

Covid-19 as a force majeure event in electricity market legislation

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Background

Emerging in China and spreading all over the world rapidly, the Covid-19 pandemic continues to affect economies and businesses alike. As with other businesses, the operations of electricity market licence holders are also impacted by the pandemic. Among other things, the supply of equipment and construction materials from abroad, licensing, land acquisition and compliance with their contractual obligations were the initial problems that licence holders have encountered in the last few weeks.

Without any doubt, the time pressure on investors in greenfield renewable energy projects which are trying to achieve completion by 31 December 2020 in order to benefit from the feed-in tariff scheme is much more intensified now. In the absence of any official statements in this respect, an extension of the eligibility period until the end of 31 December 2021 continues to be a rumour in the renewable energy market.

In addition to contractual obligations, electricity market licence holders are also obliged to comply with the requirements set forth under the Electricity Market Law No. 6446 (the **Law**) and its secondary legislation, including the Electricity Market Licence Regulation (the **Licence Regulation**). Licence holders' failure to comply with these requirements may, depending on the nature of the relevant obligation, result in the loss of their rights or even cancellation of the licence.

Other than the new measures implemented by the government to get the spread of the virus under control and mitigate the economic consequences of the outbreak, licence holders may also consider benefitting from the existing provisions under the Law and the Licence Regulation to avoid any negative impact of Covid-19 on their licences.

Description of force majeure events under applicable legislation

According to the Licence Regulation, the obligations of licence holders as set out in the applicable legislation may be postponed or suspended in the case of a force majeure event. The postponement or suspension needs to be proportionate to the effects and duration of the relevant force majeure event. The mere occurrence of a force majeure event does not automatically suspend or postpone the regulatory obligations and, in order for the relevant obligations to be suspended or postponed, the Energy Market Regulatory Authority (**EMRA**) must adopt a decision in this respect upon the licence holder's individual application. EMRA may also exempt licence holders, other than transmission and distribution licence holders, from fulfilling an obligation.

The Licence Regulation provides for a non-exhaustive list of events, which may constitute a force majeure event. Among other events, a pandemic (*salgın hastalık*) and mobilisation (*seferberlik hali*), are clearly set forth as force majeure events provided that other conditions summarised below are also satisfied.

According to the Licence Regulation, in order for a licence holder to lawfully avoid its obligations under the applicable legislation, the relevant event must be unforeseeable, unavoidable and inevitable even after the licence holder has taken all necessary care and must prevent the licence holder from fulfilling its obligations under the applicable legislation.

In order to benefit from suspension, postponement or exemption, the licence holder must notify EMRA in writing of (a) the date of occurrence and nature of the force majeure event; (b) the effects of the relevant force majeure event on the licence holder's obligations; and (c) if possible, an estimated timeline for mitigating the effects of the force majeure event. Upon this notification, EMRA is required to make a decision regarding the licence holder's obligations.

Consequences

According to the Licence Regulation, licence holders may benefit from the following remedies, depending on the effect of the outbreak on their regulatory obligations:

(a) In the event of a temporary impossibility to perform obligations

If the licence holder would be able to perform its obligations after the end of the Covid-19 pandemic, EMRA may postpone or suspend its obligations until the effects of the force majeure event are eliminated. The measures may include the extension of the 36-month preliminary licence period.

(b) In the event of an absolute impossibility to perform obligations

If the performance of certain obligations of a licence holder becomes impossible, EMRA may exempt that licence holder from having to perform these obligations.

Conclusion

A smoothly functioning electricity market is another instrument in keeping the outbreak under control and it is beyond doubt that the government will soon take sector-specific measures to ensure the uninterrupted generation and distribution of electricity. Licence holders struggling to fulfil their regulatory obligations may consider benefiting from the force majeure provisions under the Licence Regulation.

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