

# INVESTMENT CLIMATE & LEGAL ENVIRONMENT IN TURKEY

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# Investment Environment in Turkey

- Despite the global slowdown due to credit crunch, expected renewed dynamism in 2010 towards maintaining a rich investment climate:
  - liberalization in certain regulated markets
  - continued privatization towards a moderate level of public-private partnership
- Ideal emerging market:
  - geographic location
  - population
  - vast domestic market
  - fast developing economy
- Principle of equality between foreign and local investors
- Developing to satisfy international standards
- Implementation of the Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income as of January 2010 to reduce double taxation of the same income

# Foreign Investment Regulations

- Governing law:
  - Foreign Direct Investment Law
  - Regulation on the Implementation of the Foreign Direct Investment Law
- Equality between foreign and local investors – except for certain sectors such as broadcasting, no restriction or requirement imposed on foreign investors
- Relaxed legal environment – screening system rather than obtaining prior approval
- Only certain notification requirements, a foreign investor should serve a notification to the Foreign Capital General Directorate:
  - once it incorporates a new entity;
  - annually including information on activities and share capital of the entity
  - for share transfers whether intra group or not

# BUSINESS FORMS

- Two forms of capital companies under the TCC:
  - Limited liability partnerships (*limited şirket*) (“LLP”), or
  - Joint stock corporations (*anonim şirket*) (“JSC”)
  - From a practical point of view, joint stock corporations are better suited for large operations, corporate joint ventures.
- Foreign and local investors may also choose branch offices or liaison offices.

# BUSINESS FORMS

## Incorporating a new company in Turkey

### JSC

minimum 5 shareholders

indefinite term

capital is divided into shares and share certificates can be issued

board of directors

share transfer through ordinary agreements

### LLP

minimum 2 partners

a definite term of maximum 99 years

no shares and thus no share certificates, but only “percentage” in share capital.

managers

share transfer through an official agreement signed before notary public

# BUSINESS FORMS

## Protection of Investment Owner

- **Corporate veil principle exists - shareholders are only liable *pro rata* to the amount of share capital they have undertaken to contribute to the company's share capital.**
- **Piercing the corporate veil is rare and in limited circumstances.**
- **In a LLP an equity partner is liable for the portion of public debts.**
- **In a JSC members of the board of directors, in a LLP directors are personally liable for the unpaid public debts of the company.**
- **In principle directors in LLP and members of board of directors in JSC are not personally liable for agreements and transactions executed on behalf of the company - in certain circumstances, they can be held severally liable for breach of specific duties delegated to the them**

# BUSINESS FORMS

## Establishing a branch office

- Branch offices may carry out the business of their principal company in conducting and freely enjoy the right to pursue commercial activities.
- The foreign principal company remains liable for all debts of the branch office.
- Approval of the Ministry of Industry and Commerce prior to registration with the Trade Registry and announcement in the Trade Registry Gazette is required.

# BUSINESS FORMS

## Establishing a liaison office

- A liaison office may ONLY provide “representation” and “relationship management” with respect to the principal company’s Turkish customers and suppliers, but it may not engage in any commercial or trading activity.
- Permission from the Undersecretariat of Treasury must be obtained in order to establish a liaison office.
- The liaison office must be registered with a tax office, even if there are no commercial activities.





# Investment Opportunities

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## ■ Greenfields

- Regulated sectors
- Public-private partnerships (*e.g.* build operate transfer projects, concessions)

## ■ Mergers and Acquisitions

- Private party transactions
- Privatizations (*e.g.* Privatizations through asset or share transfers transactions; transfer of operation rights projects)

# KEY GOVERNMENT PLAYERS

## **Regulatory Authorities: financially and administratively autonomous public entities active in regulated markets**

- Regulatory authorities have emerged to address the liberalization needs of several sectors in Turkey and mostly mirror their EU counterparts.
- As the State is an actor in the market, it is necessary to have regulators and supervisors that are impartial and independent from any stakeholder, including the State itself.
- These authorities are not only advisory organs but entities that provide regulatory and individual administrative decisions, regulate the sector by issuing secondary legislation, impose fines if legislation is not complied with, issue licenses and permits, act as mediators and afford other means for dispute resolution.

# KEY GOVERNMENT PLAYERS

Among others, the most important regulatory authorities in Turkey include:

- Capital Markets Board: [www.cmb.gov.tr](http://www.cmb.gov.tr)
- Competition Authority: [www.rekabet.gov.tr](http://www.rekabet.gov.tr)
- Banking Regulation and Supervision Authority: [www.bddk.org.tr](http://www.bddk.org.tr)
- Energy Market Regulatory Authority: [www.epdk.gov.tr](http://www.epdk.gov.tr)
- Telecommunications Authority: [www.tk.gov.tr](http://www.tk.gov.tr)
- Savings Deposit Insurance Fund: <http://www.tmsf.org.tr/>

*(SDIF has in its portfolio failed banks and their various assets. The SDIF announces and carries out auctions for the sale of such assets in its portfolio.)*

# KEY GOVERNMENT PLAYERS

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Other important government players include:

- Undersecretariat of Treasury:  
[www.hazine.gov.tr](http://www.hazine.gov.tr)
- Ministry of Industry and Trade:  
<http://www.sanayi.gov.tr>
- Ministry of Labor and Social Security:  
<http://www.calisma.gov.tr>

# Privatization

- Legal framework provided under Privatization Law No. 4046
- Privatization Methods:
  - Sale
  - Lease
  - Transfer of operation rights
  - Establishment of incorporeal rights on property
- Administrative law-governed agreements
- Involvement of several administrative bodies
- State monitoring
- Risks assumed by private sector
- Long procedures and processes
- Legal challenges to the privatisation transactions
- Insufficiency of Representations and Warranties as to Company Information
- Limited chance to comment and negotiate on Transaction Documents

# Privatization – Recent Transactions

- **Privatization of TEKEL**
  - privatization of the tobacco assets of TEKEL in 2008,
  - largest asset sale conducted through privatization in Turkey to date
  - awarded to British American Tobacco in return of USD 1.72 billion
  
- **Privatization of Mersin Port**
  - privatization of Mersin Port owned by the Turkish State Railways General Directorate through transfer of operation rights in 2007
  - awarded to the PSA-Akfen joint venture for a period of 36 years in return of \$755 million USD
  
- **Privatization of the Türk Telekom**
  - privatization through block sale of %55 shares in 2005
  - awarded to Oger Telecoms Joint Venture in return of USD 6.550.000.000

# Privatization – Expected Future Transactions

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- Highways and Bridges
- Electricity Distribution Facilities
- Electricity Generation Facilities
- Turkey's state-owned National Lottery

# Construction - Contractors' Statutory Mortgage Rights

- Both for contractors and sub-contractors
- Security for receivables from owners or contractors for the works
- Can be registered with the relevant title deed if:
  - owner gives its consent to registration, or
  - contractor obtains a court order determining the possible receivable from the owner
- Can be granted over:
  - land
  - continuous and independent rights *in rem*, registered in the title deed registry
  - right of construction (a type of right in rem) granted to Owner through a concession in the event of state-owned lands



# Construction - Waiver of Contractors' Statutory Mortgage Rights

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- Prior waiver may not be valid
- Waiver after execution of the construction contract is allowed
- Financing institutions requiring waiver to secure their rights : A bottleneck for project finance?
- Drafting alternative contractual clauses for legitimate waiver

# Construction - Priority Of Contractors' Statutory Mortgage Rights

- Do not have priority over other contractors' statutory mortgage rights or the rights of other creditors of the owner
- Exception - Contractor can be entitled to request that the surplus amount created by the constructions be allocated to its receivables, subject to fulfillment of certain conditions:
  - **There must be a surplus amount in the value of the real property created by the construction**
  - **The contractor must not be able to obtain its receivables despite the surplus amount**
  - **The persons in whose favor the prior mortgages were established knew or must have known that their mortgages would adversely affect the contractor (*subjective condition*).**
- Rights of the owner's creditors – who have granted loans in relation to construction work – are not affected by the exception.

# ARBITRATION

1. The International Arbitration Law No. 4686 (the “Arbitration Law”) permits parties to an agreement to set arbitration as the dispute resolution mechanism.
2. Foreign element prerequisite: In order for an agreement to be subject to the Arbitration Law, it must include a foreign element. The foreign element requirement is satisfied, among others, when:
  - The permanent residences, domiciles or workplaces of the parties are located in different countries;
  - A large portion of the agreement is to be performed outside of Turkey; or
  - The basis of the arbitration agreement should allow for the flow of capital or goods from one country to another.

# ARBITRATION

## 3. Choice of venue:

- If the arbitration venue is not in Turkey, enforceability of an award requires obtainment of an enforcement order from the competent court in Turkey.
- If Turkey has been chosen as the venue of arbitration, an arbitration award is directly enforceable, unless a claim for setting aside the award is filed.

# Enforcement of International Arbitral Awards in Turkey

## APPLICABLE LEGISLATION & PROCEDURE

### 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards: the “New York Convention”

- Enforcing commercial dispute awards granted in Contracting States
- Application to the competent court for enforcement
- Seat of Arbitration is material in determining the nationality of the award
- Principle of reciprocity applies

### Turkey’s Private and Procedural Law of 27 November 2007: “IPPL”

- Enforcing arbitral awards granted on the territory of Non-Contracting States & Turkey
- Application to the competent court for enforcement
- Procedural law is given effect in determining the nationality of the award

# Thank You

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