

LEGAL REMEDIES AGAINST THE DECISIONS OF ENERGY MARKET REGULATORY AUTHORITY (EMRA) ON CANCELLATION OF A LICENSE OR THE IMPOSITION OF AN ADMINISTRATIVE FINE AND THE RELATING LITIGATION PROCEDURES

I. Introduction

Regarding the administrative fines or the cancellation of licenses imposed by Energy Market Regulatory Authority (EMRA), an application can be filed before EMRA to cancel or revoke them since there is no higher administrative authority to recourse in order to review these decisions issued by EMRA. In case a negative reply will be received from EMRA to such an application, the applicant will be entitled to file a lawsuit for cancellation within a time period of 60 days upon the date of notification of this rejection or, in case EMRA does not give any reply to the respective application at all, within a time period of 60 days following the expiry of the sixty-day-period implicit rejection. In this article, we will address the respective application procedures and the relating time periods.

1. Judicial Remedies against the Administrative Fine or the Cancellation of a License by EMRA and the Respective Trial Process

Article 125/1 of the Turkish Constitution states that the judicial remedy against all actions and acts of the administration shall be available. The paragraph 4 of this Article stipulates that the judicial power of the courts is limited to the verification of the conformity of the actions and acts of the administration with law and that the courts are not authorized to review the expediency of those administrative actions and acts. Since EMRA is a part of the administrative body and acts as an independent administrative authority, its decisions and acts can be brought before the court only within the scope of the review of the legality.

The revocation of an administrative act such as the imposition of an administrative fine or the cancellation of license requires, first of all, to submit an arbitrary application to this authority. If the application is rejected, the applicant can apply to ordinary judicial remedies such as filing a lawsuit or directly an action for nullity. If these applications remain inconclusive, one can also apply to individual application at the Constitutional Court respectively the European Court of Human Rights.

1.1. Administrative Courts shall have sole jurisdiction regarding the lawsuits to be filed with the request for the revocation of the decision of EMRA regarding the cancellation of a license granted or an administrative fine and that lawsuit must be filed within 60 days upon the notification date of this decision.

Pursuant to the Article 11 of Administrative Jurisdiction Procedures Law (AJPL), an application is to be submitted to request the cancellation, revocation or amendment of the administrative decision or replacement by a new administrative decision within the term of litigation. This application in question suspends the respective time limit for administrative proceedings. In this regard, the respective application is to be considered rejected if no reply is given within a time period of sixty days.

Pursuant to the Article 10 of Administrative Jurisdiction Procedures Law, provided that the respective Authority does not respond within 60 days following the application to the Authority, the request is deemed to be rejected. Administrative lawsuits can be filed within the term of litigation upon the expiry of this sixty-day-period.

This term of litigation of 60 days shall begin as of the notification date of the decisions regarding the cancellation of a license or the decisions of administrative fine. These notified decisions must specify the respective authority and the time period that one is entitled to file a lawsuit against these decisions. Otherwise, the notification will not initiate the term of litigation, since this action is contrary to Article 40 of the Constitution and consequently to the right to legal remedies laid down in Article 36 of the Constitution.

If an application is submitted to the administration to request the revocation of the decision regarding the cancellation of a license or the administrative fine, the term of litigation of 60 days will be suspended. In case of the rejection of the application or its implicit

rejection due to the expiry of the time period of 60 days without any reply from the Authority, the term of litigation shall continue to run from the point when it was suspended.

If the reply given by the administration within the implicit rejection period of 60 days is not final, one may either file a lawsuit accepting this reply as a rejection of the request or wait for the final reply (Article 10 of the AJPL). In the latter case, the term of litigation will not run until the receipt of the final reply. However, the waiting period shall not exceed 6 months beginning from the date of application pursuant to Article 10/2 of AJPL. If no lawsuit is filed or the lawsuit is dismissed on the grounds of not observing the term of litigation, a lawsuit may be filed within 60 days beginning from the date of the notification of the reply after the expiry of the period of 60 days but in any case within 6 months following the application date. Based on the above-mentioned issues, an application can be submitted regarding the administrative fines or the cancellation of a license in order to request the revocation of these decisions, since there is no higher authority to decide on these issues. Provided that EMRA issues an unfavorable reply to the applicant or remains silent against such requests, one can file a lawsuit for cancellation of these decisions within the respective term of litigation following the implicit rejection period of 60 days.

If the applicant applies to the legal remedies against these administrative sanctions imposed by EMRA pursuant to the relevant laws regulating the energy sector, the competent administrative courts have jurisdiction to hear the respective dispute pursuant to the Article 12 of the Code No. 4628.

1.2. Administrative courts of Ankara shall have sole jurisdiction regarding the lawsuits to be filed.

With regard to the lawsuits to be filed against the decisions of the Board, the competent administrative court of the place where the headquarters of the defendant Authority is located, will have jurisdiction to hear the case pursuant to the general rules stipulated in Article 32 of the Code No. 2577. In that case, the administrative court of Ankara will be the competent administrative court regarding the lawsuits since the headquarter of EMRA is located in Ankara.

However, in specific cases the administrative court of the place where the respective company subject to decision is located shall be the competent court pursuant to the special rule on the immovable property

pursuant to the Article 34 of the Code No. 2577.

1.3. The lawsuit to be filed against the decision on the cancellation of a license must be filed together with the request for the suspension of execution since the administrative actions other than the imposition of fines are not directly suspended by filing a lawsuit.

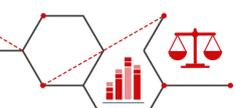
All sanctions imposed by EMRA other than the fine must be implemented immediately. For that reason, filing a lawsuit against the administrative acts other than administrative fine does not directly suspend the execution of this act.

In its decision numbered 2008-939 YD, the Council of State, Plenary Session of the Chambers for Administrative Cases ruled that in case of a lawsuit against an administrative fine, it will not to be considered final and, consequently, its collection will not be possible. Since in case of a lawsuit, the administrative fines imposed by EMRA in the electricity market do not become final and absolute and its collection cannot be executed, the lawsuit of annulment filed against the administrative fines will automatically lead to the suspension of the collection respectively of the execution of the administrative act in dispute.

However, in contrary to the above-mentioned situation, since the lawsuit requesting the revocation of a decision regarding the cancellation of a licence does not directly suspend the execution of that action, the respective lawsuit must be filed with the request of the suspension of execution in order to forestall the hardly compensable or noncompensable losses arising from the trial process.

1.4. After exhaustion of legal remedies, the applicant has the right to make an individual application to the constitutional court on the ground that the administrative fine or the decision on the cancellation of a licence is contrary to the relevant laws and the Constitution.

Provided that the unlawful administrative fine or the decision on the cancellation of a licence are not annulled at the end of the court proceedings, the license holders will have the right to submit an individual application to the Constitutional Court after exhaustion of all domestic legal and administrative remedies. It will be deemed that the ordinary legal remedies have been exhausted beginning from the date of the notification of the final decisions of the local courts. The



time limit for individual applications to the Constitutional Court is 30 days beginning from the date of the final exhaustion of legal remedy. If the final decision has been sent as an e-notification, the time period for application will begin running not at the end of the fifth day on which the e-notification is deemed to be submitted, but on the day on which e-notification is opened.

The individual application form must be sent to the Constitutional Court together with the documents attached therein within 30 days after the exhaustion of other legal remedies. It would be sufficient to deliver the application form to the registry of the Constitutional Court or to the representative offices of the Constitutional Court abroad for delivery to the Constitutional Court within 30 days in order not to miss the application period. The respective time period is to be calculated on the basis of the date of delivery of the relevant documents to the registry of the court or its representative offices abroad.

1.5. Provided that the Constitutional Court considers the individual application to be not acceptable, the legal person to whom a fine was imposed or whose license was unjustifiably cancelled is entitled to submit an individual application to the European Court of Human Rights on the grounds that its contractual rights were violated.

After the judicial remedies in domestic law against an administrative act proves to have no success, one can apply to European Court of Human Rights. Although a decision imposing an administrative fine or cancelling a license does not involve a direct violation of human rights, there are additional protocols issued by European Court of Human Rights and signed by Turkey which makes such an application possible. The administrative sanction can be considered a violation of the contractual rights, in particular property rights of the relevant legal person, pursuant to the relevant additional protocols and legal precedents.

In accordance with the rights of natural persons, the European Court of Human Rights acknowledges that the legally secured rights of the legal entities can also be violated.

Based on the above mentioned reasons, provided that the administrative fines or the cancellation of licenses are applied to legal entities, they can apply to the European Court of Human Rights if all legal rem-

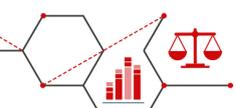
edies available in the domestic law remained inconclusive (*Application to the Constitutional Court is also one of the legal remedies provided by the domestic law which has to be taken into account. Therefore, it is not possible to apply to the European Court of Human Rights without the prior application to the Constitutional Court*).

However, although the domestic law does not request the exhaustion of proceedings before the administrative authorities as a prerequisite of a lawsuit before the European Court of Human Rights, the Court considers the exhaustion of legal remedies before the administrative authorities mandatory in order to submit an application to the European Court of Human Rights. For that reason, it would be necessary to apply to the administrative authorities, albeit voluntarily, with the request of the cancellation of the administrative fine or the revocation of the decision regarding the cancellation of a license pursuant to Article 11 of the AJPL.

The relevant party must apply to the European Court of Human Rights within 6 months as of the notification of the final decision after all respective legal remedies are considered inconclusive. The time limit of 6 months is a period of prescription and, therefore, any application submitted after the expiry of this time period will be rejected by European Court of Human Rights due to limitation issues.

II. Conclusion

The administrative acts and actions of EMRA are subject to the review of the conformity in terms of compliance with relevant laws pursuant to Article 125 of the Constitution, since it is an autonomous administrative authority. For that reason, it is possible to apply to the court based on the request for the cancellation of administrative fine and the revocation of the license cancellation issued by EMRA pursuant to the legislation on Energy Market and especially on the basis of Article 166 of the Code on Electricity Market No. 6446 and Regulation on Licenses of the Energy Market. As stipulated in Article 12 of the Code No. 4628, the administrative courts have sole jurisdiction regarding the respective lawsuits. Pursuant to the rule of general competence laid down in Article 32 of the Code No 2577, the administrative courts of Ankara are to be considered competent. However, pursuant to the rule on the special competence prescribed by Article 34 of the Code No 2577, based on the respective im-



movable property, the administrative court which is located within the boundaries of the location of the respective company that was addressed by the administrative decision is to be considered the competent court.

In this regard, one can also apply to EMRA to cancel the decision regarding administrative fine or to revoke the decision on license cancellation, since there is no higher authority to recourse. If EMRA rejects this application, the applicant will be entitled to file a lawsuit for cancellation within a term of litigation of 60 days following the notification date of tis rejection or, in case EMRA does not give any reply to the application, within a time limit of 60 days following the expiry of the sixty-day-period of implied rejection.

If all ordinary legal remedies are unsuccessful, there is also the option to submit an individual application to the Constitutional Court on the grounds that the administrative fine or the decision on the cancellation of the license is contrary to the Constitution. The time period for the application to the Constitutional Court is 30 days beginning from the date on which the last legal remedy proved to be of no avail. Provided that the final decision is notified in the form of an e-notice, the above-mentioned period of application will not begin on the date of opening the e-notice and not at the end of fifth day that the e-notice is considered to be submitted.

Provided that the Constitutional Court does not consider the individual application acceptable, the person that was addressed by the administrative fine or the decision of EMRA is entitled to apply to the European Court of Human Rights based on the grounds that his contractual rights have been violated. An application must be submitted to ECHR within the period of 6 months after the exhaustion of all legal remedies available in the domestic law. The six-month-period is a period of prescription and any application to ECHR after the expiry of this time limit is to be rejected due to limitation issues.

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