

New principles

Onur Gülsaran and Biricik Bengisu Dinçer of Cerrahoglu Law Firm discuss new principles in Turkish law governing the acquisition of immovable property by foreign investors

Draft law which amends provisions on the acquisition of immovable property by foreign real persons, by legal entities established outside of Turkey and by foreign capital companies established in Turkey was presented to the Turkish Grand National Assembly on January 20 2011, and was approved on May 3 as Law No 6302 amending the Land Registry Law. These amendments, which relate to articles 35 and 36 of the Land Registry Law, were previously made in 2003, but were cancelled by the Constitutional Court. The provisions were finalised in 2008 taking into consideration the Constitutional Court's cancellation decision. Law No 6302 is the country's most detailed regulation to date, regarding the acquisition of immovables by foreign investors. .

With article 1 of Law No 6302, which amended article 35 of the Land Registry Law, the reciprocity requirement for the acquisition of immovables and limited *in rem* rights by foreign real persons who are citizens of the countries designated by the Council of Ministers, has been removed and the restrictions on the amount of space to be acquired has been increased from 2.5 hectares to 30 hectares. Moreover, the Council of Ministers has been authorised to further increase the amount of space to 60 hectares. On the other hand, however, the Council of Ministers has also been authorised (in paragraph 4 of article 1) to impose any and all kinds of restrictions and even prohibit the acquisition of immovables by foreign real persons and legal entities, which have been established outside of Turkey, in cases where the national interest so requires.

The Council of Ministers was also granted the authority to increase the amount of space in 2008. However, the Constitutional Court removed this authority by cancelling the provision. Therefore, whether or not Law No 6302 will hit the Constitutional Court's barrier this time around, will be seen in the final decision of the Court on this matter. It can be said, though, that Law No 6302 has been drafted by taking previous experiences into consideration.

Acquisitions by foreign companies

According to paragraph 3 of article 1 of Law No 6302 (amending article 35 of the Land Registry Law), acquisition of immovables and limited *in rem* rights by companies incorporated abroad (having legal personality) in accordance with the laws of their respective jurisdictions is subject to special laws. These include the Law on Encouragement of Tourism, Law on Industrial Zones and Petroleum Law. Accordingly, such acquisitions will be governed by these special laws rather than Law No 6302.

Article 2 of Law No 6302 (amending article 36 of the Land Registry Law) includes new provisions regarding the acquisition of immovable and limited *in rem* rights by foreign capital companies established in Turkey. The article reads as follows:

Companies established in Turkey (having legal personality), in which foreign real persons, legal entities established in accordance with laws of foreign jurisdictions and international organizations, also except for persons within the scope of article 28 of the Law on Turkish Nationality, own 50% or more of the shares or have the authority to hire or fire persons with management rights, may acquire and use immovables or limited in rem rights in order to carry out their field of activity stated in their articles of association.

The same principles shall apply in case the companies stated in the first paragraph are direct or indirect shareholders of another company established in Turkey and the final shareholding of the foreign investor in the company is 50% or more; in case the foreign investor directly or indirectly acquire 50%

“Acquisition of immovables by companies incorporated abroad is subject to special laws”

or more of the shares of the domestic capital company owning the immovable; and in case the shareholding of the foreign investors in existing foreign capital company owning the immovable reaches 50% or more as a result of the share transfer.

Therefore, according to the new amendment, in case the shareholding of a foreign investor in a company established in Turkey is 50% or more, or the foreign investor can hire or fire the majority of the persons with management rights, and provided that it is to carry out the field of activities stated in the articles of association, such company may acquire or use immovable or limited *in rem* rights in accordance with article 36 of the Land Registry Law.

If the shareholding of the foreign investor in a company established in Turkey is less than 50% and such foreign investor does not have the authority to hire or fire the majority of the persons with management rights, the company is subject to the same provisions as domestic capital companies with respect to acquisition of immovables and limited *in rem* rights, and thus, is free to acquire such rights. It is therefore possible for this kind of company to acquire immovable and limited *in rem* rights for any and all purposes irrespective of the field of activity.

In 2008, the Constitutional Court cancelled a provision in article 3(d) of the Direct Foreign Investments Law numbered 4875, arguing that there are no principles in the law regarding acquisition of immovable

properties and that national interest so requires. The cancelled provision stated: "Companies (having legal personality) established or participated in by foreign investors in Turkey shall be free to acquire immovable and limited *in rem* rights in zones open to acquisitions by Turkish citizens."

It can therefore be argued that the 50% threshold provided for in the amendments in relation to article 36 of the Land Registry Law intends to resurrect the provision cancelled by the Constitutional Court back in 2008.

Law No 6302 also clearly sets out when article 36 would not be applicable. Accordingly:

The provisions of this article shall not apply to establishment of immovable pledges, acquisition of property within the context of liquidation of immovable pledges, transfer of ownership of immovable and limited in rem rights in mergers and de-mergers, acquisition of immovable and limited in rem rights in special investment zones, such as organized industrial zones, industrial zones, technology development zones and free zones, and immovable acquired by banks as a result of transactions deemed as credit in accordance with the Banking Law numbered 5411 and dated 19/10/2005 or for the purposes of collecting their receivables provided that the requirement to dispose in accordance with the relevant legislation within a given period of time is maintained.

The above provision does not, however, apply to companies incorporated abroad in accordance with the



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Onur Gülsaran graduated from the law school of the University of Istanbul in 1994. He became partner in 2008 and is a member of the firm's corporate law department. His practice is focused on corporate law, commercial law, code of obligations, immigration, foreign investment, real estate, labour, consultancy services regarding anti-corruption, lease, franchise, loan, asset purchase, and organising of companies' general assembly meetings. He speaks English and Turkish and is a member of the Istanbul Bar Association.

Examples of publicly disclosed transactions in which Gülsaran has been involved include acting for OMV Aktiengesellschaft during the privatisation of Tupras; representing successful bidder OYAK on the privatisation of Erdemir and

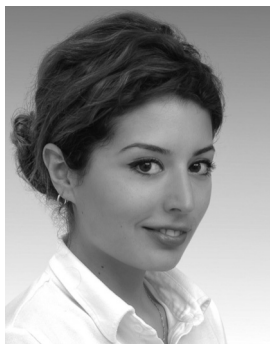
EMI in its acquisition of music business in Turkey; taking part in the due diligence of Telsim, the second biggest GSM operator of Turkey that was sold by the state to Vodafone; and representing Almanca Group from Qatar regarding its food and beverages investments in Turkey.

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laws of their respective jurisdictions. As mentioned above, these companies are subject to special laws with respect to acquisition of immovables and limited *in rem* rights.

Other restrictions

Another amendment to article 35 of the Land Registry Law is the right granted to foreign real persons and companies incorporated abroad in accordance with the laws of their respective jurisdictions to acquire immovables without any buildings (land). In the case of this kind of acquisition, the investor should present its project to be realised, to the Ministry within two years. Otherwise, the Ministry of Finance requests liquidation of the immovables after granting the relevant person extra time not exceeding one year.

Restrictions within the scope of article 35 of the Land Registry Law, do not apply to establishment of immovable pledges in Turkey in favour of foreign real persons and companies incorporated abroad in accordance with the laws of their respective jurisdictions.

Restrictions in relation to the Law on Prohibited Military Zones and Security Zones (numbered 2565) with respect to acquisition of immovables and limited *in rem* rights by foreign real persons and foreign capital companies established in Turkey are protected under Law No 6302.

In accordance with these restrictions, acquisition of immovables by companies established in Turkey with foreign capital in prohibited military zones, military security zones and zones designat-

ed under article 28 of Law 2565 are subject to the permission of the Turkish General Staff. Acquisitions in special security zones are subject to the permission of the Governor's Office, where the immovable is located.

Rights acquired in violation of the law

Immovables and limited *in rem* rights which are not liquidated by their owners within the one-year period granted by the Ministry of Finance when such immovables have been acquired in violation of article 35 of the Land Registry Law, have been diagnosed to have been used for a purpose contrary to the purpose of the acquisition, or the application thereto has not been made within the period stipulated for immovables without any buildings (land), or the projects thereof have not been realised within the time set, are liquidated and the amount is paid to the right holder.

Immovables and limited *in rem* rights acquired or used in violation of article 36 of the Land Registry Law which are not liquidated by their owners within the period granted by the Ministry of Finance will be liquidated and the amount will be paid to the rights holder.

Article 1 of Law No 6302 came into effect on May 18 2012 (the date the Law was published in the Official Gazette). Article 2 will come into effect three months following the date of publication of the Law.