NON-SANITARY ENTERPRISES WORK LICENSE, TRANSFER OF THE LICENSE AND ENCOUNTERED PROBLEMS

Atty. Mustafa Can Yürük - Atty. Onur Pajo

With motor vehicles becoming a part of our daily lives, fuel stations have gained an important place in the commercial life. Fuel stations are the places that gasoline, diesel, Liquefied Petroleum Gas (LPG) or compressed and even Liquefied Natural Gas (LNG&CNG) have been offered to the final consumer. In addition, other needed materials and services are also offered such as car washing and tire repair. There are currently about 13,000 fuel stations in Turkey. In the face of the concentration of these activities and the increasing importance of them in society, the need for the regulation of these activities and the establishment of a system of regulation with the hands of the state that will take care of the public interest emerged. In this context, in our country, as in other countries, the rules concerning security, safety, competition rules related to the operation of fuel stations, as well as many important obligations in administrative and legal dimension, are considered as liabilities of fuel station operators.

The most important criterion in determining the value of the fuel station, which is an income-generating immovable property, is the effect of the distributor brands on the consumer and the daily sales value of the station. However, the professional operation of the station should also be considered while making evaluations. In this context, "a professional business" statement includes the protection of customer standards, the general cleanliness of the station, providing competent service to the consumer by competent persons and compliance with the legislation.

With the publication of the Petroleum Market Law No. 5015 on 12/20/2003, a new era has begun for all market actors in the petroleum market. With this law, all fuel stations are required to obtain a dealership license from the Energy Market Regulatory Authority. In the applications for the dealership license to be made, it has been required to submit 3 important documents to the authority in order to obtain and preserve the license.

- Non–Sanitary Enterprises Work License
- Minimum distance determination report
- Automation statement

As can be seen from the abovementioned documents, one of the conditions that must be provided for obtaining a dealership license from the authority is the existence of a non-sanitary enterprises work license. Non-sanitary enterprises work license has been mentioned firstly in terms of regulatory compliance with Law No. 3572 dated 06/14/1989 and this law brought general and special provisions to businesses and is aimed to "simplify and facilitate granting work permits to industrial, agricultural and other workplaces and all kinds of businesses" (Article 1). With the 5216 Metropolitan Municipality Law No. 5216 (2004), Law on Provincial Special Administration No. 5302 (2005) and the Municipal Law No. 5393 (2005), new regulations were brought regarding the non-sanitary enterprises work permits, and it became bureaucratic but at the same time were taken under control and regulated.

In Article 4/b of the Business and Operation License Regulation, the definition of a non-sanitary enterprise has been made. Accordingly, "Non-sanitary enterprise refers to establishments that are more or less harmful to or likely to cause biological, chemical, physical, spiritual and social damage to those in its vicinity during its activity, or that may cause contamination of natural resources". In Article 4/d of the regulation contains such definition; "Second-class non-sanitary enterprise:

means the enterprises that need to be examined in order to establish the belief that it will not cause harm to the health and rest of the residents before permission is granted, although it does not necessarily need to be removed from the dwellings". The regulation Annex-2 contains the "List of Non-Sanitary Enterprises" and under the title "Second Class List of Non-Sanitary Enterprises" Article B/5.3., " fuel oil and / or auto gas stations" are designated as second class non-sanitary enterprises.

In Article 4/a of the Business and Operation License Regulation, the competent administration is defined as "It refers to the special provincial administration in matters outside the municipal boundaries and adjacent areas and which are authorized exclusively by the laws to the special provincial administration; it refers to metropolitan municipality within the boundaries and adjacent areas where the Metropolitan Municipality is authorized; other than these it refers to the Metropolitan District or the first-tier municipality; it refers to the municipality within the boundaries of the municipality and surrounding areas and it refers to the legal entity of the organized industrial zone within the boundaries of organized industrial zone."
The characteristic that distinguishes the non-sanitary enterprise work license from other licenses is that it is an administrative process that affects both the person and the immovable together and gives them a predetermined right. When the person is given the license, it is understood that the immovable written on the license will be operated as a fuel station by the person written on the license. In this way, the place mentioned in the license is considered as an immovable fuel station, while the person who receives the license is considered as the person who has the right to operate this fuel station.

Stations operated by dealers may be based on their own immovable or may be based on the immovable of their distribution companies or third parties. Sometimes, distribution companies allocate stations to their dealers for a certain period of time through dealership contracts, where they obtain the right to benefit from third parties based on lease, usufruct and operating contracts. Dealers start their operations in that kind of stations, that is not their own property, by obtaining a work license from authorized administrations and a dealership license from EMRA, but they do not refuse to return the license when the lease, operation, dealership and similar contracts that give them the right to use the station have expired and many problems are encountered in because of that.

According to Article 8.1. of the Business and Operation License Regulation; "If the business is transferred, provided that the subject of activity and address specified in the license is not changed, the license is issued again on behalf of the new operator upon the application of the person taking the information and documents in the file." With the Regulation amending the Business and Operation License Regulation which came into force after being published in the Official Gazette on June 9, 2020, "However, if the physical condition of the workplace and the information and documents in the registration file are contrary to the provisions of the legislation that must be met within the scope of this regulation on the subject of activity, a minimum period of six months shall be given for the elimination of such discrepancy. In cases where the discrepancies determined within the given time period are not resolved, the transfer process cannot be carried out." has been added to the aforementioned article.

In fact, the purpose of this article is to facilitate the registration process, protect the acquired right and save time by preventing duplicate procedure. Thus, a license is issued on behalf of the new dealer or operator "based on the documents available in the file". However, this situation can also be abused by malicious dealers or operators. In cases requiring dealer change, the dealer who will transfer the non-sanitary enterprises work license may decline or ask large amount of money to transfer the non-sanitary enterprises work license and the work place, by a written contract, by taking advantage of the loophole of the legislation in order to prevent the new dealer from obtaining the license and to force the renewal of the contract which gives him the right to use the station. Even though it has no legal ties with the real estate, it may transfer the license to third parties except with the consent of the owner or the owner of the right. The fact that the trial to be held in terms of resolving the license disputes may take a long time also benefits the dealer or operator who will transfer the license. In this respect, it has become necessary to make changes in the legislation in terms of changing the nature of the non-sanitary enterprises work license.

THE VESTED RIGHT ISSUE SHALL BE RAISED IN THE TRANSFER TRANSACTIONS THAT WILL TAKE PLACE AFTER THE CHANGE

As we mentioned above, the main purpose of this Article is to make things easier by reducing the red tape in the registration process. In addition, with the relevant regulation, while the applicants save time, the vested rights of the persons are protected and the continuity of the commercial enterprise is ensured. In this respect, prior to the regulation, the competent administration (Municipality, Special Provincial Administration, etc.), without the need to re-operate all procedures in transfer transactions, license was issued on behalf of the new operator based on the existing documents.

With the new regulation, the authority authorized to warrant licenses will conduct on-site inspection and audit of stations' compliance with the legislation. After the inspection, if the stations are found to be in violation of the legislation, a minimum period of six months will be given for the removal of the said violation and in cases where the violations detected within the given period are not resolved, the transfer process will not be possible.

This regulation will require fuel oil and autogas dealers operating in our country to make additional expenditures in order to comply with the changing legislation. In the event of failure to comply with the legislation, it will eliminate the right of the assignees to operate. While the assignees lose this right, which has been effectively acquired by the license for the station, there will be a serious disparity in the stations that are never subject to transfer due to the fact that they can continue their activities even if there is a violation of the legislation. For all these reasons, with the amendment on the Business and Operation License Regulation Article 8, it is stated that this regulation is contrary to many legislation including the Constitution and competition legislation, and that these contraventions harm the rule of law, equality, freedom of contract and the right to property.

As mentioned above, this license is not a form of license issued solely on the person's qualifications, such as a lawyer's license or a gun-carrying license, but is accepted as a right granted to both the person and the immovable at the same time and together. As a solution to this issue, in order to overcome the license problems encountered in the operator or dealer changes and the evaluation of granting the licenses to stations separately as persons and immovable in order to protect the acquired rights related to the license, a separate and exclusive license for the station that is specific to the immovable, on the other hand, for the continuation of the work with competent persons, the proposal for the service adequacy to be given to the operator or dealer by the professional association, EMRA or another public institution should be evaluated. With the amendment to the legislation, the issuing of the license independently of the person who will operate the business by being specific to the business, it shall mean a document showing that the workplace is conducive to a specific activity and that the activity in the business is permitted and shall not be affected by the change of the operator. On the other hand, with the service adequacy certificate given by professional association, or other public institution; that will bring personal characteristics of the operator to forefront and a sectoral merit and supervision mechanism will be provided by considering the conditions such as the collection status, ability, nationality, capital structure, other pre-rights and licenses or qualifications of the dealer or operator. Thus, deriving unlawful profit will be prevented by transfer of the license and continuity will be ensured in the rights provided by the license specific to the place (station) where the activity will be carried out. It is a fact that it is necessary, even though a new bureaucratic addition will be made to the process.

In fact, with the Regulation Amending the Business and Operation License Regulation, which came into force after being published in the Official Gazette on June 9, 2020, although there has not been a fundamental amendment regarding the immovable property (station), with regard to the qualification of the person, the provision that the owners or employees of the workplace who are in the dangerous and very dangerous class receive vocational training must have a "professional competence certificate" has been added to the regulation. Within the scope of the amendment, in regards with the "Regulation Amending the Business and Operation License Regulation", the owner of the workplace or those employed in each profession in the workplaces in dangerous and very dangerous class have to complete their vocational training within the scope of the Regulation on Vocational Education of Persons to be Employed in Dangerous and Very Dangerous Classes published in the Official Gazette dated 7/13/2013 and numbered 28706.

Finally, with the new regulation, electric vehicle charging stations were included in the scope of the regulation as third class non-sanitary enterprises and Article 13 of the Business and Operation License Regulationand he subsection titled "1- ENERGY INDUSTRY" of the section titled "C.) THIRD CLASS NON-INDUSTRIAL ENTERPRISES" of the "LIST OF NON-SANITARY ENTERPRISES" section in Annex-2 with has been amend-

ed. In order to fulfill electricity needs of the vehicles that are operating with electrical energy, electric charging stations to be installed independently in parking lots, in the places reserved as parking areas of shopping centers, in fuel stations or other places that shall be deemed appropriate by the competent authorities and reserved for this purpose in the zoning plan is provisioned that the workplace where it is established shall be specified as an incidental operations in the license issued based on its main field of activity. In accordance with the amendment of the regulation, it is necessary to specify the electric vehicle charging stations as incidental operations in the license within three months at the latest.

KILOMETER LIMITATION AND ITS APPLICATION

One of the important issues in the sector for the maintenance and administration of fuel stations is the kilometer limitation. Although it may seem like an issue to be underestimated by some, this "Minimum Distance Determination Report" allows the stations to be opened and initiate their activity.

HOW TO MEASURE THE MINIMUM DISTANCE BETWEEN FUEL AND LPG STATIONS?

In accordance with subparagraph 23 of Article 2 of the Petroleum Market Law No. 5015 and subparagraph "ü" of Article 2 of the LPG Market Law No. 5307, the kilometer limitation (minimum distance) is defined as "The minimum distance between two fuel stations in the same direction on intracity or intercity traffic ways to be determined in the regulation to be issued by the Board." The minimum distance between these two fuel stations is determined by the Article 8 of the Petroleum Market Law No. 5015 and article 45 of the Petroleum Market Licensing Regulation. According to these articles, the distance between the two stations shall not be less than 1 km on intracity roads and 10 km on intercity roads.

With the decision of EMRA, dated 12/15/2016 and numbered 6664 that published in the Official Gazette and entered into force; regarding the minimum distance, the kilometer limitation implementation between fuel and LPG stations has been determined as follows: With the enactment of this board decision, the Board Decision No. 579/113 dated 11/17/2005 was abrogated.

In Article 2 of the Board Decision No. 664, the minimum distance measures are specified, and in Article 3, a basis for the measurement of the distance has been introduced. According to this,

Article 2 - In implementations of minimum distance limitations between fuel and LPG stations;
Direction basis is taken into account, not the road name or road code on which the station is located.

a. The distance of ten kilometers between the fuel and LPG stations on the intercity roads is required.
b. A distance of one kilometer between fuel and LPG stations on city roads is required.
c. There must be a distance of at least one kilometer between the stations located at the intersection of intracity and intercity roads.
d. Intracity roads and intercity roads are evaluated separately from each other, taking into account the above mentioned points.

Article 3 - The distance between the two structures is taken into account when measuring the minimum distance between fuel and LPG stations.

MINIMUM RANGE MEASUREMENT PRINCIPLES

1. The range of ten kilometers between the fuel and LPG stations on the intercity roads is required.
2. A range of one kilometer between fuel and LPG stations on city roads is required.
3. There must be a range of at least one kilometer between the stations located at the intersection of intracity and intercity roads.
4. Intracity roads and intercity roads are evaluated separately from each other, taking into account the above mentioned points.
5. The range between the two structures is taken into account when measuring the minimum range between fuel and LPG stations.
6. Fuel stations are evaluated among themselves and LPG stations are evaluated among themselves in the processes and implementation related to minimum range between stations.

Article 4 - Fuel stations are evaluated among themselves and LPG stations are evaluated among themselves in the processes and implementation related to minimum distance between stations.

Within the scope of kilometer limitation implementation, the issue of who shall make and arrange this decision and the report has been evaluated in the section "Frequently Asked Questions About Petroleum Market Dealership Licenses" published on the EMRA website to inform and guide the energy market.
In the aforementioned information section is stated that, administrative authorities are authorized and in charge with issuing the minimum distance determination report; "Administrative authorities who are authorized and in charge with issuing the minimum distance determination minute; municipal boundaries and non-adjacent areas Special provincial administration in matters authorized exclusively to the special provincial administration in laws, within the boundaries of the metropolitan municipality and adjacent areas, the metropolitan municipality is authorized by the metropolitan municipality, in places other than these, metropolitan district or first tier municipality, in an organized industrial zone legal entity within the boundaries of the organized industrial zone."

According to legislation, EMRA does not have a duty to make individual evaluations and give opinions about the areas where the stations shall be established, except for taking general regulatory decisions regarding the kilometer limitation. Therefore, all issues regarding the application of kilometer restriction between fuel stations should be evaluated by the competent local administration, based on the relevant legislation."

Minimum Distance Determination Report in Practice

EMRA obliges the applicants to submit to the Authority the "Minimum Distance Determination Report" to be issued by the authorized local authority for the fuel station in order to determine whether the fuel stations for which license applications are made, meet the kilometer limitation requirements. These reports, which are required for the preparation of the zoning plans and which are considered as indispensable for the applications for the dealership license with station, are given by the metropolitan municipalities in metropolitan cities.

Calculation of minimum distance, although it is fundamentally simple, it causes constant controversy.
Primarily, in order to evaluate the distance between two fuel stations on a directional basis, it is necessary to determine that the stations are in the same direction. This determination is generally done in two ways as follows, in order to be considered to be in the same direction, it is necessary to evaluate the distance by dividing into two on direction basis:

1. In divided roads, a fuel station and the next fuel station that the vehicle shall arrive on the outbound route are considered in the same direction.
2. In undivided roads, a fuel station and the next fuel station that the vehicle arrives without changing the outbound lane are considered in the same direction.

It is accepted that the fuel stations that are intended to be established on both sides of the road on the highways or connection roads open to traffic in one direction are also in the same direction.

It is accepted that vehicles turning right or continuing in the same direction at intersections remain in the same direction of the road, while the vehicles turning left or backwards is accepted they cross the opposite direction

of the road. Therefore, in the direction basis implementation, even if the name, code or type of the road at the entrance or exit of the stations is different, kilometer limitation can be measured between these stations.

We shall refer to image below in order to explain the subject.

Plan opinion and distance determination minutes are requested for the establishment of a station on C parcel. Stations A and B are established and licensed stations and continue their operations.

In the event that the entrance and exit of the station to be installed on the C parcel is given via the street in the north, C station shall not meet the kilometer limitation requirement as a result of the fact that the road in the north is one direction and the presence of Station A in the same direction.

If the entrance and exit of the station to be established on parcel C is given over the street in the south, if there is a distance of more than 1 km between station C and station B to be established, station C shall be able to meet the kilometer limitation requirement. On the other hand, if there is a distance of less than 1 km between the two stations, C station will not be able to meet the required km requirement, as vehicles turning right at intersections or continuing in the same direction remain in the same direction of the road.

Finally, it should be noted that the minimum distance measurements are carried out separately for the sale of LPG and for the sale of fuel sales.

Situations Where Minimum Distance Determination Report is not Required

As of 01/01/2005, EMRA has started to seek as a prerequisite for the submission of a "Minimum Distance Determination Report", which indicates whether the fuel stations for which license applications have been submitted meet the kilometer limitation requirements and which must be issued by the authorized local administration. However, minimum distance determination minutes are not required for each license application to be submitted by those who shall operate as dealers in the petroleum and LPG markets.
The requirement for a minimum distance determination report, which has caused many discussions since its entry into force, has been the subject of different implementations in many of the abrogated regulations of EMRA in addition to that it is discussed in many proceeding. In the decisions published by EMRA, although it is required to submit documents such as "construction permit", "residential usage license" or "zoning plans" obtained before 01/01/2005 as situations where the minimum distance determination report is not counted, after various suspension of execution decisions, EMRA's implementation in this regard is also has gained uniformity.
Hereunder, on the website of EMRA, the documents required for the dealership license, under the condition of "minimum distance determination report", are stated as "Minimum Distance Determination Report is not required in license applications to be made for fuel stations for which a dealership license has already been issued".

EPGIS Chairman Fesih Aktaş's Opinions

As is known, there are technical procedures to be done in our country for the establishment of fuel stations in the first place.

The first of these is the identification of the land to be established in this direction, i.e. the technical term, processing the land in the 1/5000 and 1/1000 scale maps as "FO and L" which refers "Fuel Oil and LPG".

After the land is processed as "Fuel Oil and LPG" on the map, it now functions only as fuel oil and LPG station unless otherwise decided by the Council of the municipality of the city concerned.

After this process, Non-Sanitary Enterprise Licance is required for the station to operate.

Work can be carried out after this license is defined to the relevant institution or person. Incase of a handover, "A and L" legant notes on the land parcel keeps its status, however, in case of possible operator change in Non-Sanitary Enterprise, Non-Sanitary Enterprise Report is renewed by the relevant municipal office starting from the beginning and following the technical conditions of that day, if the partnership structure of the company in which Non-Sanitary Enterprise Report is defined has not changed.

This possible renewal of the license and changing technical conditions may result in loss of rights at previously established stations. In some cases that formal application made unconsciously, because of the fact that the process can not be withdrawn after the official applications, there may be a complete cancellation of the Non-Sanitary Enterprise Report. Therefore, in order to prevent the loss of rights, it should be ensured that the land has a holistic right by granting the licenses to the parcel of the land not to individuals or companies, such as "A and L" legant note. Fuel stations are operations with large amounts of costs as a result of their establishment. Building the technical conditions of the day during the transfer of the business can cause financial irreparable damage.