

## Foreign Direct Investments in Turkey

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### Introduction

Foreign direct investments (“FDIs”) are of great importance specifically for the developing countries. FDIs, by way of bringing external sources to the target country, help the production capacity of the country develop by virtue of the initial capital inflow and reinvestments of profits acquired within the business operated in the target country.

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In parallel with the investment trends around the world, the major development in the area of FDIs in Turkey occurred after 1980. Especially after the enactment of the Foreign Direct Investments Law (“FDIL”) in 2003, FDI inflow showed a tremendous increase. FDI inflows to Turkey, having reached \$10 billion after 2005, peaked at \$22 billion in 2007; however, due to the economic crisis having influenced whole world in 2008, FDI inflows to Turkey was also affected negatively. FDIs, starting to rise again in 2010, have reached to \$16.2 billion in 2011, stayed between \$12-13 billion in 2012, 2013 and 2014, and reached to \$17.6 billion in 2015, the highest amount after the global economic crisis in 2008. While the total FDI amount in Turkey was \$19.6 billion between 1975-2004, this amount reached to \$175.2 billion between 2005-2016.<sup>1</sup>

From the geographical perspective, Turkey, having been the country that had the most FDI inflows between 2012-2015 in West-

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<sup>1</sup> Ministry of Economy, Foreign Direct Investments Report 2016, at 10.

Asia Region, kept its position in 2016 as well, having 43 per cent of all FDIs in the region.<sup>2</sup>

## Legal Landscape

In Turkish law, foreign investments are regulated through two different mediums, namely, domestic legal regulations and international treaties. These treaties are called as “Agreement on Reciprocal Promotion and Protection of Investments”, which will be shortly referred to as “Treaty” in this article. Until today, Turkey has concluded such international treaties with 75 countries. The main purpose of these treaties between the countries is to incentivize foreign direct investments bringing not only capital but also technology, new management skills and chances of getting into new markets, and to protect the foreign investments within the scope of the domestic legal regulations of the relevant country. These treaties are given the force of law in Article 90 of Turkish Constitution, accordingly are applied as domestic legal rules.

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FDIs are regulated with the abovementioned Foreign Direct Investments Law numbered 4875 and dated 17.06.2003. Shortly after the enactment of FDIL, the Regulation for Implementation of Foreign Direct Investment Law dated 20.08.2003 and the Regulation on the Employment of Personnel of Foreign Nationality in Foreign Direct Investment dated 29.08.2003 have been put into effect to complement the implementation of FDIL.

## Foreign Investor and Foreign Investment

International investments can appear in two different forms, namely, FDIs and portfolio investments. Despite both forms are capital transfers in nature, FDI is the form of investment which is executed by foreign companies or persons by way of purchasing a foreign company, providing founding capital for a company to be established, or increasing the capital amount of an existent company; and such actions require the knowledge of technology

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<sup>2</sup> UNCTAD, World Investment Report: Investment and Digital Economy 2017, Geneva 2017, at 6.

and business administration skills along with the investor's visitorial power.

Within the context of FDIL, foreign investor is defined as (i) real persons who possess foreign nationality and Turkish citizens resident abroad, and (ii) foreign legal entities established under the laws of foreign countries and international institutions who make foreign direct investment in Turkey. It should be noted that Turkish nationals living abroad must prove that they have residence permit or work permit in the country they live in order to be regarded as a foreign investor.

Portfolio investment is not accepted as an investment method falling within the boundaries of foreign direct investment. Because, foreign direct investor is a person investing in the target country, bearing the physical conditions and the business risks of that country as well as incurring the currency risks. Additionally, in foreign direct investments, the personnel and the required equipment must be taken under protection. However, due to the fact that the portfolio investor does not employ workers in and bring equipment to the target country, such an investment is not needed to be protected in terms of foreign direct investments.

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Foreign direct investments that can benefit from the protections provided by law can be classified under two sections, namely, establishing a new company or branch of a foreign company by foreign investor, and share acquisitions of a Turkey-based company by foreign investor.

### Form of Investment

In Turkish law, unless otherwise stipulated by international agreements and other special laws, foreign investors are free to make foreign direct investments in Turkey, and such foreign investors are subject to equal treatment with domestic investors. Accordingly, foreign-capitalized companies must be established in accordance with the capital limits stipulated in Turkish Commercial Code numbered 6102.

The cash capital in form of convertible money, which can be purchased and sold by Central Bank of the Turkish Republic,

corporate stocks, equipment, and industrial or intellectual property rights brought from abroad exemplify the mediums of foreign direct investment. The assets being subject of foreign direct investment can be provided either from abroad or in Turkey. However, where a domestic source is used to actualize the foreign direct investment, several conditions must be fulfilled. In this respect, when an investment is targeted to be made with assets acquired in Turkey, persons identified as foreign investors can benefit from the protections provided in FDIL on the condition that a share acquisition of a company established in Turkey being any percentage of shares acquired outside the stock exchange or 10 percent or more of the shares or voting power of a company acquired through the stock exchange is actualized with investors' reinvested earnings, revenues, financial claims, or any other investment-related rights or financial value, and commercial rights for the exploration and extraction of natural resources.

There is no restriction pertaining to the type of the company that can be established by foreign investors. In other words, foreign investors can establish all types of companies regulated in the legislation, namely, ordinary partnerships, open partnerships, partnerships in commendam, limited liability companies and joint-stock companies. Additionally, foreign companies established under the laws of foreign countries can open liaison offices upon the permission to be given by the Ministry of Economy on the condition that they do not engage in commercial activities in Turkey.

According to the report of the Ministry of Economy, by the end of 2016, there are 53.156 active companies established with FDI. 79 per cent of these companies are established as limited liability company, 18.8 per cent as joint-stock company, 2.2 per cent as partnership in commendam, open partnership, ordinary partnership, and joint venture.

FDIs can be conducted in all areas of trade and business in Turkey. When considered the sectoral allocation of FDIs in last 10 years, finance and insurance activities sector appear as the first one with the highest amount of FDI inflow being \$38.4 billion. Following finance and insurance sector, the sectors having most FDI inflows are respectively manufacturing sector, energy sector, wholesale

and retail trade sector, and transportation and warehousing services sector. In 2016, top three most popular sectors for FDIs are respectively manufacturing, finance and insurance, and energy sectors, having 59 per cent of all FDIs made in Turkey.

### Notifications

There is no permission required to be obtained by foreign direct investors from a public authority for the purpose of establishing a company, joining an existing partnership, or establishing a branch. Likewise, no permission is needed for the capacity increase, merger, liquidation, change of business activity, capital increase, share transfer and indirect shareholding. Nonetheless, foreign-capitalized companies or the foreign companies' branches in Turkey must fill out an information sheet demonstrating the information regarding the capital of the company and the activities conducted, and must submit this sheet to the Ministry of Economy until the end of May in each year. It should also be noted that the information regarding any payment made to the capital account, and the information regarding the share transfer made between the partners or with third parties must be reported to the Ministry of Economy in 1 month commencing from the date of the transaction.

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When a company having national capital turns into one falling within the scope of FDIL, as a result of a transfer share made to a foreign investor or a foreign investor's shareholding through a capital increase executed in the company, such situation must be reported to the Directorate General of Incentive Implementation and Foreign Investment in 1 month commencing from the date of the transaction.

### 5. Prohibition of Expropriation and Nationalization

As the commercial risks, taxes, transfer of funds and the infrastructure in the target country are highly important for foreign investment, political stability and property security in that country are also key concerns for foreign investors. Therefore, in order to provide a secure basis for foreign investment in Turkey, it is regulated that foreign direct investments shall not be expropriated or nationalized, except for public interest and upon compensation

in accordance with due process of law. Such protection has also been regulated within many Treaties between Turkey and several other countries.

### Transfers

It goes without saying that one of the most crucial issues for foreign investors is the transfer of the money abroad which is acquired in the country where the investment has been made. In Turkish law, foreign investors can freely transfer abroad their net profits, dividends, proceeds from the sale or liquidation of all or any part of an investment, compensation payments, amounts arising from license, management and similar agreements, and reimbursements and interest payments arising from foreign loans through banks or special financial institutions.

### Valuation of Non-Cash Capital

Non-cash capital is valued pursuant to the regulations of Turkish Commercial Code, namely, Article 289/2 and 293. In case that stocks and bonds of companies established abroad are used as foreign capital share of foreign investors, the values determined by the relevant authorities in the home country, or by the experts designated by the courts of the home country, or any other international institutions performing valuations are accepted. Likewise, the materials to be imported to Turkey shall also be valued in the same way.

### Dispute Resolution

In Turkish law, for the resolution of disputes arising from the investment agreements subject to private law and investment disputes arising from public service concession contracts and conditions concluded with foreign investors; foreign investors can apply either to the authorized local courts, or to national or international arbitration or other means of dispute resolution, on the condition that the conditions in the related regulations are fulfilled and the parties agree thereon. This regulation has also been stipulated in several Treaties to which Turkey is a party.

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