

Expropriation Concerning Renewable Projects

As a result of the increase in demand, energy sector activities have accelerated in Turkey and around the world; and simultaneously limited nature of energy sources has started to push the governments towards using renewable energy sources. The use, generation and consumption of such sources are strictly regulated through a comprehensive legislation which contains restrictions and provides strict rules for investors planning to invest in such projects. The expropriation process regarding renewable energy projects is one of areas specifically regulated in such legislation.

As lands are one of the essential parts of the energy projects, their acquisition from their owners is also an essential hurdle that needs to be solved. Therefore, in certain cases, geographical circumstances may lead the Government to acquire land for general public interest. These acquisitions are made through the expropriation process.

Expropriation means the acquisition of the ownership of or establishment of a right of easement on lands owned by private persons by the Government for public interest, with a decision taken by the competent authorities in accordance with the procedures stipulated by law.

The legal grounds of expropriation have been set forth in the Expropriation Law numbered 2942 (the "Law"). Although the Law allows expropriation only for

governmental entities, through the enactment of special laws, expropriation for the benefit of real persons and legal entities are also possible under certain circumstances. The reason thereof is the fact that the support to the investors especially in the acquisition of required lands, is necessary in order to be able to benefit from the advantages of renewable energy resources and inputs to the national economy. However, each expropriation process whether or not for the benefit of real persons or legal entities is subject to the provisions and procedures set forth under the Law.



This article aims to generally highlight the expropriation procedures set forth under the Law in relation to the renewable energy resources.

Expropriation Procedure

As per the Law, after the request by investors for or determination by the Energy Market Regulatory Authority ("EMRA") of any need of expropriation, EMRA will evaluate such need and, if it is found appropriate, it will commence the process through an expropriation decision. However, prior to such an expropriation decision, the immovable property to be expropriated and its current legal status must be determined. Also, the value of such immovable property must be checked from the relevant tax administration.

Expropriation Decision

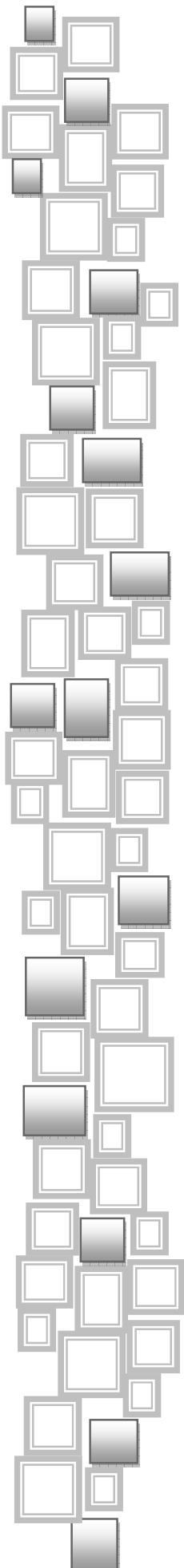
As mentioned above, expropriation is allowed only for public interest and the authorization for expropriation is given only to governmental entities. However, there may be cases where there is a need for expropriation in the name of a real person or legal entity, i.e. investors. In case, if there is such a need of expropriation, the legal entity or real person may apply to the relevant governmental entity

which is granted by applicable legislation with the authority to expropriate. In terms of energy projects, such governmental entity is EMRA. Therefore, requests for expropriation by investors must be directly addressed to EMRA.

***We can create a more
sustainable, cleaner
and safer world by
making wiser energy
choices.***

-- Robert Alan

As per Article 15/c of the Electricity Market Law, requests of investors for expropriation may be evaluated and performed by EMRA in accordance with the procedures set forth in the Law. The decision of EMRA on the requirement of expropriation shall be deemed as a public interest decision. As prescribed by the Law, a governmental entity must first take a public interest decision before taking an expropriation decision. However, according to Article 15/c of the Electricity Market Law, the abovementioned decision of EMRA shall serve as a public interest decision and, therefore, EMRA does not need to take further decision. This provision surely simplifies the expropriation procedure for energy projects.



Once EMRA takes an expropriation decision, the relevant title deed registry will be informed of the expropriation in order for the expropriation decision to be annotated with the title deed registry as per Article 7 of the Law. Upon the annotation, the title deed registry is obliged to notify EMRA of any change on the ownership of the property as well as any change regarding the rights in rem established on the immovable property to be expropriated. If, within six months, EMRA fails to deliver a document obtained from a court certifying that EMRA has filed a lawsuit for determination of the expropriation price and claimed for the registration of the immovable property in its name, then the title deed registry will cancel such annotation.

According to the decision of the Council of Ministers published in the Official Gazette dated 30 September 2004, Article 27 of the Law, regulating immediate expropriation, will be applied for the expropriations performed by EMRA. Immediate expropriation is an atypical method of expropriation which provides time efficiency for reasons of public interest during the expropriation process.

During the typical process of expropriation, the owner of an immovable property subject to expropriation will have the right to initiate an annulment lawsuit before the administrative courts. However, during the immediate expropriation, the owner of an immovable property is not entitled to challenge the expropriation process, but solely has the right to challenge the cost and expropriation price. This characteristic of immediate expropriation significantly decreases the time period for the investors.

Determination of the Expropriation Price

The expropriation price may be determined through negotiations with the owner of the immovable property to be expropriated. However, if EMRA and the owner cannot reach an agreement, EMRA will file a lawsuit before civil courts requesting the determination of the expropriation price. Furthermore, EMRA will claim the registration of the immovable property subject to expropriation in its name, in exchange of the payment of the expropriation price.

According to the Law, in the first hearing, which must be held within 30 days as of the date of application by EMRA, the court will first ask the parties to mutually agree on the expropriation price. If the parties cannot reach an agreement again, then the court will appoint an expert to determine the value of the subject matter immovable property.

Finally, pursuant to the report prepared by an expert, the court shall determine the expropriation price. The expropriation price shall be determined taking into consideration all factors that may affect the value of the immovable property, such as the legal status of the immovable property, the surface area, the distance from all roads and other settlements, including the distance from the city center.

Transfer of the Immovable Property

After the expropriation price has been determined, EMRA is obliged to pay the subject amount to the owner of the property subject to the expropriation and subsequently, such property will be transferred to EMRA. If the expropriation is made upon the request of investor, then the price must be financed by such investor. However, even in such case, the subject immovable property must be registered in the name of EMRA, and then EMRA shall create a right of easement on such property in favor of the investors free of charge for a period equal to the license period granted to such investor.

As per Article 20 of the Law, after registration of the property in the name of EMRA, EMRA will apply to the relevant execution office to ask for the evacuation of the property. Upon such application by EMRA, the execution office shall deliver a notice to the user requesting their evacuation within 15 days. In cases in which the property is not evacuated within the said period, then competent execution office will start evacuation procedures. Any objection raised by the inhabitants against the evacuation shall not interrupt the evacuation process.

Issues Encountered During the Process

One of the important problems encountered during the expropriation process is the requirement to make the payments to the owner's bank account. As per the Law, the expropriation price determined by the court must be deposited into the bank account opened in the name of the owner. Although, it seems like an easy and normal payment procedure; this little requirement creates serious difficulties where the expropriation involves a large geographical area with numerous owners. Such difficulty arises due to the Law on the Prevention of Money Laundering numbered 5549 according to which the banks are first required to open a bank account with the identity and residence information of the holder. Therefore, EMRA is required to investigate and establish the identities and residences of all owners, and thus, in practice this requirement creates an onerous work load.

Legal status of properties may also create problems for the finalization of the process. If the expropriation involves properties which are qualified as a cemetery, feeding ground, school, health care facility or which are owned by foundations, expropriation process may not be finalized within a short term due to the Turkish bureaucracy. Before expropriation, their legal status must be changed through a long process.

As a final remark, another important issue is the lawsuits initiated for the cancellation of environmental impact assessment reports. Although the owners of the properties subject to immediate expropriation do not have a right to object to the expropriation, in practice, they are initiating lawsuits against the environmental impact assessment reports regarding the energy projects to prevent the finalization of the expropriation.

The aim of this 10-dailies is to give an executive summary on certain legal matters. This has been prepared for information purposes only and does not constitute any legal advice. Thus, one should not rely on it for specific advice. For further information or advice please contact Taboglu & Demirhan, a full-service law firm based in Istanbul.