to the field where the generation plant will be constructed (Provisional Article 15/a).
- Development plans for the generation plant must be approved by the relevant authority (Provisional Article 15/b).
- Project pre-approval for the generation plant must be obtained (Provisional Article 15/c).
- Application to execute System Connection Agreement and System Utilization Agreement with TEİA or relevant distribution company shall be submitted (Provisional Article 15/ç).
- Opinion in accordance with the Regulation on Forbidden Military Zones must be obtained (Provisional Article 15/d).
- Application to obtain the Technical Interaction Permission must be submitted (Provisional Article 15/e).
- Environmental Impact Assessment decision must be obtained (Provisional Article 15/f).

At the time the former legislation was in place almost all of the above requirements were to be completed during the construction period of the generation plants, if not after the construction phase is finalized. From the start, the market perceived the six-month completion period suggested under the EML and Licensing Regulation unrealistic, as the completion of certain items on the above list usually requires a minimum 12 to 24 months and sometimes even last after the plant is under operation. It came with no surprise that almost all investors who suffered from cancellation decisions by EMRA claimed that their failure to complete the obligations was mainly driven by the delays experienced before multiple public institutions. Those claims will obviously be settled before administrative courts, which have the competence to try cases against EMRA rulings.

On the other hand, there is always room to evaluate and discuss the ratio legis behind these legislative efforts. In fact, although some of the above-mentioned requirements such as obtaining the military zone approvals may be accomplished timely, the above cited market perception is hardly debatable, especially for some more sophisticated procedures that require trying cases before civil and/or administrative courts or those that require the involvement of different branches administration.

If we look at the requirement seeking for finalization of the development plans, the major obstacle awaiting the investors is to obtain the opinion and/or approvals of approximately 40 different public institutions. In most cases investors complain of being unable to locate the correct institution or point of contact for any specific matter in question. Even if the correct institution is located, there are many shifts in the planning and development of lands and forest areas on a major scale, which delays or sometimes even blocks the approval of the plead request. In most operational power plants the development plans must have been finalized during the construction period, but not in the pre-construction period due to delays experienced on the basis of the identified circumstance.

When one looks at the expropriation process the situation is even worse, as it usually takes a minimum of two to three years to finalize the whole process after the expropriation decision is taken by the EMRA. One can hardly argue a statement that it is even harder to finalize the acquisition of the usufruct rights on the expropriated property than to finalize the long-lasting expropriation process itself. The timeline for the expropriation process is mostly dependent on the approach of the property owners to the process and if the owners incline to settle with the expropriation order a long lasting court phase is initiated, which alone may take even longer than the average estimated time for the whole expropriation process itself. Due to this very reason, it is a well-known fact that in today's Turkey that there are power plants operating without completing the expropriation process. Actually, the Ministry of Energy and Natural Resources, as the authorized public entity to carry out the acceptance procedures of the energy facilities, orders "temporary acceptance" of such plants. These temporary acceptances are converted into "definite acceptances" once the expropriation and all other formalities are completed. It is surprising to see that there

are no time restrictions to convert the temporary acceptances into permanent acceptances. This mere approach itself shows that a shift in law making and legislation is being experienced in the field by the introduction of the EML and the Licensing Regulation.

Current Environment and What to Expect

The EMRA has not made any cancellations since the decisions taken in August, which affected 27 generation licenses and their holders. While the reasons behind the EMRA's silence are unclear, an expectation has arisen in the market that a new legislative effort to follow soon for enactment of new regulations to supersede the currently relevant provisions of the EML and License Regulation.

One reason behind the EMRA's move to stop of the cancellations might be reconsideration of the potential impact of such a large number of license cancellations on the targets the government has set in its efforts to decrease the percentage of imported energy. Considering that banned legal entities and their shareholders above 10 percent are not able to apply for new licenses in the electricity market for three years the effects of cancellation of all licenses on the amount of energy generated cannot be set aside.

The ongoing debate regarding identification of the delays caused by the other public authorities as force majeure might be another reason behind EMRA's hesitation to cancel the remaining licenses within the scope of Provisional Article 9 of the EML. Many reports received from the sources of energy associations indicate that the EMRA intends to re-evaluate the projects considering their force majeure status and start to grant additional time to projects having problems with the other public authorities.

A draft law dated June 16 amending Provisional Article 9 of the EML (**the "Draft Law"**) was presented to the Grand National Assembly of Turkey by the Ministry of Energy and Natural Resources. The Draft Law suggested amending Provisional Article 9 of the EML to provide an additional year for license holders to complete their pre-construction obligations. In addition to an extra one-year period, the Draft Law was foreseeing defenses for investors on the basis of "reasonable causes that are not related to the license holder". These defenses, once put forward by the license holders in view of their pre-construction phase requirements would enable the EMRA to grant additional time and amend the generation license so that the license holders are able to complete the construction of the facilities. While the Draft Law has still not been passed as of November, in the event that it does, any further license cancellations would be ceased.

In case the EMRA decides to grant additional time to remaining license holders or a new legal arrangement is accepted throughout the ongoing legislative efforts, not only the future circumstances regarding the concerned 500 licenses may change, but also the status of the license holders that previously had their licenses cancelled by the EMRA may be positively affected. It is therefore worthwhile keeping an eye on the future developments in this end.

1 Decisions dated 7.08.2014 numbered 5156/4-6-8-13-15-17-19-20-21-23-26-27-29 published in the Official Gazette dated 19 September 2014 numbered 29124.

2 Decisions dated 21.08.2014 numbered 5176/2-4-5-17-31-32-36-37-40 published in the Official Gazette dated 19 September 2014 numbered 29124.

3 Decisions dated 27.08.2014 numbered 5187/40-7-8-13-14-15 published in the Official Gazette dated 19 September 2014 numbered 29124.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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