

The Historical Development of the Ownership of Real Property in Turkey by Foreigners

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In 2008, the Constitutional Court of the Turkish Republic released two important decisions: First, the Court cancelled the second sentence of the first paragraph and the seventh paragraph of Article 35 of the Land Registry Law. Second, the Court cancelled Article 3(d) of the Direct Foreign Investments Law. This article attempts to provide a snapshot of the current legal situation of the ownership of real property in Turkey by foreigners.

In the first half of 2008, the Constitutional Court of the Turkish Republic released two important decisions affecting the regulation of the ownership of real property in Turkey by foreigners. First, on 16 January 2008, the Court cancelled the second sentence of the first paragraph and the seventh paragraph of Article 35 of the *Land Registry Law*¹ (*LRL*). Second, on 13 March 2008, the Court cancelled Article 3(d) of the *Direct Foreign Investments Law*² (*FDI Law*). The main purpose of this article is to provide information on the current legal situation of the ownership of real property in Turkey by foreigners. However, it would be helpful to review the prior decisions of the Court on the subject in order to understand the historical development of the rules regulating the ownership of real property in Turkey by foreigners. In this way, one could get a better understanding of the current legal situation by looking at the development of the rules and the Court's response to them. Taking a brief look at the different time periods in which different rules applied to the ownership of real property by foreigners, along with the four related past decisions of the Constitutional Court, will reveal the view of the Court on the issue of foreign ownership of real property. Below is a brief summary of the legal evolution over different time periods in which different rules applied to foreign ownership of real property, along with the Court's response to these rules.

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¹ *Land Registry Law*, 22 November 1934 Law Nr. 2644.

² *Foreign Direct Investments Law*, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar *in rem* rights in any real estate where Turkish citizens can acquire ownership rights.

The period between 1934 and 2003

The principles governing the purchase of real property in Turkey by non-Turkish nationals are governed by the 1934 *Land Registry Law*³ (*LRL*). Only foreign individuals, not companies, could acquire real property in Turkey with the permission of the Government, subject to reciprocity and subject to existing legal rules introducing restrictions and prohibitions. It was not possible to acquire real property in villages, military zones and certain zones of strategic importance. The changes made in 1984⁴ and 1986⁵ made an exception to the reciprocity requirement for foreign real persons with the approval of the Council of Ministers. Thus real persons were able to acquire land even if their countries did not provide the same opportunity to Turkish individuals in their countries. The ability to suspend the principle of reciprocity with a decision by the Council of Ministers was cancelled by the Turkish Constitutional Court in 2003⁶ because the Court was of the opinion that creating an exception to the reciprocity clause could only be made by the legislature, not by the Council of Ministers.

In 1954, the *Foreign Capital Incentive Law*⁷ (*FCIL*) came into effect which provided foreign investors freedom to enter the Turkish real estate market with Turkish investors as long as no monopolies and concessions were created. All the rights and privileges that were given to Turkish investors were also provided to foreign investors. Thus, as long as *companies with foreign capital*⁸ were founded in Turkey pursuant to the provisions of the *Turkish Commercial Code* and registered in the Turkish Commercial Registry, these companies were considered to be Turkish companies. Therefore, these companies were subject to the legal rules of Republic of Turkey. However, the *FCIL* required Turkish companies with foreign capital to obtain permission for real estate purchases; as long as the permission and approval system requirements were satisfied, acquiring real property by Turkish companies, in which some or all of their capital belonged to foreign real or legal persons, was allowed.

³ *Land Registry Law*, 22 November 1934 Law Nr. 2644.

⁴ Constitutional Court Decision, June 13, 1985 E: 1984/14 K: 1985/7. Law Nr. 3029 in 1984, which added a subparagraph both to Article 35 of the *Land Registry Law* number 2644 and to Article 87 of the *Village Law* Nr. 442, permitted: "The acquisition by foreign real persons, companies and societies, following a decision of the Council of Ministers, of land everywhere including villages, suspending the principle of reciprocity." However, the Constitutional Court annulled this law on June 13, 1984 in Decision 1984/14 Principle, 1985/7.

⁵ Constitutional Court, October 9, 1986 E: 1986/18 K: 1986/24. In spite of the Constitutional Court's lengthy reasoning for the 1984 law (see footnote 9), the government enacted Law Nr. 3278 on 22 April 1986, and for a second time that made changes to the law by adding the same subparagraphs to Article 35 of the *Land Registry Law* and Article 87 of the *Village Law*. The Constitutional Court again annulled the law in question in Decision Nr. 986/18 Principle Nr, 986/24 on October 9, 1986, repeating similar reasons.

⁶ Constitutional Court Decision, March 14, 2005 E: 2003/70 K: 2005/14.

⁷ Foreign Capital Incentive Law, Law 6224, January 18, 1954.

⁸ Turkish companies in which only a part or all of their capital belonging to foreign real or legal persons.

The period between 2003 and 2005

After the cancellation of the 1984 and 1986 changes, the legal framework set up in 1934 was modified with a by-law⁹ (Law Nr. 4916) in 2003. With these changes, the legal framework was as follows:

- Foreign real persons were subject to a reciprocity clause except if acquiring real property ownership through inheritance.
- Non-Turkish legal entities (companies) were also subject to a reciprocity clause with a twist; that is to say, foreign companies formed in a country whose government allows Turkish nationals/companies to purchase real estate in their countries, were to be allowed to purchase real estate in Turkey. In this way it was possible for a company from country A that does not have reciprocity with Turkey to form a new company in country B that has reciprocity with Turkey to form a Turkish company in Turkey on the basis of this clause. With this indirect reciprocity, the company that is originally from a country that does not have a direct reciprocity with Turkey could bypass the legal reciprocity requirement.
- As foreign nationals, non-Turkish legal entities (companies) also had the right to acquire real property in Turkey subject to legal restrictions and prohibitions.
- A foreign national could not purchase more than 25,000m² (6 acres) of land (with or without construction) in Turkey without the specific consent of the Turkish Council of Ministers. The Council of Ministers was authorized to increase this limit up to 300,000m² per person.

With the *Foreign Direct Investments Law*¹⁰ (*FDI Law*) in 2003, the Foreign Capital Incentive Code¹¹ of 1954 was abolished and new terms were imposed to encourage and increase foreign investments, protect the rights of foreign investors, and transform the permission and approval system into an information system in order to encourage foreign investments. With the *FDI Law*, foreign investors were subject to the same treatment as domestic investors: permissions and approvals such as the investment permission and company foundation permission were abolished; companies with a legal entity founded or established in Turkey by foreign investors to acquire real property ownership or limited *in rem* rights in the regions open for the acquisition by the citizens of Republic of Turkey was decontrolled.

Therefore, the acquisition of real property by Turkish companies with foreign capital that would conduct activities pursuant to *FDI Law* could send their real property acquisition request directly to the Deed Registry Offices. The office would evaluate the authority certificates issued by Trade Registry Offices, subjecting them to the same terms and procedures as companies that

⁹ Law about Amendments on Various Laws and Decree – Law about Structure and Duties of the Ministry of Finance, July 3, 2003 Law Nr. 4916.

¹⁰ *Foreign Direct Investments Law*, 5 June 2003, Law Number: 4875.

¹¹ *Foreign Capital Incentive Law*, 18 Ocak 1954, Law Number: 6224.

were founded pursuant to Turkish Commercial Code. As long as the authority was shown, the authorized person(s) of the company could acquire real property in the name of the company. This simple procedure was applied to all Turkish companies regardless of the existence of foreign shareholders or investment.

The period between 2006 and 2008

Following the constitutional challenge made by Turkey's main opposition party, the modifications brought about by the 2003 by-law (regarding foreign real persons and companies founded in foreign countries) were declared void by the Turkish Constitutional Court on 26 April 2005. In its reasoning, the Court stated that to allow indirect reciprocity circumvents the legal requirement and effectively makes the reciprocity requirement meaningless. Secondly, the Court found an erroneous transfer of power in the transfer of that power to the Council of Ministers. The Court was of the opinion that the power to create exceptions belonged to the legislature.

Most importantly, throughout its reasoning the Court acknowledged the need to provide foreigners a right to acquire real estate in Turkey:

Advances in science and technology, dramatically improved means of transportation and communication, the need for restructuring of economic, social and political relations have all brought a new intensity and dimensions to the international relations. As a result of all these developments, the need to provide foreigners with a right to purchase real estate in some circumstances and, in relation to this right, the need to create certain legal limitations has emerged.¹²

As seen in the quote above, the Court does not oppose foreign ownership of real property but requires that the relevant regulations be in place. The Court articulated its reasons more on page 21 of its decision for cancellation with the following sentence: “*Even though the foreign real property ownership rights are subject to reciprocity and adherence to the legal limitations, the procedural and substantive principles of acquiring real property are not set forth in Section 35 of the Land Registry Law Nr. 4916, July 3, 2003.*” The Court goes on to say that the fundamental rights and freedoms for non-Turkish persons set forth in Section 16 of the Turkish Constitution¹³ can only be limited in accordance with international law. Thus as long as foreign ownership of real property is regulated within the boundaries and framework of national and international law, the Court suggested that it will recognize these rights.

¹² Constitutional Court (Anayasa Mahkemesi), 26 April 2005, E: 2003/70, K: 2005/14, page 21 – Sinerji Mevzuat.

¹³ *Constitution of Republic of Turkey*, October 18, 1982, Law Nr: 2709.

As mentioned above, following the constitutional challenge made by Turkey's main opposition party, the modifications brought by the 2003 by-law were declared void by the Turkish Constitutional Court on 26 April 2005. The decision was to enter into effect as of 27 July 2005 and the purchase of real estate by foreign nationals was suspended until a modified law became effective. The modified law, Law Nr. 5444, was retrospective in its application to 26 July 2005 and was largely the same as the by-law of 2003 (with regards to reciprocity and legal rules introducing restrictions and prohibitions) with some notable amendments, especially with regards to size limitations.

In the period since 2003 until the March 2008 decision of the Constitutional Court, the original *FDI Law* applicable to the Turkish companies with foreign capital remained unchanged.

The Current period:

There have been two Constitutional Court decisions that changed the legal status of foreign ownership of real property in the current period since January 2008. The first decision came on January 16, 2008 in which the Court cancelled the second sentence of the first paragraph and seventh paragraph of Article 35 of the *Land Registry Law (LRL)*. The second decision came on March 13, 2008, in which the Constitutional Court cancelled Article 3(d) of the *Direct Foreign Investments Law*¹⁴ (*FDI Law*). These decisions have created uncertainty and waiting for the current Turkish government to regulate this uncertain area mark the current period.

In the first decision, the Court cancelled the second sentence of the first paragraph and seventh paragraph of Article 35 of the *LRL*, which gave the Council of Ministers broad power to increase the property area limitation up to 30 hectares for foreign real persons and foreign entities acquiring real property in Turkey. The Court was of the opinion that this broad and unlimited power transfer to the Council of Ministers violated the Turkish Constitution. The Court also found an erroneous transfer of power and stated that enacting legislation is the Parliament's exclusive and non-assignable power. This ruling was to become effective 3 months following its publication in the Official Gazette, in which period the Turkish government would have time to regulate a new legal framework in line with the Court's decision. However, the Turkish government did not enact any new law in this area during that 3 months period; the ruling became effective as of 16 April 2008. In the absence of new regulations, the Ministry of Public Works and Settlement announced a circular (the "Circular") on 14 April 2008 to avoid any ambiguity until the date that anew law enters into force. According to the Circular the legal situation for the real property ownership by foreigners in Turkey is as follows:

¹⁴ *Foreign Direct Investments Law*, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar *in rem* rights in any real estate where Turkish citizens can acquire ownership rights.

- Foreign real persons and foreign companies incorporated outside of Turkey shall not be able to acquire immovable (real) property as of 16 April 2008 until the date the Parliament enacts a new law governing the acquisition of real property by foreigners.
- With the condition that the real property which is subject of the acquisition was acquired prior to 16 April 2008, foreign real persons and foreign companies may sell their real properties to Turkish citizens and companies until 16 October 2008 by which date the Parliament enacts a new law governing the acquisition of real property by foreigners.
- Real properties, which have been acquired before 16 April 2008, by foreign real persons and foreign companies incorporated outside of Turkey, shall not be affected.
- The acquisition of real property by foreign real persons and foreign companies will be frozen until further notice.
- The by-law does not limit foreigners' right to establish rights *in rem* on immovable property, such as mortgage, usufruct, or easement rights. Such rights shall continue to be granted.
- Turkish companies incorporated by foreign investors or in which foreign investors are shareholders shall be able to acquire real property until 16 October 2008 (at the end of the sixth month following the Court's second decision on 16 April 2008).

In the second decision, which was entered on 13 March 2008, the Constitutional Court cancelled Article 3(d) of the *Direct Foreign Investments Law*¹⁵ (*FDI Law*). The reasoning of the cancellation decision was published in the Official Gazette on 16 April 16, 2008. The cancellation of Article 3(d) will take effect at the end of the 6 month period following the publication of the decision in the Official Gazette (which will be 17 October 2008).

As will be seen in the quotes below, the Court does not oppose foreign ownership of real property but requires that the relevant regulations be in place and within the boundaries and framework of national and international law; only then the Court suggests that it will recognize these rights. Since I believe the most recent decision of the Constitutional Court will speak better for itself, I provide an excerpt of the decision relating to Article 3(d) of the *FDI Law*.

B- Analysis of Article 3(d) of the *Law on Direct Foreign Investments*

In the legal rule¹⁶ of which its cancellation has been requested, foreign investors are treated equally with local investors for the acquisition of real

¹⁵ *Foreign Direct Investments Law*, June 5, 2003, Law Number: 4875. Article 3(d): Legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar *in rem* rights in any real estate where Turkish citizens can acquire ownership rights.

¹⁶ Article 3(d) of the *FDI Law*.

property; there is no difference between the treatment of the local and foreign investors and there are no limits as to the size of the real property to be acquired by companies incorporated by foreign investors or companies in which foreign investors are shareholders. Therefore, without any size limits and without any inquiry as to the necessity of the investment activity, foreign investors could acquire real property and *in rem* rights in where Turkish citizens could acquire such rights.

Advances in science and technology have dramatically improved the means of transportation and communication while the need for restructuring of economic, social and political relations have all brought a new intensity and dimensions to the international relations. As a result of all these developments, *the need to provide foreigners with a right to purchase real estate* in some circumstances and, in relation to this right, the need to create certain legal limitations according to the country's conditions has emerged.¹⁷

In the Article 2 of the Turkish Constitution, it is emphasized that 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 tenets set forth in the Preamble.

With the legal rule at hand¹⁸ legal entities in Turkey incorporated by foreign investors or in which foreign investors are shareholders, can freely acquire ownership and similar *in rem* rights in any real estate where Turkish citizens can acquire ownership rights. For the attainment of the rule of law principle mentioned above, and for the organization of the national economy according to national interests, there exist no legal regulations in regards to the purpose, the forms of utilization and the transfer of the acquisition of real property and *in rem* rights by foreign investors. This absence of relevant legal regulations causes legal uncertainties and also unlimited acquisition rights for foreign investors.

For the above mentioned reasons, the legal rule at hand is in violation of the Article 2 of the Turkish Constitution. It should be cancelled.¹⁹

¹⁷ This whole paragraph is taken from the Constitutional Court's decision in April 2005 (Constitutional Court (Anayasa Mahkemesi), March 3, 2005, E: 2003/70 K: 2005/14).

¹⁸ Article 3(d) of the FDI Law.

¹⁹ Constitutional Court (Anayasa Mahkemesi), March 11, 2008, E: 2003/7, K: 2008/79, page 5 and 6.