

June 30 2022

Turkish Competition Board grants negative clearance for energy performance contract

ELIG Gurkaynak Attorneys-at-Law | Competition & Antitrust - Turkey

› Facts

› Decision

› Comment

This article provides an analysis of the Turkish Competition Board's recent decision in *Enerjisa/Galatasaray*⁽¹⁾ The Board evaluated a solar energy power plant construction and maintenance agreement through the use of energy performance contracting (EPC) between Enerjisa Müşteri Çözümleri AŞ (EMC) and Galatasaray Spor Kulübü Derneği, and granted the agreement a negative clearance certificate according to article 8 of Law No. 4054 on the Protection of Competition.

Facts

The agreement between EMC and Galatasaray concerned certain aspects related to the design, installation and maintenance of a turnkey solar energy power plant to be used to generate electricity for Ali Sami Yen Sports Complex. For the purposes of the agreement, EPC was adopted as its financial model.

EMC is active in the provision of:

- customer solutions including energy management;
- distributed energy systems;
- energy efficiency; and
- other customer-oriented energy services.

It is wholly owned by Enerjisa Enerji AŞ.

Galatasaray is a sports foundation that was established to support sportive activities and strengthen solidarity among its members.

The Board's decision provides extensive information pertaining to renewable energy applications and indicates that such projects involve high investment costs and, therefore, require certain incentives and internal or external financing sources. ECP is only one of the prominent financial models for realising renewable energy applications (self-consumption solar energy power plant) and energy efficiency projects. Further, EPC models, while also facilitating "financing" and "investment performance (benefit or saving)", also provide a variety of offerings, such as:

- consultancy and sales services;
- installation;
- performance measuring; and
- performance guarantee (where possible).

ECP, as a contracting model, is applied in many countries and provides solutions in terms of technical performance and financing mechanisms, through which undertakings provide their customers with "performance-based energy projects". The Board, in its decision, indicated that the EPC model is currently a developing concept in Turkey.

According to the EPC model within the agreement, the contract types provided by EMC applied to two areas:

- self-consumption solar energy power plants; and
- energy efficiency projects.

Law No. 5627 on Energy Efficiency provides the legal framework for energy efficiency projects and self-consumption solar energy power plant applications, which could be considered as EPCs. Article 3 of Law No. 5627 defines EPC as the contract that is based on guaranteeing the energy savings to be achieved further to the application project and paying the incurred expenses with the savings that would be achieved after the application.

Self-consumption solar energy power plant applications

In self-consumption solar energy power plant applications, the parties enter into EPCs that provide that the contract includes the design, installation, transfer and maintenance of the solar energy power plant in the customer's facility. Further, these services are provided by the energy services companies during the contract term in return of the agreed price.

The essence of this model is not to provide electricity to the customer but to collect the price of the project that passes to the customers' ownership in the long term, based on the performance of the solar energy power plant project, which is tailored entirely to the customer's needs. Based on this, the contract price includes the project investment value, financing costs and maintenance costs for the solar energy power plant that occurred during the contract term, and this price is invoiced to the customer with the transfer of the facility. Once the solar energy power plant starts operating, the contract price is collected monthly based on the performance of the solar energy power plant. On the other hand, in energy efficiency projects, energy efficiency solutions, such as the reuse of waste heat that occur as a result of the heating, ventilation and production processes, as well as electric motors, are provided, and the project price is collected



GÖNENC
GÜRKAYNAK



BUİRAHAN
KOROİLU



EFE OKER

during the term of the contract based on the achieved savings. This ensures the reduction of energy consumption (eg, electricity, natural gas and fuel oil).

Board's relevant market definition

The Board indicated that, although this is an emerging market both nationally and globally, the relevant product market could be broadly defined as the "market for performance-based energy projects". In this market, a wide spectrum of activities are provided together in a complementary manner. They include:

- energy efficiency and renewable energy investments;
- consultancy and sales services related to such investments;
- installation;
- performance measuring;
- performance guarantee (to the extent possible); and
- financing provided together in a complementary manner.

Although the markets for "solar energy power plant project and application services" and "energy efficiency consultancy services" could be considered as the relevant sub-segments of the market for "performance-based energy projects", the Board ultimately defined the relevant product market as the market for "performance-based energy projects". The Board considered that the supply and demand structures in the relevant product market are of global nature, in particular for large-scale structures and projects. The Board concluded that supply and demand structures are similar to each other in Turkey and, therefore, defined the relevant geographic market as "Turkey".

Decision

The Board assessed the agreement on the basis of articles 4, 6, and 7 of Law No. 4054. In terms of article 4 of Law No. 4054, which prohibits anticompetitive agreements, concerted practices and decisions of associations of undertakings, the Board emphasised that the main objective of the agreement for Galatasaray was to generate the electricity that was being consumed in its own premises, in the Ali Sami Yen Sports Complex; therefore, Galatasaray could not become a competitor to Enerjisa Enerji in the market for the generation and sale of electricity after the agreement. In addition, the Board indicated that the agreement did not include any anticompetitive clauses and, in particular, it did not introduce any exclusivity obligations to Galatasaray. Accordingly, a customer who is not bound by any contractual exclusivity obligations would be able to make a facility or a part of a facility subject to different EPCs or establish an infrastructure to achieve savings by entering into multiple EPCs with different undertakings for different parts of the same facility.

The Board also evaluated that the duration of the agreement is a time-related factor that is associated with the performance-based, long-term payment system and, therefore, the agreement's duration did not give rise to any competition law concerns. The Board also remarked that the solar energy power plant project that was subject to the agreement was a turnkey engineering project and the agreement did not require that the provider supply electricity or other energy to the customer. To that end, the Board concluded that the agreement did not fall within the scope of article 4 of Law No. 4054.

As for article 6 of Law No. 4054, which prohibits abuse of dominant position, the Board assessed:

- the amount of electric energy consumed between 2017 and 2019 in the stadium where the project took place;
- the estimated amount of electric energy to be generated from the solar energy power plant that is subject to the agreement; and
- the amount of electric energy to be supplied to the electricity network.

As a result of its extensive assessment, the Board indicated that only a limited amount of electric energy to be generated in the facility would be supplied to the network, the period during which electric energy could be supplied to the network was only summertime, and the electric energy to be generated in the facility would not meet the consumption during the vast majority of the year. Therefore, the Board considered that the electricity generation from the facility would likely be consumed internally for the facility. The Board further calculated the amount of revenue that Galatasaray would achieve by taking into account the amount of electric energy that was planned to be supplied to the network and the actual price of electricity. In addition, the Board estimated the amount of savings that Galatasaray would achieve given the amount of electric energy to be generated in the facility and to be consumed internally in the facility. Based on its assessments and estimates, the Board considered that the market shares of Galatasaray in the market for the generation and sale of electricity both based on electricity generation and installed capacity would not be of a significant level and that, as an unlicensed electricity producer that would allocate the vast majority of its production to its own consumption, Galatasaray would not be at a dominant position in the market for the generation and sale of electricity.

In terms of article 7 of Law No. 4054, which governs mergers and acquisitions, the Board indicated that Galatasaray was the final consumer in the agreement, and this would not give rise to a change in control over Galatasaray or EMC. The Board also explained in its reasoned decision that the subject of the agreement was merely the installation and operation of the solar energy power plants and collection of the contract price periodically based on the performance. On this basis, the Board considered that the agreement did not establish a joint venture between the parties and did not result in a significant impediment of effective competition in the market for performance-based energy projects.

In view of all its assessments, the Board decided that the agreement did not violate articles 4, 6 and 7 of Law No. 4054, and it granted a negative clearance certificate to the agreement.

Comment

The Board's decision sets a significant precedent in terms of long-term energy agreements, as it provides an insight into the Board's approach towards energy-related matters and, particularly, EPC models. Further, the Board acknowledged the importance of such agreements in today's economy, as well as the benefits for the contracting parties and the general public. As the Board did not determine any competition law concern that is intrinsic to EPC models upon its extensive assessments, the decision itself constitutes a pathfinder for the undertakings engaging in similar energy projects by virtue of the Board's favourable attitude towards renewable energy solutions and energy efficiency applications.

For further information on this topic please contact Gönenç Gürkaynak, Buğrahan Köroğlu or Efe Oker at ELIG Gürkaynak Attorneys-at-Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@eliglegal.com, bugrahan.koroglu@elig.com or efe.oker@elig.com). The

ELIG Gürkaynak Attorneys-at-Law website can be accessed at www.elig.com.

Endnotes

(1) Dated 21 October 2021 and numbered 21-51/706-350.