

Turkey: Recent Developments Concerning The Legal Regime Applicable To Foreign Real And Legal Persons' Acquisitions Of Immovable Properties In Turkey: An Analysis Of The Decision Of The Constitutional Court As Published On April 16th, 2008

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The Law on Direct Foreign Investments (the "Law") and the Land Registry Law regulate the provisions with respect to acquisition of immovable property and rights in-rem¹ by foreign real and legal persons. The Turkish Constitutional Court ("the Court") has very recently annulled Article 3/d of the Law, and the last sentence of sub-clause 1 of Article 35 of the Land Registry Law. This calls for an analysis of the current legal status of foreign real and legal persons' immovable property rights and future acquisitions of immovable property rights.

Acquisition of immovable properties and rights in-rem by foreign investors in Turkey

Article 3/d of the Law read as follows: "*Legal persons, incorporated or participated in² by foreign investors in Turkey, may acquire immovable or limited rights in-rem in the areas that are open to Turkish citizens for such of acquisition*". This article is annulled with a decision of the Court rendered with file number 2003/71, dated March 11, 2008 (the "Decision"). The Decision and its reasoning is published in the Official Gazette on April 16, 2008, and it will become effective at the end of a sixth-month period following the date of publication.

According to the reasoning of the Decision, Article 3/d of the Law is deemed to be in breach of Article 2 of the Constitution of the Republic of Turkey (the "Constitution") on the following grounds:

The fifth paragraph of the preamble of the Constitution indicates that no protection shall be given to an activity contrary to national interests of the Republic of Turkey, the principle of "the indivisible existence of the Republic of Turkey with its state and territory", and the Turkish historical and moral values.

In addition, pursuant to Article 2 of the Constitution, the Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental principles set forth in the preamble.

Furthermore, as per Article 5 of the Constitution, the fundamental aims and duties of the state are to safeguard the independence and the integrity of the Turkish nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual, in a manner incompatible with the principles of justice and of the social state governed by the rule of law.

According to the Decision, in the context of the aforementioned preamble and provisions of the Constitution and the requirements of functioning as a state governed by the rule of law; and in order to regulate national economy in accordance with national benefits, the principles and procedures of (i) foreign investors' purposes for acquisition; (ii) utilization and use method; and (iii) issues relating to the assignment of immovable or limited rights in-rem, must have been determined and adequately regulated in the Law.

However, the Court finds that Article 3/d of the Law lacks such restrictions, which in the Court's opinion could lead to ambiguity, and allow foreign investors to acquire immovable properties and limited in-rem rights without any limitations.

Therefore, as per the Court's opinion and the resulting Decision, Article 3/d of the Law has been found to be contrary to Article 2 of the Constitution, and it has therefore been annulled.

In accordance with Article 153 of the Constitution and Article 53 of the Law on Establishment and Proceedings of the Constitutional Court, an annulment decision of the Court enters into effect on the date such decision is published in the Official Gazette. However, if the Court opines that an annulment decision creates a legal loophole which may threaten public order or violate the public welfare, the Court may decide on a later effective date. In the case at hand, the Court has taken such a possibility into consideration, and attempted at preempting any immediate ambiguity resulting from the annulment of Article 3/d. Therefore, the Court resolved for a 6 months transition period as of the publication date of the Decision in the Official Gazette (thereby delaying the effective date of the decision to October 16th, 2008), in order to allow for a new regulation to be promulgated by the Turkish legislative body, should the legislator wish to replace the annulled provision with a new set of norms.

The Decision is published in the Official Gazette on April 16, 2008, and it will become effective on October 16, 2008. In other words, Article 3/d of the Law will remain in force and will continue to be applicable until October 16, 2008. Since the Court did not provide for a stay of execution of the article annulled, companies with foreign capital may continue acquiring immovable properties and limited rights in-rem pursuant to Article 3/d of the Law until October 16, 2008.

On a related note, the dissenting opinion of five judges of the Court criticized the reasoning of the Decision, in finding that it is based on an inadequate argumentation that the Article 3/d of the Law does not specify any restrictions for foreign investors. The dissenting opinion brings into attention that the relevant provisions of the Capital Markets Law, the Law of Obligations and the Turkish Commercial Code provide restrictions with respect to foreigners acquiring immovable properties and limited rights in-rem in Turkey. Furthermore, the dissenting opinion continues to observe that the provisions with respect to immovable property ownership and exercise of limited rights in rem for commercial companies are specified in the articles of association of each company, leaving no room for uncertainty. Finally, the dissenting judges opine that a foreign investor is already required to specify its direct investment purpose in the articles of association of the company incorporated or invested in, rendering obsolete the alleged legal necessity to provide an additional explicit provision in the annulled norm with respect to this subject.

For the time being and until the annulment decision enters into force, companies incorporated by foreign investors may acquire immovable properties and limited rights in-rem in Turkey.

In addition, it is expected that the Turkish Grand National Assembly will revise the Law in accordance with the Court's reasoning during this transition period of six months, and grant to the foreign investors a right to acquire immovable or limited rights in-rem subject to certain restrictions (purpose of acquisition, utilization and use method, and a regime on assignment to third parties).

However, should the Turkish Grand National Assembly not introduce a new legislation until October 16, 2008, companies established or invested in by foreign investors in Turkey will not be allowed to acquire any further immovable properties or limited rights in-rem after the end of this transition period.

In any case, the validity of the transactions already concluded pursuant to Article 3/d of the Law will not be affected by the Decision. Since the Court did not provide for a stay of execution of the article annulled, legal persons, incorporated or participated in by foreign investors in Turkey may continue to acquire immovable properties and limited rights in-rem pursuant to Article 3/d of the Law until October 16, 2008.

Acquisition of immovable properties in Turkey by foreign real persons

Sub-clause 1 of Article 35 of the Land Registry Law reads as follows:

"With reservation of reciprocity and compliance with legal restrictions, foreign real persons can acquire immovable in Turkey for the purpose of using it as residence or as business place, provided that such immovable properties are allocated and registered in the implemented development plans or localized development plans for these purposes. The same conditions are required in establishing limited rights in-rem on immovable properties. The total area of the immovable property and limited rights in-rem on an immovable property that a real person of foreign nationality can acquire in Turkey can not exceed 2.5 hectares. Within the framework of the same conditions set forth in this paragraph, the Council of Ministers is authorized to increase this area up to 30 hectares.

The last sentence of this sub-clause, which reads as "*within the framework of the same conditions set forth in this paragraph the Council of Ministers is authorized to increase this area up to 30 hectares*" was annulled with a decision of the Court dated April 11, 2007. This decision and its reasoning was published in the Official Gazette on January 16, 2008. According to the reasoning of the Court, the last sentence of the article is annulled due to the fact that it grants an excessive authorization to the Council of Ministers to increase the legal limit that is 2.5 hectares to (2.5 x 12) 30 hectares. This discretionary power was considered by the Court to be defeating the purpose of the limitation that was deemed necessary by the legislature.

In this decision, the Court allowed for a 3 months transition period, delaying the effective date of the decision with three months following the publication date of the decision in the Official Gazette, in order to allow the legislature to issue a new regulation with respect to the annulled article, should it wish to do so. Since the Court did not grant a stay of execution, the annulled sentence remained in force until April 14, 2008 which was the final day of the 3 months period. Since this 3 months period expired and the legislature has not provided for new regulations to revise the annulled provision, on April 14, 2008, the Ministry of Public Works and Settlement has issued a circular. This circular indicates to all relevant counterparts, including the land registry offices and cadastral officials, that applications for acquisition of

immovable properties by foreign real persons and legal entities will not be responded to until another circular is issued, in order to avoid confusions that may arise due to the current legal status.

The legislature actually did prepare a new regulation. Nevertheless, it could not be made ready to enter into force within the 3 months transition period provided by the Court due to the complex legal bureaucracy involved. In a speech he gave on April 16th, 2008, the Minister of Finance, Mr. Kemal Unakitan, publicly announced that the new regulation has been signed by him and it will enter into force in the near future.

Acquisition of immovable properties in Turkey by foreign legal persons

The sub-clause 2 of Article 35 of the Land Registry Law reads as follows:

"Companies having legal personality established in foreign countries according to the laws of these foreign countries can acquire immovable and establish limited rights in-rem on immovable in Turkey according to the provisions of special laws". In this respect, the relevant special laws are the Law for Encouragement of Tourism numbered 2634, the Petroleum Law numbered 6326, and the Industrial Regions Law numbered 4737.

Conclusion

Legal persons, incorporated or participated in by foreign investors in Turkey may continue to acquire immovable properties and limited rights in-rem pursuant to Article 3/d of the Law until October 16, 2008. However applications for acquisition of immovable properties by foreign real persons and legal entities will not be responded to until another circular is issued by the Ministry of Public Works and Settlement or until the legislator replaces the annulled sentence of Article 35 of the Land Registry Law with new provisions. Due to the fact that the annulment decisions of the Court are non-retroactive, the validity of the transactions concluded so far pursuant to Article 3/d of the Law and the annulled sentence of Article 35 of the Land Registry Law will not be affected by the annulment decisions. By the same token, the existing proprietary rights attached to the immovable properties already owned by foreign real and legal persons will not be affected as a result of the annulment decision of the Court.

Footnotes

1 Rights in-rem are limited rights relating to an immovable property other than ownership right. Rights in-rem allow their holders to use or benefit from an immovable property and they are established by registration in title deed. Upon registration, rights in-rem are recognized by third parties. Some examples of rights in-rem include right of residence, right of easement, usufruct, mortgage etc.

2 As per Article 2 of the Law, direct foreign investment is defined as foreign real or legal person's i) holding shares representing at least 10% of share capital of a listed company; or ii) holding any amount of shares of a listed company granting right to cast 10% of the total votes; iii) holding any amount of shares in a non-listed company.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.