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Overlap of Mining Activities and Infrastructure Projects on the Same Area, Legal Remedies and Recent Discussions

Mining is a growing sector in Turkey's economy. Although a great amount of the reserves remain unexploited and current activities are limited to shallow depths, mining sector continues to attract local and foreign investors. However, major infrastructure projects in various sectors have attracted more attention in recent years and public-private partnerships became a hot topic.

While the abundance of minerals and the potential to develop the mining sector is expected to increase the amount of inbound investments, on-going mining activities sometimes create problems in implementing key infrastructure projects. As seen during the early stages of the Istanbul New Airport Project which was tendered in May 2013 under a PPP scheme, existing mining licences can cause headache for the grantor in handing over the necessary pieces of lands to the project company.

The new provisions introduced to Turkish mining legislation in 2010 aim to cope with the problems which may arise if a new infrastructure project is contemplated to be implemented on a location which also hosts the activities of a mining licence holder. However, there are still several issues which the investors need to be aware of in advance.

TURKISH MINING SECTOR AND MINING ACTIVITIES

Overview of the Sector

Turkey is considered as a major player in global mining sector thanks to the diversity of its mine ore and reserves, sufficient workforce to satisfy the needs of such labour-intensive industry and its geographical advantage which facilitates transportation of the products.

A wide spectrum of mines and minerals, including a significant amount of industrial minerals are found in Turkey. Among many others, lignite, boron, marble, quartz, and anthracite reserves are the most remarkable. According to the General Directorate of Mining Research and Exploration (*Maden Tetkik Arama Genel Müdürlüğü*) (MTA), Turkey's export has included ample amounts of marble, copper and chromium in 2012. MTA has also reported that mining sector has accounted for 2.64% of the total exports last year and the largest volumes were exported to China, USA and India.

Exploration and mining of metallic ores such as gold and silver are also increased steadily over the last decade.

As per the statistics published by MTA, the share of mining in Turkish GDP was 1.49% in 2012 and it has demonstrated an upward trend since 2002.

Legal Framework and Licensing Regime

The main piece of legislation regulating mining regime and the activities is the Mining Law no 3213 (the **Mining Law**) which was significantly amended in 2010. According to the Mining Law and Turkish Constitution, mines are independent from the ownership of the relevant land and exploration and exploitation rights with respect to the same rest with the state. However, these rights may be transferred to third parties through licences in return for royalty payments.

The Mining Law divides mines into six different categories and provides different licensing regimes. As per the Mining Law, the General Directorate of Mining Affairs (*Madencilik İşleri Genel Müdürlüğü*) (**MIGEM**) established under the auspices of the Ministry of Energy and Natural Resources is authorised to grant licences and keep the mining registry to which all technical and financial issues with respect to mining rights and activities are recorded.

In order to engage in mining activities, the investors are required to apply to MIGEM¹ directly or online². The licences entitle their holders to engage in mining activities for a period of five years for the items listed in paragraph (a) of Group I set forth under the Mining Law. For all other categories, the minimum licence period is 10 years. These terms can be extended upon the application of the licence holders; however, the total period of a licence cannot exceed 60 years unless the Council of Ministers extends such period. Any licence issued for a specific category does not provide any rights for other categories.

The Mining Law and the Regulation on Implementation of Mining Activities (**Mining Regulation**) provide for several circumstances in which MIGEM may revoke the mining licences. Among some others, performing the mining activities without obtaining a clearance with respect to environmental impact assessment or workplace opening and operating licence; failure to pay relevant fees and charges; providing false or misleading information; failure to submit necessary reports; engaging in production of raw materials without obtaining the required permits or failure to perform mining activities for a period of more than three years in a five-year term, may result in revocation of the mining licences.

GRANTORS' OBLIGATIONS WITH RESPECT TO SITE HANDOVER IN PPP PROJECTS

In a PPP scheme the concession agreement aims to allocate the risks and responsibilities to the party who is best able to assume and undertake. In most of the infrastructure projects such as motorways, tunnels, airports or railways, the location and condition of the site play a big role in the implementation of the project and acquisition of the required land often requires compulsory acquisition powers to be exercised. Therefore, concession agreements frequently oblige the grantors to assume this responsibility.

In many cases the grantor does not have any dispositive rights on the land to be delivered to the project company as other public authorities or third parties hold the title. To be able to fulfil this obligation properly; the grantor is required to complete several procedures in advance.

Legal Procedures to be Completed

In order to provide the project company with the necessary land in a manner not obstructing commencement of the investment works, the grantor should first of all complete the necessary legal procedures such as

¹ There is an exception to this general principle. If the activities are in connection with the items listed in paragraph (a) of Group I set forth under the Mining Law (*i.e.* sand and gravel used in construction and road construction), the application is made to special provincial administration (*il özel idaresi*).

² Only the Turkish citizens and the legal entities established in Turkey can obtain mining licences and engage in mining activities. However, mining legislation does not provide for specific capital requirements for legal entities. In other words, a Turkish legal entity wholly owned by foreign investors can also engage in mining activities in Turkey.

expropriation, land allocation and lease transactions and ensure that it is legally authorised to deliver the site to the project company.

The legal procedures which the grantor needs to complete generally include obtaining the necessary permits and licences as well.

Clearance of the Physical Obstacles

In addition to the legal procedures, some concession agreements hold the grantor responsible for the clearance of the site from all physical obstacles such as existing public buildings, roads, utilities, contamination, historical findings, etc.

If the concession agreement requires the grantor to clear off the site, this should also be completed prior to site handover.

THE PROCEDURE TO BE FOLLOWED IN THE EVENT OF AN OVERLAP

If the location of the contemplated infrastructure project overlaps with licenced mining activities, the grantor may be required to cope with more issues related with site handover. For instance, on the area where the Istanbul New Airport Project is contemplated to be built, several licence holders engage in mining activities and a settlement has been required for the site to be handed over to the project company.

We understand that the amendments introduced in 2010 to the Mining Law aim to find a solution to this concern. As per amended Article 7 of the Mining Law, if the areas on which mining activities are performed overlap with the investment sites such as state and provincial roads, motorways, railways, airports, energy facilities, ports, pipelines, etc., the conflict is resolved by the intervention of MIGEM or an ad-hoc council constituted to make the final decision. The details with respect to constitution of such council and the decision making process is stipulated under the Mining Regulation.

Procedure to be Followed by MIGEM

As per the Mining Regulation, if an investment project having public benefits obstructs mining activities (or vice versa); or the investment project prevents mining activities completely; and, if there is no other alternative site for the investment project, the investor or holder of the mining licence is required to apply to MIGEM to resolve the issue. In such case, the investor is required to provide scientific and technical information and documents to MIGEM evidencing that there is no other alternative available for the investment.

Upon such application, MIGEM will conduct an in-situ inspection and based on its examination, resolve on the procedures to be followed. Subsequently, MIGEM's resolutions will be sent to the parties and the parties will be invited to submit information, supporting documents and their opinions within a one-month period following such notification.

This process is followed on the condition that the inspection minutes indicate that (i) the relevant investment project obstructs the mining activities; (ii) the investment project prevents the mining activities completely; and (iii) the planned investment project overlaps with the operation licence area or the visible reserve area or the area of the facility, in which production is carried out based on the mining licence.

Procedure to be Completed by the Council

In the event the parties reach an agreement, the procedure set forth above is not continued any further. In case an agreement cannot be reached or no opinions are submitted to MIGEM within such one-month period, the conflict of interest on the relevant area is resolved by an ad-hoc council.

MIGEM is required to prepare a report which will be taken as the basis of the council's final decision. Such report should contain information with respect to the mining activities and the proposed infrastructure investment. MIGEM can also outsource preparation of such report.

As per Article 127 of the Mining Regulation, the council is comprised of at least three members. Accordingly, (i) the minister to which State Planning Organization (*Devlet Planlama Teşkilatı*) is affiliated with; (ii) the Minister of Energy and Natural Resources; (iii) the minister(s) that the investor(s) are affiliated with; and (iv) the minister that the administration which has approved the relevant investment (*i.e.* the grantor) is affiliated with can become members of such council. The council can adopt resolutions by simple majority. The secretarial works of the council are performed by MIGEM and the council's resolution is also served on the parties by MIGEM.

If the council decides to cancel or limit the mining activities, the investor is required to compensate the licence holder's investment expenses determined by MIGEM³.

DISCUSSIONS ON THE NEW AMENDMENTS UNDER THE MINING LAW AND SEVERAL CONCERNS FROM A PPP PERSPECTIVE

Although the developments introduced to the mining legislation aim to bring faster solutions for the conflict of interests of mining licence holders and investors of new infrastructure projects, we understand that there are still several issues which should be taken into consideration by the licence holders and investors.

As per the Mining Law and the Mining Regulation, only the "investment expenses" made by the licence holders are compensated; whereby, further items such as the movable assets or the income and profits which the licence holder will be deprived of are not taken into consideration. Therefore, MIGEM and the council are expected to make fair assessments in determining the importance of the mining activities and the proposed investment on the same area. Failure to do so may have a negative impact on the expected development of the mining sector.

Conflict of interests between the licence holders and investors may also affect the infrastructure projects negatively. Similar to issuance of the mining licences, restriction or cancellation of the same are also administrative acts and therefore, can be subject to judicial review.

Both the assessment procedure before MIGEM and the subsequent procedure led by the council necessitates a series of administrative acts to be completed. Any delay in one of the relevant chains would cause delays in solving the problems in connection with the site handover. In addition, each administrative act can be subject to judicial review and if a stay of execution decision is rendered by the court, the project may have to wait the outcome of the court's assessment.

Although it is not considered by the majority of the scholars as a strong argument which can be claimed in each and every instance, the licence holder may also claim that his rights under the relevant licence is a vested right (*kazanılmış hak*) and challenge MIGEM's or the council's decision. Even though it is remote, based on vested rights concept, the licence holders may claim compensation of their losses occurred as a result of cancellation or restriction of their licence rights. In such an event, those losses exceeding the licence holder's investment amounts may also become payable.

The Mining Law and the Mining Regulation state that the licence holder's investment expenses will be compensated by the "investor" and it is unclear whether the public administration launching the relevant project (*i.e.* the grantor) or the project company is obliged to make the compensation. Such uncertainties may result in the project company to shoulder the whole burden of the compensation obligation on its own and increase the project costs.

³ Such amount is stated in the report submitted to the council by MIGEM.

In addition, from an international project financing perspective, cancellation or restriction of a mining licence may also result in increase in the number of the economically displaced individuals as portrayed by international institutional investors in their performance standards. In such scenario, the project company would be expected to compensate the individuals employed at the relevant mining facility together with the licence holder and provide further assistance to the displaced persons as required by the funders.

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