

The Regulation Regarding Acquisition of Real Property by Companies with Foreign Capital was published on 12 November 2008. However, contrary to expectations, it seems that the Regulation will, in practice, increase the problems faced lately.

By Erol OZBEK

Acquisition of Real Property by Turkish Companies with Foreign Capital

Legislation regulating acquisition of real property by Turkish companies with foreign capital was amended by Law No. 5782 and dated 3 July 2008 after the cancellation of Article 3 (d) of the Foreign Direct Investments Law by the Constitutional Court. The Law No. 5782 introduced new rules concerning acquisition of real property by Turkish companies with foreign capital in order to comply with the Constitutional Court's ruling.

Taking into consideration that the world may be facing the worst financial crisis since the Depression, the amendment made by Law No. 5782 to Article 36 of the Title Deed Act is of great importance for Turkey as it relates directly to Foreign Direct Investments Law No. 4875, which was enacted in 2003 to promote foreign direct investments.

As per the Turkish Title Deed Act as amended in July 2008, the rules and procedures concerning the acquisition of real property by foreign capital Turkish companies should be determined by a regulation. The long-awaited regulation was published in the Official Gazette numbered 27052 and dated 12 November 2008, under the name "Regulation Regarding Acquisition of Real Property by Companies with Foreign Capital" ("**Regulation**").

Unfortunately, the Regulation contains provisions which violate Article 36 of the Title Deed Act and Articles 1 and 3 of the Foreign Direct Investments Law. Thus, it seems that the operation of the new system will be burdensome as the Regulation will increase the confusion caused in the acquisition of real property by foreign capital companies recently. Furthermore, this may create an environment that is contrary to the interests of the country and may also violate the principles of the rule of law, equal treatment, and supremacy of law, which are included in the Turkish Constitution.

The Drawbacks of the New Regulation

When introduced in 2003, the Foreign Direct Investments Law aimed to liberalize the regulation of foreign direct investment in Turkey and to accommodate all foreign investors. As a result, the amount of foreign direct investments and the acquisition of real property by those companies have significantly increased following the legislative changes.

The Constitutional Court challenged the "total freedom" granted to companies incorporated in Turkey by foreign shareholders for the acquisition of real property and ruled that certain restrictions should be imposed on them as well. Following the ruling of the Constitutional Court, general principles for the acquisition of real property by Turkish companies with foreign capital were included in Law No. 5782 and dated 3 July 2008, leaving room for a new regulation to determine further details.

However, the Regulation disregards Article 5 of the Constitution, which requires the state to promote people's welfare, peace, and well-being, and yet imposes strict conditions beyond the scope of Article 36 of the Title Deed Act. The investment possibilities of the Turkish companies with foreign capital are being complicated by the Regulation, contrary to the "principle of proportionality" promoted by Article 13 of the Constitution.

Under the Regulation, even the acquisition of real property by Turkish companies with foreign capital outside military zones, secured zones, strategic regions, or special security zones was made subject to governmental bodies' approval and required the submission of applications to the appropriate governorship. Although certain time limitations were stipulated for the replies of the Directorate of Industry and Trade, the General Staff of Armed Forces, and the General Directorate of Police to the governorship regarding its information request, there are no response periods specified for notifications to be made by the

governorship to such authorities. It is also unclear whether or not the commission formed within the governorship will convene regularly and be able to decide on these matters within a specific time period. Another drawback is that the decisions of the commission must be unanimous. This may cause uncertainty and arbitrariness in practice, and the Turkish companies with foreign capital may be subject to difficulties or unpredictable timing problems when acquiring real property under Article 36 of the Title Deed Act.

It would be unwise for Turkey to disregard the importance of foreign direct investments and their positive impact on the general welfare, economic development, and social stability of Turkey. Companies with foreign capital make long-term investments, open business places nationwide, provide employment to people, and form one of the more dynamic sectors of the economy.

In a state like Turkey, which has incorporated the “rule of law” principle as a fundamental jurisprudential doctrine, the imposition of legal restrictions on foreign capital, corporations with major industrial and commercial activities, and publicly held corporations governed by the Capital Markets Board cannot be justified. Such rules conflict with the laws and “principle of justice” and moreover restrict freedom of trade, investment rights, the right of acquisition of real property, and limited rights *in rem*.

The Constitutional Court in its decision dated 11 March 2008 with decision no 2008/79, cancelled Article 3 (d) of the Foreign Direct Investments Law based on breach of the “reciprocity principle.” At the same time, amazingly, the Court underlined the positive impact on the Turkish economy of foreign capital companies that contribute to Turkey a substantial amount of direct investment, employ numbers of Turkish workers, or acquire real property in line with their investment field. The Court furthermore acknowledged the public benefits derived from the investments of such companies.

Our Proposals for Amendments

The Regulation needs to be amended because its application may negatively affect the social and economic development of Turkey and the welfare of the Turkish people, and it may eventually decrease lending activities in the financial sector. Our initial suggestions for the amendments are as follows:

1-) For the purpose of Article 36/1 of the Title Deed Act, it should be sufficient to obtain a certificate from the relevant trade registry with which the foreign capital Turkish company is registered to determine the appropriateness of the acquisition of real property in view of the company’s field of activity. The trade registry offices should be clearly authorized for this purpose.

2-) The right of acquisition of real property by Turkish companies with foreign capital in military zones, secured zones, military secured zones, and special security zones determined under Article 28 of the Military Secured Zones Law should continue to be subject to permission respecting the “reciprocity principle” as stipulated under Article 36/2 of the Title Deed Act. However, the acquisition of real property outside these special zones and regions should be easily accomplished.

The Title Deed Act does not justify a permission request for the acquisition of real property outside the special zones and regions. This can also be understood from paragraph 3 of Article 36 of the Title Deed Act regarding liquidation of the real properties acquired or used contrary to this law.

The regulator’s purpose in granting to the state the right to liquidate “unlawfully-acquired real property” should be to procure the liquidation of such property where a company knowingly or unknowingly invests in military zones, secured zones, special security zones or strategic regions, in violation of the law. Apparently, the reason for the regulator to provide for a liquidation process cannot be based on the possibility that the General Staff of the Armed Forces or any command they authorize or commissions formed within the governorships may make mistakes in permitting the acquisition of real property by Turkish companies with foreign capital. It is

obvious that as long as the permission mechanism for special zones works, there is no need for any liquidation of properties since no one could acquire any property without strict scrutiny by the authorities. Thus, paragraph 3 of Article 36 of the Title Deed Act would only be applicable if the use of the real property was not appropriate for the field of activity of the company. One of the important duties of a modern and social state governed by the rule of law is to take all necessary precautions to enable people to exercise their constitutional rights and freedoms and make necessary legal regulations to that end. For this purpose, the foreign capital Turkish companies which have share capital in excess of certain thresholds, employ a certain number of Turkish workers, or engage in continuous production and trade activities, as well as publicly-held corporations or corporations subject to the control of independent authorities, should benefit from certain exemptions when acquiring real properties. The foregoing points were also highlighted in the decision of the Constitutional Court. Otherwise, it is impossible to say that the financial institutions, industrial enterprises, and commercial companies with foreign capital are receiving the same treatment as Turkish companies.

3-) Relevant maps regarding military zones, secured zones, special security zones and strategic regions should be sent to the title deed registries and the governorships in each province. Applications for the acquisition of real property outside the military zones, secured zones, special security zones and strategic regions should be directly finalized by title deed registry officers without being subject to any permission or application procedure. Applications for the acquisition of real property in military zones, secured zones, special security zones and strategic regions should be sent to the governorships for approval according to the Regulation from the General Staff of Armed Forces or commissions formed within the governorships.

A fair and balanced system complying with the objective of the Foreign Direct Investments Law may be established to the benefit of the Turkish economy and the nation's social development if amendments are made to the Regulation. This would increase the benefits

that could be achieved, and enhanced confidence in the system should lead to increased and continuous foreign investment.

It is mandatory that all the necessary social, economic, and legal precautions and actions be rapidly taken for Turkey to remain an attractive investment opportunity for foreign investors and to reassure the foreign individuals and corporations investing in Turkey.

Conclusion

Legal regulations that are contrary to the laws, restrict freedom of trade and investment, and violate the principles of equal treatment cannot find a place in a modern state governed by the rule of law. The state should protect the fundamental rights and freedoms of the people and provide social and economic development to the society. Therefore, proper initiatives should be taken as soon as possible by the regulators in order to amend the Regulation Regarding Acquisition of Real Property by Companies with Foreign Capital published in the Official Gazette numbered 27052 and entered into force on 12 November 2008.

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