

COMPULSORY AMENDMENTS ON ARTICLES OF ESTABLISHMENT OF COMPANIES IN POWER MARKET

After the "Regulation on Unlicensed Electricity Generation" which was published following the entry into force of the "Electricity Market Law" (dated 30th March 2013), "Electricity Market License Regulation" was also published as of 2nd November; therefore, at least theoretically the rules of the game in the electricity market have become clarified. In this scope, the "**minimum capital amount**" and "**share transfer**" regulations within context of the License Regulation gave rise to a need for amendment of "articles of association" of the legal entities who wish to operate as "licensed" entity in electricity market.

So, what do legal entities have to do? Firstly, we should remind that companies who wish to operate as licensed entities in electricity market has to;

- Be established as a **joint stock company or limited liability company** in accord with Turkish Commercial Code numbered 6102; and
- In case of joint stock companies, **all company shares must be registered** excluding of those shares traded in stock market in accord with capital market legislation.

Therefore, if you are a Joint Stock Company, the articles of association/incorporation of your Company must have a provision stating that all shares are registered shares. Moreover, while making your pre-license/license application, you should make sure that the articles of association which will be presented to the Authority "covers the provisions which are required to be present in 'articles of association' in accord with the License Regulation."

Specification of "Minimum Capital Amount" in the Articles of Association

As is known, in accord with the new regulations adopted within scope of the Electricity Market Law, from now on, any investor "applying for a production license" shall be first granted a temporary "pre-license" instead of license. Only after fulfilment of "pre-license" obligations, this license shall be converted into a "production license". During this pre-license period, the investor shall obtain the approvals, authorisations, permits and similar certifications required by the relevant legislations, and acquire the right of property or right of usufruct on the land on which it shall establish the production facility.

License Regulation requires **the minimum capital of the Company applying for pre-license** to be in an amount equal to **five per cent of total investment amount** prescribed by the Authority for the production facility, and be in an amount equal to **one per cent of total investment amount** prescribed by the Authority for the nuclear energy based production facilities. Therefore, the companies who do not meet this prerequisite have to increase their capital and submit the articles of association instrument showing that capital is increased/capital prerequisite is met to the EMRA (Energy Market Regulation Authority). In addition;

- The capital of a legal entity applying for multiple pre-licenses for the first time operation must be at least equal to the aggregate of the minimum capital amounts specified for each granted pre-license;
- The capital of a legal entity already holding a license or a pre-license who applies for a new pre-license must be at least equal to aggregate of the minimum capital amounts specified by the Authority for each license under which the preliminary acceptance of the relevant facility is not yet made and each granted pre-license.

In case of **License Applications**, the **Minimum Capital of the Company**, which is specified as black and white in the articles of association, **applying for pre-license** must be in an amount equal to **twenty per cent of total investment amount** prescribed by the Authority for the production facility, and be in an amount equal to **five per cent of total investment amount** prescribed by the Authority for the nuclear energy based production facility. In case this prerequisite is not met, the minimum capital amount must be increased, and the articles of association evidencing this increase must be submitted to the Authority.

In regard of licenses other than production license, the Company capital should be minimum in the amount of two million Turkish Liras for procurement license applications and equal to the ratio and/or amount

specified by the Authority in case of distribution license, market operation license and procurement license applications of related procurement companies. The articles of association evidencing that this requirement is met must be submitted to the Authority. Capital requisites that must be fulfilled during the license period by legal entities holding distribution license and related procurement companies shall be determined by decision of the Authority.

Furthermore, the License Regulation stipulates that provisions regarding the business and objectives of the company must be made compliant with the electricity market legislations *for procurement companies engaged in activities subject to tariff regulation*, and the articles of association of such companies must include a provision stipulating that the Authority shall be consulted for amendments on articles of association provisions regarding the business and objectives of the company.

Specification of the Provisions Regarding "Share Transfer" in the Articles of Association

Within the framework of License Regulation, another important requirement in articles of association is a provision regarding "share transfer". Excluding inheritance and bankruptcy, a legal entity holding a pre-license may not engage in any direct or indirect changes in shareholding structure, transfer of any shares or any other act or transaction which may result in transfer of any shares until the license is obtained. In other words, share transfers are not permitted in the pre-license period. Any legal entity **applying for pre-license** must have in its articles of association a provision stating "***No change shall be made in the shareholding structure of the company during the pre-license period***". Any articles of association which will be submitted to the Authority within the scope of ***applications for production license and other licenses*** must also include the provisions regarding share transfers and mergers as specified by License Regulation, and articles of association lacking such provisions must be amended to comply with the legislations.

In conclusion, any investor planning a Pre-License/License Application should be aware that in accord with the provisions of Turkish Commercial Code **one quarter of the capital** must be paid **in cash**, and the balance of the capital (the remaining part) must be paid in two years, and move forward in awareness of the limitations regarding "share transfer" and "merger". In this context, the company should make sure that "provisions required to be included under articles of association" in accord with the Regulation, i.e. "registered capital", "share transfer" and "merger", are covered under the articles of association of the company, and any lack thereof is rectified and completed. The companies must remember that being aware of statutory obligations when applying to the Authority will save time, effort and money, and prevent any potential loss of rights. We wish everybody success on this long and arduous road!