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# Turkey



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# Doing Business In Turkey

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The Hergüner team is composed of approximately140 individuals with a variety of educational and professional backgrounds. Our 80-member legal team, 15 of whom are Hergüner partners, are involved in cases that require a full grasp of Turkish and cross border jurisdictions, as well as different cultures and languages.

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# Doing Business in Turkey

### State of Emergency and Its Impact on the Business Environment

Following the attempted coup d'état on July 15, 2016, the Council of Ministers convened on July 20, 2016 and declared a state of emergency throughout the country for a 90-day period starting on Thursday, July 21, 2016 at 1am, which was then ratified by the Grand National Assembly of Turkey ("National Assembly") the next day. Since then, the state of emergency has been extended seven times, and is expected to last until the next elections.

The current Turkish Constitution grants extraordinary authority to state agencies during the state of emergency, and authorises the Council of Ministers, chaired by the President, to issue decrees that have the force of law. These decrees allow the government to overcome long and time-consuming legislative processes that might hinder responsiveness to the emergency. Although these decrees are subject to approval by the National Assembly, the empowering act that would normally be required for adoption is not necessary, and the decrees are not subject to review by the Constitutional Court.

The state of emergency has no effect on the ordinary course of business in Turkey. While the Code on the State of Emergency provides a general framework for government action that may take place during the state of emergency, government officers and officials have repeatedly affirmed that the state of emergency is merely intended to identify and remove the influence of the Gülenist movement over state organs, and that the powers vested to the government during the state of emergency will be used strictly for this limited purpose.

However, the National Assembly has amended certain codes in order to further insulate the business community from any negative effects of the state of emergency. For example, the Code Amending Certain Codes for the Purpose of Ameliorating the Investment Environment ("Investment Amendments") was passed in March 2018, most notably amending certain provisions of the Turkish Commercial Code ("TCC") and the Code on Pledges over Movables by Commercial Operations ("Movable Pledge Code"), as well as making certain changes to real estate and customs laws. The purpose of the Investment Amendments is to promote bureaucratic efficiency, encourage predictability, and save time and money by ensuring quick resolutions to issues facing investors.

Additionally, public authorities such as the Capital Markets Board ("CMB") and the trade registries have taken regulatory measures to ease the burden on investors. For example, the CMB abolished the share percentage threshold in the buyback mechanism under Turkish Law, as long as a material events disclosure has been made on the Public Disclosure Platform.

### Constitutional Referendum

On April 16, 2017 Turkey held a referendum during the state of emergency to amend its Constitution, most notably to change the government from a parliamentary system to a presidential one. The vote was 51.4% in favour of the change.

Under the current Constitution, legislative power is exercised by the National Assembly, which is a unicameral parliament comprised of 550 members elected by the public for four-year terms. The Prime Minister is the head of the Government and the cabinet of ministers, while the President of the Republic has the authority to ratify or veto laws, in addition to certain non-executive and non-legislative powers as head of State. Procedurally, committees of the National Assembly draft bills in accordance with relevant rules, and the bills become law upon approval by a full session of the National Assembly. However, laws do not become binding and enforceable until the Prime Minister submits them to the President and the President ratifies them and submits them for publication in the Official Gazette. In addition, the President has the right to veto laws, but in essence this is merely a "delaying veto", and if the National Assembly overrides the veto by a simple majority, the President has a duty to ratify it.

Under the new Constitution following the recent referendum, the office of the Prime Minister will be abolished and the parliamentary system will be replaced by an "executive presidency", which will become effective as of the presidential elections to be held on June 24, 2018. These amendments give the President the dual role of both head of State and head of Government, with the legislative authority to issue executive decrees. However, the National Assembly will continue to be the supreme legislative authority empowered to create or abolish any law.

Until the new constitutional amendments enter into force, the Prime Minister will continue to forward new laws to the President of the Republic to be published in the Official Gazette.

Bills proposed in the National Assembly are usually consistent with EU legislation as Turkey is in the process of negotiations for EU admission. The Helsinki European Council of December 1999 granted Turkey the status of a candidate country. The European Council of December 2004 confirmed that Turkey fulfils the requisite Copenhagen political criteria for accession negotiations. Subsequently, accession negotiations began on October 3, 2005 with the adoption of the negotiation framework by the Council of the European Union. The 'Negotiation Framework Document' includes principles governing negotiations, the substance of negotia-

tions, negotiating procedures, and a list of negotiation chapter headings. However, the negotiation process is moving at a slow pace.

## Legal System

### Legal Framework

As a civil law country, Turkey's legal system is composed of codified sets of rules structured hierarchically, resembling the legal systems of Continental Europe. The Turkish Constitution is the supreme law of the land, followed by codes and decrees issued by the government that have the force of codes, and then regulations, by-laws and communiqués, provided that none of them are in conflict with a superior rule in the hierarchy. International treaties duly ratified and put into effect bear the force of law and stand alongside codes and decree-codes within the hierarchy. All of the foregoing constitutes the primary and binding sources of Turkish Law. Court precedent has no binding effect, with certain exceptions, and is therefore considered a secondary source of law.

### Court Structure

Turkish courts are divided into two sets of general divisions: the civil and criminal judiciary, and the administrative judiciary. These general divisions are each structured in three tiers, which are, in ascending order, the courts of first instance, the regional courts, and the high courts (ie, the Court of Cassation and the Council of State).

## Civil and Criminal Judiciary

### Civil and Criminal Courts of First Instance

There are two types of general civil courts of first instance: the Civil Court of First Instance, and the Civil Court of Peace. The Civil Court of Peace only hears civil disputes arising from lease contracts, partition of ownership, and protection of possession over goods, and some disputes specifically assigned to it by law. Civil Courts of First Instance are specialised by subject matter jurisdiction. For example, commercial disputes are heard by chambers of the Commercial Courts under the Civil Courts of First Instance. Other specialised civil courts include Labour Courts, Consumer Courts, Courts of Intellectual and Industrial Property Rights, and Cadastral Courts.

Similar to civil courts, criminal courts also function by subject matter jurisdiction. Disputes relating to specific crimes are heard before the High Criminal Court, while all remaining crimes are heard before the Criminal Courts of First Instance. There are also specialised criminal courts, such as the criminal court for intellectual and industrial property rights and criminal execution courts. Judicial decisions during ongoing investigations are rendered by the Criminal Peace Judicature.

For a civil dispute, the type of lawsuit or amount in controversy determines whether a decision rendered by a court of first instance is appealable and, if so, which court will be the final appellate body. For criminal disputes, whether a decision is appealable is determined by the type or severity of the penalty imposed by the court.

## Civil and Criminal Regional Courts

The first appellate body in the civil and criminal judiciary is the Regional Courts, which conduct both legal review and de novo factual re-examination. The Regional Courts may reverse decisions of the Courts of First Instance, rule on matters of law, and conduct further examination on matters of fact. Accordingly, regional courts may hold hearings, hear witness testimony, and conduct expert witness examination at their own discretion.

### The Court of Cassation

The Court of Cassation is the highest court and the final appellate body in the civil and criminal judiciary. It only reviews matters of law and does not conduct factual re-examination. Decisions of the civil and criminal chambers of the Court of Cassation do not constitute case precedence. However, decisions of the plenary assembly of the Court of Cassation, which harmonises mixed decisions, are binding on all chambers of the Court of Cassation, as well as the lower courts.

### The Administrative Judiciary

Each tier of the administrative courts is separated into tax chambers and administrative chambers, which are authorised to hear all disputes arising from government actions, actions between one or more public authorities, and actions between private parties and public authorities. The hierarchy amongst the tiers is analogous with the Civil and Criminal Judiciary.

The lowest tier of the administrative judiciary contains the administrative and tax chambers of the Administrative Courts of First Instance. The second tier contains the administrative and tax chambers of the Administrative Regional Courts, which function as the first appellate body for legal review and are also empowered to conduct de novo review. The top tier is the Council of State, which is the highest court in the administrative judiciary. Although analogous to the Court of Cassation in reviewing matters of law, the Council of State also reviews questions of fact for disputes that are subject to emergency procedures, and is empowered to give opinions on proposed laws and secondary regulations when requested.

## Main Sources of Law That Apply to Companies

The TCC is the primary code that applies to companies, and the Turkish Code of Obligations ("TCO") sets forth the fundamental principles of contracts.

The Capital Markets Code ("CMC") and its secondary regulations set forth the rules for the incorporation and operation of listed companies. Companies operating in regulated sectors are subject to further specific legislation. For example, banks are regulated by the Banking Code, and insurance companies are regulated by the Insurance Code. Principal decisions of the related regulatory bodies also govern the practice of regulated companies.

## Regulatory System

In the Turkish legal system, various sectors are subject to specific restrictions and the supervision of regulatory authorities. While certain sectors are directly supervised by the corresponding Ministries, independent legal authorities have been established for the purpose of regulating some sophisticated sectors. The following are regulatory authorities with which investors commonly interact while doing business in Turkey.

### Capital Markets

The Capital Markets Board ("CMB") (Turkish: Sermaye Piyasası Kurulu) regulates and supervises capital markets in Turkey. The CMC sets forth general principles and rules governing the Turkish capital markets, and gives the CMB the duty and authority to further elaborate on these rules by issuing secondary legislation and enforcing the compliance of market actors.

The scope of the regulatory and supervisory authority of the CMB includes listed companies, capital markets institutions such as intermediary institutions, investment funds and corporations, independent audit and appraisal firms, credit rating agencies, portfolio management companies, central clearing and depository institutions, and capital markets instruments.

The CMC grants the CMB broad supervisory powers that allow it to impose administrative fines, withdraw the licences of capital markets institutions, initiate legal actions against unlawful operations and transactions in capital markets, impose restrictions on trading, etc.

### Banking

The Banking Regulation and Supervision Agency ("BRSA") (Turkish: Bankacılık Düzenleme ve Denetleme Kurumu) was established under the Banking Code, to regulate the banking sector, monitor and supervise bank compliance, and regulate, monitor and supervise the incorporation, operation, management, organisational structure, merger, demerger and liquidation, and share transfers of banks and financial holding, financial leasing, factoring and financing companies.

As with the CMB, the BRSA is also equipped with extensive supervisory authority to impose administrative fines on banks and other financial institutions, and to compel banks to take certain actions in the event of non-compliance with financial requirements. Depending on the severity of a bank's financial status, these actions may be corrective (eg, equity increase), remedial (eg, replacement of board members), or restrictive (eg, termination of activities resulting in financial loss). If none of these actions is sufficient to cure the financial problems faced by a bank, the BRSA may either withdraw the licence of the bank or transfer both the shareholding rights in the bank (other than dividend rights) and the management and supervision of the bank to the Savings Deposits Insurance Fund ("SDIF") (Turkish: Tasarruf Mevduatı Sigorta Fonu).

The SDIF is another regulatory body established under the Banking Code to protect the rights and interests of depositors, and to ensure confidence and stability in financial markets. It has the duty and authority to do the following:

- insure deposits and contribution funds held by banks;
- manage the banks transferred to it;
- improve these banks' financial standing; and
- transfer, merge, sell or liquidate these banks.

In doing so, the SDIF monitors and collects the receivables of the banks under its management, and manages their assets and resources. For these purposes, the SDIF is authorised to sell the assets of banks under its management, as well as the assets of the majority shareholders of these banks, entities under the control of these banks or their majority shareholders, and the shareholders of entities working on behalf of or for the abovementioned persons or entities.

## Energy

The Energy Market Regulatory Authority ("EMRA") (Turkish: Enerji Piyasası Düzenleme Kurumu) oversees the Turkish energy sector. EMRA grants licences for participation in the electricity, oil and gas markets; introduces performance standards applicable to each market; monitors the performance of market actors; determines pricing methods; and generally supervises compliance in each market with relevant laws. In the event of non-compliance, EMRA may impose various sanctions, including administrative monetary fines and/or cancellation of licences.

## Competition

The Competition Authority (Turkish: Rekabet Kurumu) is in charge of enforcing the Code on the Protection of Competition, and investigates and reviews the records and documents of undertakings (including correspondence with third parties). Its powers also include compelling undertakings that are in violation of competition laws to cease such activities, precluding undertakings from carrying out certain actions, and imposing administrative fines. Mergers and acquisitions

that have the potential to adversely affect competition are also subject to prior approval of the Competition Authority.

### Telecommunications

The Information and Communication Technologies Authority ("ICTA") (Turkish: Bilgi Teknolojileri ve İletişim Kurumu) oversees the Turkish telecommunications sector by introducing technical requirements for operators, establishing rules to protect consumer rights, ensuring reconciliation between operators when necessary, protecting competition in the sector, and authorising operators to provide telecommunications services. It also regulates the postal services sector, with similar duties and authority. In both sectors, the ICTA is responsible for supervising the compliance of authorised entities with the relevant laws, imposing administrative fines, and cancelling authorisation for non-compliant operators and service providers.

## Dispute Resolution

### Main Dispute Resolution Procedures

The civil, criminal and administrative judiciary are each regulated under a separate procedural code. The Code of Civil Procedure regulates the civil judiciary, the Code of Criminal Procedure regulates the criminal judiciary, and the Code of Administrative Procedure regulates the administrative judiciary. Alternative dispute resolution methods are also regulated under their own specific codes, as explained under Section C below.

### Litigation Process

Turkish civil litigation is based primarily on written submissions. In order to initiate a civil lawsuit, a plaintiff files a statement of claim with the relevant court and pays the required court fees. Foreign nationals are required to deposit an additional amount as security when initiating a civil lawsuit, unless there is a reciprocity agreement between Turkey and the plaintiff's country of nationality.

Upon examination of a plaintiff's statement of claim, the court prepares a scheduling order setting forth the procedural rules to be followed by the parties, and serves the scheduling order and the statement of claim on the defendant, who has two weeks from receiving the statement of claim to submit its statement of defence; under certain circumstances, courts may grant additional time if requested by the defendant. Once submitted to the court, the statement of defence is served on the plaintiff.

Once the petitions have been exchanged, the court conducts a preliminary examination regarding the mandatory procedural requirements and the defendant's preliminary objections. The court then proceeds with the main examination on the merits of the dispute, during which it examines the evidence, hears witness testimony, and conducts expert witness examinations either by party request or at its own discretion. Once the main examination concludes, the court sets a date to render its verdict. Civil lawsuits can be finalised anywhere from one to six years, including appeals proceedings, depending on the type and complexity of the lawsuit.

### Methods of Alternative Dispute Resolution (ADR)

ADR is not currently commonly pursued in Turkey, but it has started to gain increasing popularity due to the impact of recent legislation and campaigns by the state and bar associations to encourage or even require ADR prior to court action.

### Mediation

Legislation on mediation is relatively new. The Mediation Code was enacted in 2012, and its essential provisions only entered into force on June 22, 2013.

As per the Mediation Code, parties have the sole discretion to initiate, continue and conclude mediation, and may apply for mediation either before or during ongoing court proceedings. Unless otherwise agreed, the mediator is chosen by the parties from a list of registered mediators. The mediator does not render a decision on the dispute, but merely encourages parties to reach an amicable agreement. Unless otherwise agreed, the parties and mediator must obey the principle of confidentiality, and the parties are treated equally by the mediator in mediation.

If the parties reach an agreement, a "settlement minute" is prepared and signed by both parties and the mediator. In order to execute a settlement minute, the parties are required to obtain an "execution endorsement" from a court. During its examination, the court will only review whether the subject matter of the dispute is appropriate for mediation and execution. Once an execution endorsement is obtained, the settlement minute is the equivalent of a court decision.

The new Labour Courts Code recently introduced the concept of "mandatory mediation" for almost all categories of labour dispute, which became effective on January 1, 2018. This requires both employers and employees to first apply for mandatory mediation before either party may initiate a labour lawsuit.

### Arbitration

The Code of Civil Procedure sets forth the rules for domestic arbitration, but international arbitration is regulated under the International Arbitration Code, which entered into force in 2001 and was modelled on both the UNCITRAL Model Law of 1985 and the international arbitration section of the Swiss Federal Private International Law of 1987. The International Arbitration Code applies to arbitrations seated in Turkey that involve a foreign element. Even if the arbitration is seated in another country, the parties may still agree to

apply the International Arbitration Code to the arbitration process as long as it involves a foreign element.

Under the International Arbitration Code, an arbitral tribunal is competent to review and rule on both its own jurisdiction and the existence of a valid arbitration agreement between the applicant parties, and an affirmative decision of the tribunal on these points is not appealable before a court. A court's interference in the arbitral process is limited to cases explicitly stipulated under the International Arbitration Code (such as an invalid arbitration clause/agreement, lack of due process, incorrect tribunal appointment process, unequal treatment, and an award violating public order).

There are two main arbitral institutions in Turkey: the Istanbul Chamber of Commerce Arbitration Centre and the Istanbul Arbitration Centre. The rules of both institutions are modelled after the international arbitration rules.

**Conciliation**

Conciliation for civil disputes is regulated by the Code of Attorneys, which states that attorneys and their clients may invite counterparties to conciliation. If the parties reach an agreement, they and their attorneys will prepare and execute a settlement minute, which becomes equal to a court decision without the need to obtain an execution endorsement from a court.

Conciliation for criminal disputes is regulated by the Code of Criminal Procedure and its secondary regulations, which state that if there is sufficient doubt that an individual or legal entity has been a victim of certain crimes such as burglary, fraud or disclosure of trade secrets, or crimes prosecuted on complaint, the prosecutor can invite the alleged victim to participate in conciliation with the suspect. The conciliator can be the prosecutor, a qualified law graduate, or an attorney assigned by the bar upon the request of the prosecutor. If the parties solve their dispute at conciliation, the prosecutor will not initiate a criminal case against the suspect. Under certain circumstances, the court can also invite parties to participate in conciliation; if the parties agree and solve the dispute, the court will dismiss the case.

## Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards

### Recognition and Enforcement of Foreign Court Judgments

Procedures for the recognition and enforcement of foreign court judgments are regulated under the Code on Private International Law and Procedural Law ("Private International Law Code"), which prohibits Turkish courts from reviewing the merits of foreign judgments: Turkish courts may only examine whether or not the requirements for recognition and enforcement under the Private International Law Code have been met, which are definite judgment (res judicata), the existence of reciprocity, the absence of exclusive jurisdiction of Turkish courts over the subject matter of the judgment, the absence of a breach of Turkish public policy, and whether due process has been respected in a foreign litigation process. The recognition requirements are the same for recognition and enforcement, except that reciprocity is only a requirement for the recognition of decisions.

Turkish courts may also rule on the partial enforcement of a foreign judgment. A Turkish court's decision to enforce a foreign judgment is appealable pursuant to the general procedures on appeals. An enforcement decision also includes the recognition of a foreign judgment. Once a foreign judgment is recognised by a Turkish court, it becomes res judicata, and therefore conclusive evidence under Turkish Law. The effect of recognition of a foreign judgment is retroactive, starting from the date of the finalisation of the foreign judgment.

**Recognition and Enforcement of Foreign Arbitral Awards**

The recognition and enforcement of foreign arbitral awards in Turkey are regulated under two sets of rules: the New York Convention of 1958 and the Private International Law Code. The New York Convention is applicable to awards rendered in another signatory state when the subject matter of the dispute is considered commercial as per the TCC. If these conditions are not met, then the recognition of a foreign arbitral award will be subject to the Private International Law Code.

Both the New York Convention and the Private International Law Code explicitly stipulate the legal grounds for dismissal of an enforcement request. Under both sets of rules, the burden of proof lies with the party who requests dismissal of enforcement. At its own discretion, however, a court may review whether or not enforcement of an award would be in violation of public policy, or whether the subject matter of the dispute is not appropriate for arbitration.

One significant difference between the New York Convention and the Private International Law Code is that, if there are legal grounds for dismissal of an enforcement request, the New York Convention states that a court may rule for dismissal whereas the Private International Law Code states that a court shall rule for dismissal. Accordingly, if grounds for dismissal exist in an arbitral recognition and enforcement case that is not covered by the New York Convention, a court must reject the enforcement request.

## Foreign Investment and Trade

### Foreign Investment and Trade

Unless otherwise required under international treaties or specific provisions of law (as explained below), foreign investors are subject to the same treatment and entitled to the same investment incentives as local Turkish investors

under the Foreign Direct Investments Code ("FDI Code"). The scope of incentives that are granted with respect to a particular investment is determined according to the purpose, volume and location of such investment. Additionally, the Investment Support and Promotion Agency ("ISPA") was established in 2006 under the Office of the Prime Minister of the Republic of Turkey in order to attract foreign investment. The ISPA develops and implements investment support and promotion strategies, and assists foreign investors with the procedures for working with State institutions.

As per the FDI Code, foreign investors, like local investors, are free to repatriate net profits, dividends, proceeds from the sale or liquidation of their investment, royalties or fees arising from licensing, management and similar agreements, and/or principal and interest payments under external loans, through banks or other authorised financial institutions. Turkey very recently introduced a restriction on the use of foreign currency loans.

Turkey has been using floating exchange rates since 2001, which are freely determined in accordance with market supply and demand. The Central Bank of the Republic of Turkey (Turkish: T.C. Merkez Bankası) announces indicative exchange rates at the end of each day, and banks and other authorised financial institutions freely determine their own exchange rates based on market conditions.

Rules governing foreign exchange are mainly set out under Decree No. 32 on the Protection of the Value of Turkish Currency ("Currency Decree"). As of May 2, 2018, an amendment to the Currency Decree prohibits Turkish individuals from utilising foreign currency loans, and neither Turkish individuals nor Turkish legal entities can utilise foreign currency indexed loans. Moreover, Turkish legal entities that do not have foreign currency earnings are no longer allowed to utilise foreign currency loans unless they benefit from one of the exemptions set forth under the Currency Decree. These exemptions include situations where the borrower is a bank, financial leasing company, factoring company or financing company, or where the borrower will utilise the loan for an investment made subject to an investment incentive certificate, for domestic tenders for which an international announcement was made, or for projects to be realised under the public-private-partnership model.

Finally, there are a limited number of exceptions to the principle of equal treatment of foreign and domestic investors, including restrictions on foreign control or ownership in a limited number of regulated sectors, such as defence and broadcasting, and certain approval or notification requirements in others (eg, energy, banking, insurance). Furthermore, acquisition of real property by foreigners is also subject to certain restrictions, summarised as follows.

Turkish companies that are directly or indirectly controlled by foreign individuals or legal entities may freely acquire real property in Turkey, although a screening process is applicable to determine whether or not the property is located in a restricted zone (ie, military forbidden zone, military security zone or strategic zone) and, if it is, whether the company should be allowed to acquire such property. To that end, an application should be filed with the relevant governorship to obtain clearance prior to the acquisition of real property by these companies. If a foreign individual or entity gains direct or indirect control of a Turkish company that owns real property as a result of a share transfer, the relevant governorship initiates a similar process on its own. If the ownership is deemed to be against national security, the company is asked to make the necessary changes to eliminate the threat to national security, and eventually to liquidate the property.

The direct acquisition of real property by foreigners (without the use of a Turkish special purpose vehicle) is subject to stricter requirements. The acquisition of real property by foreign individuals is permitted only if all of the following conditions are met:

- if the individual in question is a citizen of one of the countries approved by the Council of Ministers;
- if the total surface area of the property owned by such individual in Turkey does not exceed 30 hectares;
- if the total surface area of property acquired by foreign individuals in a given district does not exceed 10% of the surface area of that district;
- if the property is not in a restricted zone; and
- if there is no construction on the property in question, a project must be developed on the property within two years.

On the other hand, unless explicitly permitted by a specific provision of law, foreign legal entities cannot acquire real property in Turkey. While there are several laws that allow for the acquisition of property by foreign entities for specific purposes (such as the Petroleum Market Code and the Code on the Encouragement of Tourism), foreign investors usually prefer to establish Turkish companies as special purpose vehicles and acquire the real property through these companies, due to the restrictions specified in the relevant laws concerning the purpose of investment.

## Key Developments

The business environment in Turkey has resisted the domestic and international political and economic challenges of the past year, and it is expected to demonstrate similar resilience throughout 2018. Turkey's sizeable energy demand has played a significant role in the business environment, and the largest portion of deal value belonged to the energy sector in terms of M&A deals completed in 2018. Technology, internet and mobile services were also among market

leaders in terms of volume, due to many early-stage investments by financial investors into smaller entities.

The challenges faced in financing may cause Turkish entities to conduct IPOs or to conclude partnerships, especially with foreign investors, and lead to a further increase in business activities in 2018. The energy and technology sectors are also expected to draw yet greater attention by domestic and foreign investors going forward.

Finally, the results of the upcoming presidential and parliamentary elections may have a direct impact on business activities in 2018.

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