

CRUCIAL STEPS IN PRIVATIZATION OF THE ELECTRICITY DISTRIBUTION COMPANY IN TURKEY

In the recent years, the Privatization Administration of the Prime Ministry of the Republic of Turkey (the “**Administration**”) has given priority to the privatization of several electricity distribution companies (the “**Distribution Company**”) which are state-owned economic enterprises actively involved in the electricity market in Turkey. This Article is focused on (i) the share transfer procedure of the Distribution Company that shall be taken over by means of privatization and (ii) the responsibilities arising from the share transfer of the legal entity that may purchase the shares of such Distribution Company (the “**Buyer**”).

Electricity Market Law (*published in the Official Gazette dated March 03, 2001 and numbered 24335*) (“*Elektrik Piyasası Kanunu*”) (“**Law No. 4628**”), Electricity Market Licensing Regulation published in the Official Gazette dated August 04, 2002 and numbered 24836 (“*Elektrik Piyasası Lisans Yönetmeliği*”) (the “**Licensing Regulation**”), Law regarding the Protection of Competition published in the Official Gazette dated December 13, 1994 and numbered 22140 (“*Rekabetin Korunması Hakkında Kanun*”) (“**Law No. 4054**”), Communiqué numbered 1998/5 and the Competition Board Communiqué numbered 1998/4 issued by the Competition Board regarding the Procedure and Principles on the Prior Notification and Permit Application Process to the Competition Board for the Transfer through Privatization to become Legally Valid published in the Official Gazette dated September 12, 1998 and dated 23461 (“*Özelleştirme Yoluyla Devralmaların Hukuki Geçerlilik Kazanabilmeleri için Rekabet Kurumuna Yapılacak Ön Bildirimlerde ve İzin Başvurularında Takip Edilecek İzin ve Esaslar Tebliği*”), Communiqué Serial: VIII, No. 54 issued by Capital Markets Board regarding the Principles on Public Disclosure of Special Circumstances published in the Official Gazette dated February 06, 2009 and numbered 271339 (“*Özel Durumların Kamuya Açıklanmasına İlişkin Esaslar Tebliği*”), Law regarding the Implementation of Privatization published in the Official Gazette dated November 27, 1994 and numbered 22124 (“*Özelleştirme Uygulamaları Hakkında Kanun*”) (“**Law Numbered 4046**”) and Labor Law numbered 4857 (*published in the Official Gazette dated June 10, 2003 and numbered 25134*) (“**Law Numbered 4857**”) are the main legislation governing the legal framework of the privatization of the Distribution Company.

I. Procedure of Share Transfer

The share transfer procedure of the Distribution Company should be carried out in the below mentioned order:

- A.** Firstly, the decision of the Board of Privatization (“*Özelleştirme Yüksek Kurulu*”) regarding the privatization of the relevant Distribution Company shall be obtained. The Board of Privatization tends to authorize the Administration regarding the sale, transfer and any related issues of the Distribution Company that has been taken into its agenda and privatization strategies of which has been determined.
- B.** The prior notification of the Energy Market Regulatory Authority (“**EMRA**”) shall be obtained regarding the share transfer of the Distribution Company pursuant to Article 47 of the Licensing Regulation.
- C.** The permit regarding competition shall be obtained from the Competition Board pursuant to Article 7 of Law No. 4054 and Procedure and Principles on the Prior Notification and Permit Application Process to the Competition Board for the Transfer through Privatization to become Legally Valid.
- D.** Pursuant to Article 14 of the Communiqué regarding the Principles on Public Disclosure of Special Circumstances, a declaration of special circumstances may be necessary if the issue of share transfer may be deemed as significant enough to affect the value of shares for the shareholders and the decisions of the investors. Pursuant to Article 21 of such Communiqué, these circumstances shall be reported to the relevant share markets as soon as they have occurred or been known of, via the fastest method of communication, and through the use of the forms in the manual to be prepared by the Capital Markets Board regarding the declaration of special circumstances.
- E.** The Share Purchase Agreement (“**SPA**”) shall be entered by and between the Buyer and the Administration and the Administration shall immediately deliver and transfer the official share certificates representing the shares to the Buyer following the execution of such SPA.

F. Finally, the SPA shall be submitted to the EMRA in order to be registered. The parties shall notify the Distribution Company for the registry of the share transfer to the share ledger following the registration process. The Administration shall ensure that a decision regarding the registration of the share transfer into the share ledger shall be resolved by the board of directors of the Distribution Company as of the signing date of the SPA.

II. Responsibilities of the Buyer After the Share Transfer

The liabilities of the Buyer that may arise from the share transfer of the Distribution Company following the finalization of such transfer may be listed as set forth below:

A. Responsibilities Regarding the Payment of the Sales Price

The purchase price shall be paid generally in cash on the signing date of the SPA. However, the payment may also be made in two or more installments. In this case, an additional amount with the yearly London Interbank Offered Rate (“**LIBOR**”) in USD of such purchase price shall be due. In the recent privatization projects, we have seen that the interest rate is the simple interest in the amount of LIBOR plus three point five (3.5). It should be noted that the interest payment shall be made on the same date with the payment of the principal capital.

B. The Transfer of Control

Any kind of direct or indirect share transfers resulting in the transfer of the Distribution Company for a definite time period from the signing date of the SPA by the Buyer are subject to prior permission of the Administration, provided that such transfers satisfy the criteria specified in the tender specifications and save for the approvals to be taken pursuant to the electricity legislation. In the event that the Buyer transfers the control of the Distribution Company to a third party following the share transfer, the Buyer acknowledges and undertakes that all the representations and warranties arising against the Administration shall also be undertaken by such third party. In this case, the Buyer shall remain to be jointly and severally liable of its obligations and responsibilities against the Administration.

C. Provisions Regarding the Employees

Pursuant to Article 22 of Law No. 4046, the employees in the Distribution Company subject to the transfer, shall be transferred to other public entities and institutions. The Buyer acknowledges and undertakes to protect the rights of the employees that are subject to Law No. 4857 arising from legislation and collective labor agreement, and to pay their severance pays. Other rights of such employees shall be reserved as well. Moreover, the Buyer shall submit promptly to the Administration the applications of the employees whose labor contracts have been terminated pursuant to the Decree of the Council of Ministers dated May 03, 2004 and numbered 2004/7898 (*published in the Official Gazette dated October 20, 2004 and numbered 25619*).

D. Liability regarding the Release

The Buyer shall acknowledge and undertake to release the board of directors, the chief executive officers and statutory auditors of the Distribution Company for any liabilities arising from execution of the activities until the share transfer within the scope of their titles and to vote in this manner in the first general assembly following the share transfer. The Buyer shall also ensure that the members of the Board of Directors to be elected and the statutory auditors shall not act against such release.

E. Liabilities Regarding the Separation of the Distribution and Other Electricity Market Activities

Pursuant to the decision of Competition Board dated July 21, 2005 and numbered 05-48/695-M, the Buyer is on obligation to separate the distribution activities and other electricity market activities until December 31, 2012.

F. Liabilities Regarding the Immovable under the Possession of the Treasury or the State

Pursuant to Article 15 sub-clause (d) of the Law No. 4628, in case of any claim for establishment of the right of easement or grant of the certificate of occupancy for the immovable that belongs to the Treasury or the State and which are required for activities of

production, distribution and transmission conducted by the public entities, the Ministry of Finance may establish the right of easement or grant the certificate of occupancy on behalf of such public entities for the term of the electricity license.