

## **REAL ESTATE ACQUISITION IN TURKEY**

The real estate acquisition by foreign real and legal persons in Turkey has been regulated under the Land Registry Law dated 22.12.1934 numbered 2644.

The Land Registry Law and the Law on Direct Foreign Investments which used to compose provisions with regards to the real estate acquisition by foreign real and legal persons in Turkey were undergoing significant restructuring due to the annulments by the Constitutional Court of certain provisions in the relevant pieces of the legislations. The annulments were due to the Constitutional Court's broad assessments about whether the limits of these rights provide a balance between the risks and benefits of allowing foreigners to purchase real estate property in Turkey. Consequently, the Law No.5782 concerning the Amendment of the Land Registry Law, was announced in the Official Gazette of 3/7/2008.

Significantly, the Constitutional Court has also annulled paragraph (d) of Article 3 of Law on Direct Foreign Investments with no. 4875, which is in parallel with the annulled articles of the Land Registry Law and the reason for this annulment was publicly announced in the Official Gazette of 16.04.2008 and consequently it was resolved that the annulment would become effective 6 months after the date of announcement.

In addition to the below stated annulments of the Constitutional Court to the Land Registry Law and the Law on Direct Foreign Investments, recently the Communiqué numbered 27052 with regards to the real estate acquisition of legal entities established in Turkey with foreign capital ("Communiqué") was announced in the Official Gazette of 12.11.2008. The Communiqué determines the conditions of the acquisition of real estate and/or *limited rights in rem* in Turkey by the legal entities, which foreign investors have established or participated in Turkey. And finally the Circular Order numbered 1668 of the subject Communiqué was announced by the Ministry of Public Works and Settlement on 20.11.2008.

The Constitutional Court annulled sentence four of paragraph one of the 35<sup>th</sup> Article of the Land Registry Law which states that "Council of Ministers is authorized to increase the total area to be acquired by foreign real persons and legal entities up to no greater than thirty hectares with the conditions stipulated in this paragraph" and the provision of the seventh paragraph of the 35<sup>th</sup> Article of the Land Registry Law stipulating that: "the rate of real estate acquisition by foreign real persons in cities in accordance with each city and, provided that such rate shall under no circumstances whatsoever exceed five per thousand of the total area of each city" which was rearranged with the first article of the Law on Amendment of the Land Registry Law, enacted on 29.12.2005 with no. 5444. The annulment decision was publicly announced in the Official Gazette of 16.01.2008. Also promulgated that the annulment decision would take effect on April 16,2008. After April 16, 2008 there has been *casus missus* on acquisitions of real estates by foreign persons. Therefore, all transactions of the foreign persons regarding real estate acquisitions have been ceased, due to the order of Government until the announcement of the Law No.5782 concerning the Amendment of the Land Registry Law, which was announced in the Official Gazette of 3/7/2008.

The Paragraph (d) of Article 3 of Law on Direct Foreign Investments with no. 4875, which was requested to be annulled, is as follows:

“Companies with legal entities, which foreign investors has established or participated in Turkey, are free to acquire real estate or *limited rights in rem* in locations open for the acquisitions of the citizens of Republic of Turkey.”

It is observed in paragraph (d), annulment of which is requested, that foreign investors are considered having the same status with Turkish investors with regards to acquisition of real estate or *limited rights in rem*, that they are not treated differently and that the companies in Turkey established or participated by foreign investors are not introduced with any limitation with regards to the amount of such acquisitions. In line with this provision, foreign investors are free to acquire real estate or limited right in rem in locations open for the acquisitions of the citizens of Republic of Turkey without any limitation in amount or regardless of whether or not such acquisitions are necessary for the investment made.

The Constitutional Court has annulled the said paragraph (d) due to the reasons explained herein above by deeming it in breach of Article 2 of the Constitution. Since the legal loophole that arose with the annulment of the disputed paragraph (d) of Article 3 of the Law with no. 4875 is accepted to have breached the public benefit, it was decided that the annulment should become effective six months after it was publicly announced in the Official Gazette to grant time to the legislative organ for enactment of a new arrangement.

As a consequence of the above mentioned annulments of the Constitutional Court, the Law No.5782 concerning the Amendment of the Land Registry Law, Article 35/p.7-8 and Article 36 was announced in the Official Gazette of 3/7/2008.

According to the Law No.5782, the new form of the paragraphs seven and eight of Article 35 of the Land Registry Law states that:

"The Council of Ministers is authorized, in response to proposals submitted by the relevant public establishments or institutions accompanied by plans and coordinate maps that have been registered with competent authorities, to determine such areas that require special protection due to their significance for irrigation, energy, agricultural or mining purposes or for reasons of conservation, faith or culture; and areas under special protection along with sensitive areas that require protection due to their flora and fauna; and strategic locations in which for reasons of national security or the common good that foreign real persons or commercial companies, owning legal entities established in abroad in accordance with the laws of foreign countries may not acquire immovable property, nor establish *limited rights in rem* in their favour. Foreign real persons may acquire immovable or independent and continuous *limited rights in rem* up to ten per cent of the total area of the lands falling under the land use or locality development plan in central provinces and districts.

The Council of Ministers is authorized to determine a different rate, provided that it is not more than the one above, taking into account the importance of the central provinces and districts in terms of infrastructure, economy, energy, environment, culture, agriculture and security matters. Requests by public establishments and institutions pursuant to this article shall be examined and evaluated by a commission, which shall consist of representatives of administrative bodies within the Ministry to which the Directorate General of Land Registry is affiliated and act under the authority granted to the Council of Ministers pursuant to this article, and shall be submitted to the Council of Ministers. Governor's offices will inform the commission of the changes that have occurred in the total land falling under the land use or locality development plan of the central provinces and districts until the end of January of the year following any such change.

Maps and coordinate values with regards to the areas to be designated as prohibited military zones, military security areas or strategic areas or decisions to be taken to alter such areas, shall be, without delay, submitted by the Ministry of National Defence; whereas those concerning special security areas and decisions to be taken to alter such areas shall be submitted by the Ministry of the Interior to the Ministry to which the Directorate General of Land Registry is affiliated."

In addition to the changes on Article 35 of the Land Registry Law, Article 36 of the Law has been rearranged in line with the above stated amendment as well. Even though the Article 36 of the Land Registry Law No. 2644 was revoked by the Law no. 4916 on June 3, 2003, with the Law no. 5872, Article 36 has been reconstituted in order to avoid the legal vacancy which has been occurred by the annulment of Article 3/d of the Law on Direct Foreign Investments with no. 4875.

The new form of Article 36 of the Law is as follows:

“Legal entities, which foreign investors have established or participated into in Turkey, may acquire and use immovable or *limited rights in rem* in order to realise the activities stipulated in their articles of associations. The same principle applies to transfer of the immovable acquired in this way to another company with foreign capital established in Turkey and during a company with domestic capital holding immovable becoming a company with foreign capital by means of share transfer. Provisions of Article 35 apply in case of liquidation of companies with foreign capital established in Turkey, shareholders who are foreign real persons or foreign commercial companies established in abroad wish to acquire the immovable held by the company.

Provided that the provisions of the Law on Prohibited Military Zones and Security Areas dated 18/12/1981 with no. 2565 are reserved, immovable acquisitions of these companies in prohibited military zones, security areas and strategic areas determined as per Article 28 of the same law shall be subject to the permission of the Chief of General Staff or the commanderships to be authorized by the Chief of General Staff; whereas, those in special security areas shall be subject to the permission of the governor's office in such area.

Issues to be determined as per the permission of the governor's offices will be decided in a commission to be established upon participation of the related representatives of the administration by discussing the suitability of such immovable acquisition to the national security issues and scope of the activity of the company.

Immovable and *limited rights in rem* determined to be acquired or used contrary to the provisions of this article, unless liquidated by their holder within the period to be granted by the Ministry of Finance, shall be liquidated and converted into cash and paid to the right holder. Merits and procedures with regards to application of this article shall be, subsequent to taking the opinions of the related ministries, arranged in a regulation to be issued by the Undersecretariat of Treasury, Ministry of the Interior, Ministry of Public Works and Settlement and Ministry of National Defence."

The last amendment on the Land Registry Law is the addition of the interim Article-3 of the said Law. The Interim Article 3 states that:

" The relevant institutions and associations will inform the commission of the total area of the lands where the foreign real persons or commercial companies, owning legal entities established in abroad in accordance with the laws of foreign countries may not acquire immovable or *limited rights in rem* pursuant to paragraph seven of Article 35 of this Law; whereas, the governor's offices shall inform the said commission of the total area of the lands falling under the land use or locality development plan of the districts indicated in this paragraph within not later than three months as of the effective date of this article.

Foreign real persons may, during the period in which the amount of immovable and independent and continuous rights in rem that may be acquired by such foreign real persons in central provinces and districts is determined, acquire immovable and *limited rights in rem* as per the provisions of Article 35 of this Law."

As it has mentioned above, after the stated amendments on the Land Registry Law and the Law on Direct Foreign Investments, the Ministry of Public Works and Settlement has published the Communiqué which was announced in the Official Gazette dated 12.11.2008. The purpose of this Communiqué is to determine the conditions of the acquisition of real estate and/or *limited rights in rem* in Turkey by the legal entities, which foreign investors have established or participated in Turkey.

According to the Communiqué the legal entities, which foreign investors have established or participated in Turkey must follow the below path in order to acquire real estate and/or *limited rights in rem* in Turkey:

**1. Application to the Governorship of Province Planning and Directorate of Coordination by submitting the required documents as follows:**

- a. A written statement of the objectives for such a transaction and information regarding the real estate;

- b. A written statement indicating that the applicant is permitted to conclude real estate transactions and the details of its representatives;
- c. The tax office and tax number of the applicant;
- d. A recent written statement (not older than one month) obtained from the relevant Trade Registry indicating the scope of activities of the applicant designated in its AoA and information on the shareholders (names, nationalities, their shareholding, etc.);
- e. A notarized written statement of identification of the foreign real person shareholders and/or a duly approved written statement regarding the scope of activities of the foreign legal person shareholders;
- f. The names, addresses and identifications of the managers of the company; and
- g. Last three years' balance sheet of the Company (if any).

In case the application is only for the acquisition of *limited rights in rem*, the documents stated under e, f, g shall not be required.

**2.** The Governorship of Province Planning and Department of Coordination shall ask from the Directorate of Industry and Trade of Province to state in written whether the claim of real estate acquisition is stated in the activities of the Articles of Associations of the Company within 7 days as of the receipt of its request. The Governorship of Province Planning and Department of Coordination shall ask from the General Staff Presidency or the mandated Command headquarters to state in written whether subject real estate falls in the areas of prohibited military zone, military safety zone of strategic zone and if it is a case to state in written whether such acquisition is acceptable or not within 30 days as of the receipt of such claim of the Governorship. Finally, the Governorship of Province Planning and Department of Coordination shall ask from Security General Directorate to state in written whether the subject real estate falls into the special safety zone or not within 20 days as of the receipt of its claim.

In case of an acquisition of *limited rights in rem*, the Governorship of Province Planning and Department of Coordination shall ask from the Directorate of Industry and Trade of Province to state in written whether the claim of real estate acquisition is stated in the activities of the Articles of Associations of the Company within 7 days as of the receipt of its claim. The Governorship of Province Planning and Department of Coordination shall finalize its decision on the acquisition of real estate and/or *limited rights in rem* after receiving the decision of Directorate of Industry and Trade of Province.

**3.** The Governorship of Province Planning and Department of Coordination shall notify the Company and the Directorate of Land Registrar in written in case it accepts the application of the above mentioned Companies regarding the acquisition of real estate and/or *limited rights in rem*. If the Governorship refuses such application, it only sends a written notification to the applicant Company stating its decision.

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LAW FIRM

In general Article 13 of the Communiqué states that the subject Companies which obtains the permits from the Governorship of Province Planning and Department of Coordination should use the acquired real estate and/or *limited rights in rem* in accordance with the activities of the Company stated under the Articles of Association of the same. The Commission which is formed by the Governorship shall investigate whether the Companies comply with the conditions of this provision. The investigation may start with the claim of the written application of the real persons or legal entities or directly with the Governorship's written claim. In case of the non compliance to the subject activities stated in the AOA, The Commission may provide a cure period to the Company to customize its usage to its activities. The Governorship shall notify the result of the investigation of the Commission to the Company in written. In case the decision of the Commission is negative, the Commission shall notify the Governorship in written.

As a result of the announcement of the above stated Communiqué, which has the potential to block transactions of banks subject to the Foreign Direct Investments Law, the General Directorate of the Land Registry issued a circular on November 20, 2008. According to this Circular, if an application is made to establish a mortgage in favour of a bank which is subject to the Foreign Direct Investments Law, the bank is required to obtain a one-time permission from the Governorship of the city in which the bank's headquarters is located. Significantly, the one-time permission makes it unnecessary for the bank to apply for permission for each subsequent transaction.