

EPIAS: a review of the new energy market operating company

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Introduction

In March 2013 a new Electricity Market Law was enacted, with the aim of improving energy regulation and attracting greater investment in the electricity market. One of the highlights was the introduction of EPIAS, the new energy market operating company, which would establish and operate an electricity stock exchange, among other activities.

EPIAS was initially planned to commence operations in October 2013, but it took longer than expected to lay the groundwork for its establishment. However, the preparations have now reached their final stage: the company's articles of association and regulations on its structure and operating principles were recently approved by the Energy Market Regulatory Authority (EMRA).

In order to ensure that EPIAS operates independently, it will have both public and private sector shareholders. On July 1 2014 the EMRA issued an invitation to private sector companies licensed to conduct electricity production or natural gas wholesale, retail sale or export activities to become Group C shareholders of EPIAS. Private sector companies must submit their responses to this invitation by August 29 2014.

This update analyses the articles of association of EPIAS and highlights certain issues that any private sector companies interested in becoming EPIAS shareholders should bear in mind.

Activities

EPIAS's main activities will be:

- the establishment of a stock exchange for the purchase and sale of electricity; and
- oversight of the financial settlement of operations conducted on the market.

Additionally, upon authorisation by the EMRA, EPIAS will be entitled to operate other energy markets besides the electricity market - for example, in relation to natural gas and oil. EPIAS will also determine the market operating tariffs within the scope of the procedures and principles designated by the EMRA.

Shareholding structure

EPIAS will be established with a share capital of TRY61,572,770 and three groups of shareholder, as outlined in the following table.

Shareholder	Group	Shareholding
Turkish Electricity Transmission Company (TEIAS)	A	30%
Istanbul Stock Exchange (ISE)	B	30%
Private sector companies	C	40%

Each Group C shareholder can directly or indirectly own up to 4% of EPIAS's share capital.

However, there is a problem regarding the shareholding of TEIAS, the Group A shareholder. Article 11 of the Electricity Market Law provides that the shareholding of a state-owned entity (except the ISE) in EPIAS cannot exceed 15%, although the Cabinet of Ministers is authorised to increase this percentage to 30%. However, no such decision of the Cabinet of Ministers appears to have been issued in this regard. The articles of association of EPIAS cannot be signed or registered as they stand, in the absence of such a decision; therefore the Cabinet of Ministers must authorise this increased shareholding before the articles of association are signed by the founding shareholders.

Board of directors

EPIAS will be managed by a board of directors comprised of seven members. Each shareholder group will have the right to nominate two candidates to the board; the final member will be an independent person appointed by the general assembly from a list of candidates nominated by the shareholders.

The board of directors will be entitled to appoint the general manager and establish committees, such as a risk committee and a market monitoring committee.

Initially, board members will be appointed by the EMRA, to hold office until the first general assembly. This provisional arrangement should not remain in place for too long and the first general assembly should be convened as soon as possible after the establishment of EPIAS, to ensure that each shareholder group is represented equally on the board.

Additionally, given that EPIAS will likely have a large number of private sector shareholders, the selection of their board members and the decision of whom to appoint as the final board member at the general assembly may well prove time-consuming processes. Including a provision in the articles of association that specifies the procedure for nominating the board member candidates of Group C shareholders would prevent potential disputes that may arise in this regard.

Share transfer restrictions

Article 7 of the articles of association sets out numerous share transfer restrictions, whose validity is somewhat questionable under Article 493 of the Commercial Code. Article 493 of the code provides that in order for a share transfer restriction to be valid:

- there must be a just cause for the restriction which falls within the categories listed in Article 493 (ie, relating to the company's scope of activities or economic independence); and
- that just cause must be explicitly stated in the articles of association.

However, EPIAS's articles of association do not specify such a just cause for the share transfer restrictions, which thus contravene Article 493 of the code. In order to determine whether this would render the restrictions invalid, they are analysed individually below.

Group A shares

Article 7 of the articles of association provides that the percentage of Group A shares in the share capital of EPIAS can in no circumstances fall below 30%; which means that the Group A shareholder, TEIAS, cannot transfer its shares to any third party. At first glance, this provision may seem to reflect Article 11 of the Electricity Market Law. However, while Article 11 specifies an upper limit for the shareholding of state-owned entities, it does not specify a base limit. As a result, Article 11 does not restrict TEIAS from transferring its shares to third parties. If the Electricity Market Law

were to restrict share transfers, the share transfer restriction regarding Group A shares would presumably be valid due to the principle of *lex specialis* (ie, where two laws govern the same subject matter, a subject-specific law will take precedence over a general law). However, as the Electricity Market Law imposes no such restriction, Article 493 of the code still applies and therefore the restriction under Article 7 of the articles of association is invalid.

Group C shares

Article 7 of the articles of association further provides that no Group C shareholder can directly or indirectly own more than 4% of the shares in EPIAS. This means that where a company with a shareholding of 4% is willing to take over additional Group C shares from another Group C shareholder, the board of directors must reject the share transfer.

Another share transfer restriction related to Group C shares provides that these shares can be transferred only to companies that are licensed to conduct electricity production or natural gas wholesale, retail sale, export or import activities, or to ISE.

These share transfer restrictions do not comply with Article 493 of the Commercial Code and are therefore invalid.

Resolving validity issues

The share transfer restrictions included in the articles of association of EPIAS are necessary to ensure that such an important player in the industry does not fall under the control of a single company or group. However, the articles of association must comply with the technical requirements of the Commercial Code in order for these restrictions to be valid.

To this end, a just cause for the restrictions should be included in Article 7 of the articles of association which relates to the scope of activities or economic independence of TEIAS - for example, a provision stating that the restrictions are intended to safeguard the economic independence of EPIAS and prevent unlicensed companies from becoming shareholders, given that the company mainly engages in operational activities in regulated sectors.

Execution proceedings

Article 7 of the articles of association states that the acquisition of shares through compulsory execution is also deemed a share transfer within the scope of this provision. However, according to Article 493 of the Commercial Code, the transfer of shares acquired through compulsory execution may be rejected only by proposing the purchase of those shares at their market value. Therefore, EPIAS cannot reject the transfer of shares to a third party which acquires them through compulsory execution proceedings - even if the articles of association include an explicit just cause, as stated above, and the share transfer conflicts with that just cause - unless EPIAS purchases the relevant shares itself from the third party by paying their market value.

Approval of Group B share transfers by general assembly

Article 12 of the articles of association provides that transfers of Group B shares to third parties that would not qualify as Group C shareholders (ie, that do not hold a licence for electricity production or natural gas wholesale, retail sale or export activities) must be approved by the general assembly with a quorum of 80% of the shareholders present at the relevant meeting.

This provision contradicts Article 7 of the articles of association, which provides that a share transfer becomes valid after it has been approved by the board of directors and the EMRA; as well as Article 492 of the Commercial Code, which provides that a share transfer may be subject to approval by the company (subject to the provisions of Article 493 mentioned above). However, share transfers in a joint stock company should be approved not by the general assembly, but by the board of directors, since this is the body which represents the company and has the power to govern its relations with respect to third parties (unless otherwise set forth under the Commercial Code). Moreover, making the share transfer subject to the approval of the general assembly contravenes the principle of transferability of shares in joint stock companies, as the general assembly convenes less frequently than the board of directors and this may thus delay approval of the share transfer.

Although transfers of Group B shares to parties that would not qualify as Group C shareholders will likely be exceptional in practice, from a legal standpoint, Article 12 of the articles of association should be deleted and the transfer of Group B Share made subject to approval by the board of directors.

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