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*We are glad to share April issue of our Law Bulletin which includes recent legal developments and news globally and in Turkey.*

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## *Recent News*

# BINDING NATURE OF IRAN ECONOMIC SANCTIONS ON TURKEY AND ITS EFFECT ON LOGISTICS SECTOR - IRAN EMBARGO


**1. Introduction**

Iran has been facing various sanctions and international pressure for more than four decades. These sanctions are twofold and can be imposed unilaterally by countries or groups of countries, or by supranational organizations such as the European Union (EU) and the United Nations (UN).

**2. A Brief History of Sanctions Against Iran**

The United States has been the leading actor regarding these sanctions and pressures, and the tension between the US and Iran started with the Iran Hostage Crisis in 1979 at the US Embassy in Tehran. Subsequently, the tension and crisis between the two countries has continued exponentially due to the economic sanctions and embargoes imposed by the US against Iran and continues to show its effects across the international arena today.

In 1945, the atomic bombs dropped on Hiroshima and Nagasaki and the atmosphere of fear and anxiety following the casualties caused by nuclear weapons created the need for various legal arrangements. Thus, the United Nations, a supranational organization, was established in 1945. The responsibility for international security was basically given to the United Nations Security Council. As the world's resources diminished, countries in search of alternative energy sources started to engage in nuclear activities. In this sense, Iran, which has a nuclear power plant and intensively produces nuclear studies, has become a subject of debate across the international arena with the possibility that its studies are not only for civilian purposes and may endanger international peace.

Iran's nuclear activities within the framework of its uranium enrichment program raised the security concerns of the United Nations Security Council, and the United Nations adopted multilateral sanctions resolutions. The UN adopted its first resolution in 2006 stating that Iran must halt its nuclear activities or face sanctions. These embargoes continued until 2015, when the Iran Nuclear Deal was signed. The UN, believing that Iran would carry out its nuclear activities for peaceful purposes, adopted a resolution dated 20.07.2015, which set the timetable for suspension and lifting of sanctions and stipulated that sanctions would re-enter into force if Iran did not comply with the Joint Comprehensive Plan of Action (JCPOA), and thus sanctions were lifted. However, sanctions on terrorism, human rights violations, missile technology remained in force and full inspections of nuclear activities were decided.

For the United States, one of the five permanent members of the United Nations, these positive developments were short-lived, as the US decided to unilaterally withdraw from the JCPOA in 2018 and announced that it would reintroduce the sanctions it had imposed before the JCPOA. The other signatories of the JCPOA remained committed to the agreement. [1]

**3. Economic Sanctions Imposed on the State of Iran by the United States, the European Union and the United Nations Security Council**

In this study, since the relevant sanctions covering all sectors are quite comprehensive, rather than addressing the sanctions one by one, we will only briefly draw attention to the important issues with respect to the information regarding the sanctions, and we will take a more comprehensive look at the effects of the sanctions on the commercial sector. As mentioned, the United States has been the leading actor of the sanctions, and of course, the United Nations Security Council and the European Union have also signed important decisions regarding the sanctions.

The UN decided to freeze the assets in all countries of individuals and entities dealing with Iran and supplying nuclear energy-related materials and to restrict their travel permits. Arms trade by Iran was banned, restricting the banks and financial institutions in their Iran-related operations. Travel bans were imposed on persons on the sanctions list. Foreign individuals and organizations were banned from investing in nuclear activities and arms aid was halted. Direct and indirect sales of sensitive nuclear materials and ballistic missiles to Iran were banned. These sanctions were also imposed by the US and the EU.

The US has a wide range of sanctions against Iran. Iranian state assets in the US have been frozen. Central Bank of Iran funds entering the US financial system have been seized. The Central Bank of Iran and related institutions are banned from entering the US financial system. Trade with Iran and investment in Iran is prohibited. All exports of US companies to Iran are banned. It was decided to restrict or prohibit financial institutions from accessing the US financial system if they transact with institutions on the SDN list. The direct transfer of US dollars to Iran is prohibited.

In general, sanctions have the effect of excluding Iran from the world financial system. On 8 May 2018, the US President Donald Trump announced the US withdrawal from the JCPOA and imposition of secondary sanctions by the US. The first sanctions package of the US was put into effect on 7 August 2018 and the second sanctions package was put into effect on 5 November 2018.

It has become impossible for companies doing business with Iran to do business in the US market. Industry giants such as Google, Apple and Microsoft have started to impose access restrictions on users with ties to Iran. It was decided to confiscate the assets of individuals and organizations in the US that cooperate with Iran or provide financing. The Iranian government is prohibited from purchasing US Dollars and trading in gold and precious metals. Even the sale of petroleum products was sanctioned. As a result of the serious embargo on trade, bans have been imposed on most products. Violation of the relevant prohibitions can lead to imprisonment within the framework of primary sanctions.

In the 2000s, the European Union applied its sanctions in parallel with the United States. It banned all Iranian banks from SWIFT service, which has an important position in financial transactions. The sanctions included economic, political, military and diplomatic issues.
Following the JCPOA, Iran has re-entered the international financial system, and although it is close to achieving economic stability, it is still trying to recover its economy.

**4. Legal Structure of Economic Sanctions and Their Legal Binding for Turkey**

The Article 39 of the Charter of the United Nations, entitled " Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", reads as follows: " The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The United Nations Security Council derives its authority to impose sanctions from the present and subsequent articles.
Article 41 of the Charter of the United Nations sets out as follows: " The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

As such, Turkey is a member of the UN, and under the aforementioned articles, Turkey is also under an obligation to refrain from providing assistance to the states against which measures are taken. UNSC resolutions are legally binding for Turkey. However, since the UN sanctions resolutions have been suspended, there are currently no sanctions that Turkey has to comply with.

The possible sanctions that may be imposed by the US are of 2 types: primary and secondary sanctions. At the same time, the US President may grant general, country-specific or company-specific exceptions to sanctions, and additional sanctions may also be regulated in accordance with the President's order. The United States is one of the five permanent members of the United Nations.

Although it is one of the administrative authorities in the decision-making process due to being a member state, the sanction decisions taken by the US itself do not have a legal binding effect in terms of Turkey. However, as we will further elaborate below, Turkey is under an abstract binding in terms of trade and is almost adapted to the form of a secret embargo.
The European Union has published Basic Principles and two guidelines for the regulation of economic sanctions and these documents are binding only for member states. As a candidate country, Turkey is not obliged to comply with the economic sanctions decisions taken by the European Union.

There is no doubt that the binding mechanisms regarding these sanctions will have different binding effects for each country in terms of procedure and law. Although Turkey is not legally bound by the sanctions in the current situation, investors are cautious about trade with Iran due to the high risk factors and inefficient cost analyses, and the two countries impose a secret embargo on each other.

**5. Sanction Mechanisms**

The concept of sanctions, which is basically defined as "attempts to prevent undesirable behavior or actions of states with a sufficient amount of damage or at least a perceptible threat", has been stated as trying to ensure that a state refrains from threatening and using force against other states. [2] The sanctions imposed by the US are mainly motivated by the exclusion of Iran from the world financial system.

In the event that an activity, business and/or transaction is included in the sanctions list of the US, the sanctions that can be imposed by the US against the person and/or organization carrying out the relevant transaction are of two types: primary and secondary sanctions. Primary sanctions are binding for US natural and legal persons. Secondary sanctions, on the other hand, are binding on individuals and organizations of other countries. These secondary sanctions are also binding on natural and legal persons of Türkiye, and it is important that the persons and institutions of our country pay attention to this issue.

According to the secondary sanctions, in case of partnerships established and business and transactions carried out with persons and organizations on the sanctions list, your money transfers passing through the US may be confiscated or the US financial institution may refrain from performing the transaction. Sanctions related to trade bans are regulated in all sectors and spread over a wide range. However, in some cases, there may be exceptions for certain products related to the relevant sectors. For example; food, medicine, hygiene, medical device products are among the exceptional sectors.

As will be discussed below, the issue that needs to be emphasized with respect to the countries that are likely to be subject to secondary sanctions is not the feasibility of exports, but how the payment systems will be operated after their implementation. And the current situation does not make it possible to receive payments if there is a potential export. This is because the US suppresses trade by controlling electronic financial payment instruments and banks through secondary sanctions. Although Turkey is not binding against these sanctions, it is possible to call this situation a hidden embargo in practice.

The US Treasury Department's Office of Foreign Assets Control ("OFAC") prohibits transactions between US persons and businesses (e.g.; companies) and entities on the Specially Designated Nationals and Blocked Persons List, or "SDN List". In this sense, even if the product or service to be transacted is not covered by the sanction, the obligation to check whether the recipient of the product or service is on the SDN list or other lists, and the end user lies with the sender. As a result, the end user and the recipient must be checked.

The US adds some Iranian individuals, companies and institutions to the list called SDN and may impose sanctions on third country citizens who engage in commercial transactions with these persons. In this sense, it is important that companies control the counterparties with whom they conduct transactions from the SDN list. Apart from the SDN List, there are also lists of banned persons and institutions. In this sense, it would be healthy for investors who do not want to suffer secondary sanctions to pay attention to these controls.

The "significant transaction" criterion is applied in determining the violation of US sanctions against Iran by US or other nationals. OFAC considers all documents and circumstances in determining whether a transaction is a significant transaction and makes its decision based on the following criteria.

- Size, number, frequency of the transaction,

- Shape, complexity, commercial purpose of the transaction,

- The level of awareness of the management level on the repetition of the process,

- The link between the transaction and the blocked person,

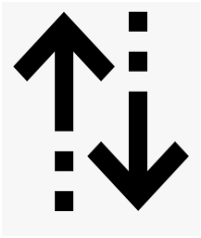
- The effect of the lawfulness of the purpose of the transactions,

- Whether the transactions involve deceptive/misleading behavior,

- Other reasons that the US Treasury Department will assess on a case-by-case basis. [3]

**6. The Binding Nature of Iran Economic Sanctions for Turkey and Their Impact on Trade Relations**

As explained above, since the United Nations Security Council's binding decisions on economic sanctions against Turkey were suspended in 2015, there are no sanctions imposed by the United Nations, except for the restriction on the sale of heavy weapons. As for the US sanctions, they are not legally binding for Turkey. As a result, the transaction you make when doing business with Iran will be legal. However, the transaction made / to be made may involve risks for companies within the scope of US sanctions.



It is important to pay attention not to act against the sanctions in order to maintain relations with the USA and not to subject the company to any secondary sanctions.

As a result, it is de facto possible to continue trade with Iran. This is because the sanctions are not binding for Turkey to stop trade relations. However, secondary sanctions in this case increase the risk and cost of trade.

Problems such as failure to receive payments related to the trade may arise. Or it can be seen that the final decisions regarding the business partnerships established/to be established by US companies are made by making a distinction between the list of companies that trade with Iran and the list of companies that do not trade with Iran. In the current situation, the first distinction that US firms make in the business partnerships they choose is whether or not they trade with Iran.

Withdrawal of the US President Trump from the Iran Nuclear Deal in line with his decisive and strict policy has disrupted Turkey-Iran relations. Although Turkey has declared that the sanctions are unfair and are not binding on it, the business world and investors who fear being subjected to US sanctions have weakened and even severed their economic ties with Iran.

As mentioned above, in the second phase of the economic sanctions, foreign financial institutions' transactions with the Central Bank of Iran and other Iranian banks were also made subject to sanctions. In addition, the US government openly declared that the SWIFT (Society for Worldwide Interbank Financial Telecommunication) system, which regulates international fund transfers between banks, will be subject to US sanctions if it is not closed to all embargoed Iranian financial institutions, and that any person and organization that does not comply with the sanctions is in danger of being excluded from the world financial system.

At this point, in addition to the companies that have suspended their trade with Iran by avoiding taking the specified risks, the point to be considered for the companies that want to continue their trade will be not to use the bank channels within the framework of the economic sanctions imposed by the USA against the Iranian government in the money transfers to be made with the intermediary company. It seems reasonable to work in factory delivery as much as possible. In addition, if the currency is Iranian state currency, the possibility of acting within the scope of sanctions prohibitions will arise. It should also be paid attention to this issue.

In this context, the most active follow-up is carried out by the USA through the SWIFT service. As a matter of fact, a heavy sanction was also provided through SWIFT. Therefore, Dollars should not be used in any way when trading with Iran. Apart from and in addition to this, the US also conducts sanctions control by using different intelligence sources and operates the blacklist logic and motivation in practice. In addition, it is known that sanctions can also be examined based on the notification of third parties, and it is clearly evident that an action plan should be created by taking these risks regarding the trade made / to be made.

In the event that an economic sanction, which is not among the existing sanctions, is applied through a third party or the state of Turkey, it is possible to request cancellation of the administrative action applied in the Administrative Courts of Turkey and to file a lawsuit demanding termination of the violation.

**7. In Conclusion**

In the current situation, clear and precise approaches and responses to the issue still do not seem reasonable. As a matter of fact, in the face of the course, importance and sensitivity of the issue in the world conjuncture, the importance of up-to-date control and communication with the right channels regarding the actions to be taken is clearly evident.

Although there are countries like Turkey that want to mobilize export relations with Iran, the feasibility studies made on the grounds that the problems in the payment systems, which are the important pillar of the export process, are a big and important problem, generally hold companies back from taking any action.

In addition to sectoral-based determinations and controls, it may also be important what kind of transaction the product belonging to the relevant sector is subject to. As such, it would not be difficult to support the view that reports including detailed research in potential trades should be issued due to the wide range of interpretations related to sanctions. In practice, corporate firms with large trade volumes may even establish "sanctions compliance offices" within their companies in order to eliminate such interpretative differences.

Within the scope of the fact that the authority implementing the sanctions is the US Treasury Department, it seems healthier at this stage to carry out process management with the confirmation letters to be received from the relevant Offices of Commercial Counsellor after the decision to turn the planned trade into action. While investors are trading and collaborating;

- The position of the product subject to trade within the scope of the sanctions regime,

- Who the persons or organizations to be traded in Iran are (pay special attention to the SDN List),

- The level of relations with the United States,

- US citizenship of the owners (including Green Card),

- Whether the owners or the firm have assets in the US,

- Whether US natural or legal persons are among the shareholders of the company,
- Whether there is a credit flow from US financial institutions to the company,

- If the company is included in the SDN List, what kind of problems this may cause for the company,

- How to transfer money in their trade,

would be appropriate for them to make a comprehensive assessment of the issues.

Again, if we take a look at the content titled "Main Issues to be Considered in Export Transactions to Iran" dated 25 January 2022 published on the official website of the Ministry of Trade of the Republic of Türkiye;

• It should not depend only on the proforma invoice but should act within the framework of a sales contract to be made with the Iranian importer and all conditions to be clearly set out.

• There should be provisions under the agreements for the Iranian importer to solve the problems that may arise in cases such as changes in customs duties, import procedures, products and / or quantities subject to importation. In sales to Iran, it should be worked on Ex-Works and cash basis as much as possible. The "Reference Price Application in Imports" applied by Iranian customs is an important problem.

• Agreements and proforma/commercial invoices should be issued in a country currency other than US Dollars - preferably Euro, TRY or other convertible country currency to be mutually agreed - and payments should be made in this way. Attention should be paid to the relationship between the payment and the mode of delivery.

• In Iran, it is seen that the state does not allow exports below a certain price in the export prices of some products. For this reason, it is seen that our companies may encounter problems in determining Customs Duties. For this reason, it is important for our companies to consider this issue in their imports from Iran. [5]

The statement that trade with Iran is not impossible, but the process management is important and contains details. As can be seen from the news content published on the official website of the Ministry of Trade of the Republic of Türkiye dated 18 February 2020 titled "The Most Foreign Companies Established in Turkey in 2019 by Iranian Citizens", companies in Iran have established representative offices in Turkey.

According to the data announced by the Union of Chambers and Commodity Exchanges of Turkey, Iranian citizens established the most foreign companies in Turkey with a total of 970 companies in 2019. At this point, Jalal Ebrahimi, Secretary General of the Turkey-Iran Business Council, stated that the main reason for Iranian citizens to establish companies in Turkey is to reduce the impact of US sanctions on imports and exports. "These companies import Iranian final or disassembled products to Turkey and export them to European and Balkan countries through processing, assembly, packaging or brand change," Ebrahimi said.

He also stated: “The fact that Turkey has trade agreements with 36 countries, has offices of commercial counsellor in 102 countries and is not subject to sanctions makes this preference even more meaningful".

In this context, it should not be forgotten that the US expects the end-user control of the first or intermediate seller to be carried out both in Turkey and Iran and asks companies doing business with Iran to act as a prudent merchant.

As can be seen, it is very difficult to continue trade with Iran without solving some important problems, especially the payment difficulties arising from the SWIFT electronic financial system, and the steps to be taken by countries in the future in this regard are eagerly awaited and are of great importance for the world financial order.

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# THE REGULATION ON ACTIVE CO-OPERATION FOR THE PURPOSE OF UNCOVERING CARTELS (LENIENCY REGULATION) AND ITS EFFECTS ON PROTECTION OF COMPETITION

**1-FREE MARKET ECONOMY AND COMPETITION**

Before mentioning competition law, it is useful to mention the free market and its natural limits. Free market economy or economic liberalism, in the simplest definition, represents an environment of free commercial activity and competition without state intervention. In a free market economy where Adam Smith's famous saying "Laissez-faire, laissez-passer" (let them do, let them pass) principle is adopted, the important point in terms of our subject is that competition is also out of control, and the state does not intervene. Is it possible to establish fair and equitable competition and competition in favor of the consumer in a market that is not subject to any restrictions or supervision? Or does the order create its own big fishes and turn freedom into a hollow word?

Article 3 of the Law Nr. #4054 on Protection of Competition ("LPC") defines the concept of competition as follows: "Competition between undertakings in the goods and services markets that enables free economic decisions to be made". As can be seen from the definition, the competitive environment, which is one of the inseparable elements of the free market, refers to the situation in which undertakings can regulate supply and demand, pricing, advertising, and all kinds of marketing activities in line with their profit objectives without state pressure and control. There are four types of market types according to the status of undertakings across the market. "These are complete competition, monopoly, monopolistic competition and oligopoly." [1] "Firms in complete competition do not have market power. They compete fiercely and accept the market price as it is... Monopoly is a form of market that produces goods and services that have no substitutes, where there is a single seller protected from competition and prevents new firms from entering the market. A single firm in this market has market power." [2] In the case of oligopoly, which is between perfect competition and monopoly representing the two opposite poles of the market in terms of competition, there are "few" undertakings and competition is relatively more controlled. In all markets where the number of undertakings is more than one, competition regulations and the state should determine the field of action with legal regulations, even if limited, in order to ensure just and beneficial competition and to ensure the benefit of the consumer and the country within the profit-loss balance. For this purpose, the Law Nr. #4054 on Protection of Competition and the relevant provisions of the Commercial Code are in force in our country, and audits are carried out by the Competition Authority.

As a continuation of the previous explanations, it should be noted that all undertakings aspire to be unique in the market and to determine production-consumption-price balances alone and freely. Since the increase in the number of undertakings leads to a "market price", undertakings are forced to play the game according to the rules, so to speak, in which all undertakings are involved. In order to limit the aspiration to become a monopoly and to establish fair competition, statutory regulations keep undertakings under control.

**2. THE "LENIENCY REGULATION" SPECIFICALLY WITHIN THE SCOPE OF COMPETITION LAW REGULATIONS AGAINST CARTELISATION**

"Although there is no clear definition of competition law, it can be defined in various ways by the authors in the doctrine. According to one perspective, agreements and decisions, restrictive practices or economic power of an undertaking in a dominant position with the aim of affecting the market in which the undertakings operating in various products or service sectors operate, and the unlawful disruption of the free market economy that is desired to exist in the market with the economic power that enables it to be in a dominant position, and all of the regulatory or prohibitive regulations aimed at preventing the restriction of the free market economy after this unlawfulness are called cartel law or competition law." [3] In other words, Competition Law introduces regulatory and prohibitive rules in order to prevent the free market economy from being damaged by unlawful acts and transactions and to prevent strong undertakings in a dominant position and unlawful business associations from disrupting market balances and serves the purpose of keeping the market under control. As we have mentioned, unlawful acts and transactions carried out by dominant undertakings in order to keep the strings of the order in their own hands and thus increase their profits to the detriment of other undertakings, rather than playing the game according to the rules, constitute unfair competition, and in order to prevent cartelization, cooperation with the Authority is also presented as an alternative solution under our Law.

The "Regulation on Active Cooperation for the Purpose of Uncovering Cartels", known as the "Leniency Regulation", which is based on the Article 16 of the Law on Protection of Competition, entered into force after being promulgated on the Official Journal dated February 15, 2009 and bearing the issue number #27142. The Authority has also published a Guideline on Explanation of the Regulation on Active Cooperation for the Purpose of Uncovering Cartels. The provision established pursuant to the Article 16 of the LPC is as follows:

*"The penalties specified under the third and fourth paragraphs may be waived or the penalties to be imposed according to these paragraphs may be reduced for the undertakings or associations of undertakings or their managers and employees who actively cooperate with the Authority for the purpose of revealing the violation of the Law, by taking into account the nature, effectiveness and timing of the cooperation and by clearly showing the justification."*

As stated under the related provision of the Law, undertakings that actively cooperate with the Authority for the purpose of revealing the violation of the Law may not be fined or their fines may be reduced.

The respective procedures and principles are set out under the aforementioned Regulation. In competition law, leniency refers to the fact that undertakings that are involved in a cartel formation and support the growth of a cartel by supporting this cartelization, may avoid the fine completely by reporting the cartel to the Competition Authority or obtain a discount from the fine to be imposed against them in certain circumstances. Briefly referred to as the leniency program, active cooperation with the Competition Authority within this system is an important recourse offered by the Competition Law as a way to avoid heavy fines to be imposed by reporting the cartel and presenting various evidences and details. [4]

**3. CARTEL**

"As it is clearly understood from the regulation, leniency practices only cover cartels. Since other competition violations are not covered by this regulation, they will not be able to benefit from the leniency provisions." [5] At this point, some applications are rejected due to the fact that the notified undertaking is not a cartel, even if there is unfair competition. At this point, the concept of "cartel" is important, and the definition of Cartel is set out under the Article, titled “Definitions”, of the Regulation as follows:

*"c) Cartel: Agreements and/or concerted practices between competitors restricting competition in the fields of price fixing, allocation of customers, suppliers, regions or trade channels, restriction of the amount of supply or imposition of quotas, collusion in tenders."*

At present, undertakings that exceed a certain volume try to maintain or even increase their dominant position by using their market influence, especially small enterprises. Small enterprises may contribute to cartelization in various ways, hoping that they can go much further than they can go on their own through sector-leading undertakings. By controlling the trade channels of the dominant undertakings, organizing the customer portfolio through incentive and discount systems, and getting ahead of rival firms through various commercial relations, cartels undermine the fair competition environment by unfairly increasing their market volumes. As the cartels carry out these co-operations in a highly secretive and behind the scenes manner, it is often too late or not possible at all for the Authority to be informed and intervene. For this reason, the notification of these illegalities to the Authority by an undertaking within the co-operation serves both to protect the time and resources that the Authority will lose through inspection, evidence collection and investigation, and to protect the fair competition environment. The undertaking that makes the first application without any investigation has the highest discount rate (or even impunity); other undertakings that apply after the first undertaking may receive discounts at varying rates depending on the order of application. In this case, the amount of the reduction is below 50% . [6]

**4. APPLICATIONS FOR LENIENCY IN PRACTICE**

Although the leniency remedy has its advantages, it should not be forgotten that it is an extremely sensitive and risky institution. The low amount of reduction in penalties will not encourage any attempt to self-disclose and this remedy will lose its intended function. In case of complete impunity or high reductions, undertakings that knowingly and willingly participate in cartelization and unfair competition collaborations will be exonerated from unfair competition acts with almost no loss in addition to what they gain if they apply for leniency. For this reason, penalty reductions and application processes should be closely monitored by the relevant authorities and abuse of the institution should not be allowed. The conditions for not imposing a fine and/or reducing the fine to be imposed are set out under various articles of the Regulation. If these conditions are summarized in 6 items, they are as follows:

*"1. Presentation of Information and Documents,*
*2. Not to withhold or conceal information and documents,*
*3. Cease to be a Party to the Cartel,*
*4. Confidentiality of the Application,*
*5. Continued Co-operation,*
*6. Inability to Benefit from Immunity in Case of Coercion of Other Undertakings to Infringe".* [7]

Similar practices regarding Leniency and Co-operation applications have been in place for many years in the European Union and the US Competition Law, and it is seen that they are relatively functional and facilitate supervision of the competition environment. However, in line with the precedent decisions, it can be said that this institution, which has only recently come into force in Türkiye, still has a long way to go in terms of predictability and transparency. The fact that different decisions are rendered for similar applications, and that different discount/non-penalty sanctions are applied for the undertakings and their executives, may put the undertakings in a dilemma in this respect.

*"Under the Condor decision (Decision Nr. #11-54/1431-507, Decision Date: 27.10.2011), the Board was informed that SunExpress and Condor acted in co-operation in determining the ticket prices for flights between Germany and Türkiye. This is an interesting decision in which the Board refrained from defining the actions of the undertakings as a cartel, but granted full immunity by accepting the leniency application made by one of the parties who committed the alleged violations. The Board initiated an investigation against SunExpress Aviation and Condor Flugdienst for restricting competition in relation to flights between Germany and Türkiye through various agreements. The Board decided that the two undertakings violated the Article 4 of the LPC through price fixing under their distribution agreements. At the end of the investigation, Sun Express' application for leniency was accepted and no fine was imposed. Although leniency applications are only possible for cartel cases, the Board applied the provisions of the Leniency Regulation in this decision without defining the violation as a cartel. According to the relevant decision text, the Board automatically reduced the fine based on the information and documents provided by Condor. In a cartel consisting of two undertakings, in order for the second undertaking to benefit from the leniency program, it is necessary to provide substantial and sufficient evidence that will add value to the ongoing investigation. In this decision, it is considered that the Board has been very generous in order to encourage leniency applications."* [8]

*"In the Board's decision on Otuzbir Kimya (Decision Nr. #12-24/711-199, Decision Date: 03.05.2012), an investigation was initiated with the allegation that Otuzbir Kimya ve Sanayi Türk Ltd. Şti. and Sodaş Sodyum Sanayi A.Ş., the producers of sodium sulphate, had formed a cartel in the powder sodium sulphate, crystalline sodium sulphate and raw salt markets through price determination and customer sharing.*

*Sodaş applied for leniency after the preliminary investigation decision for the cartel in the sodium sulphate markets but did not receive full immunity and the fine was reduced. In this decision, the Board fined both the undertakings that were parties to the cartel and the "persons who had a decisive influence on the infringement" but reduced the fines of Sodaş Sodium and the general manager who applied for leniency. The Otuzbir Kimya decision is the first decision in terms of imposing penalties on persons who have a decisive influence on the infringement."* [9]

*"In the 3M decision (Decision Nr. #12-46/1409-461, Decision Date: 27.09.2012), 3M Sanayi ve Ticaret A.Ş. alleged that some undertakings operating in the traffic marking sector had committed acts in violation of the Law and applied for leniency. In the Decision, the leniency applicant 3M did not fully cooperate, moreover, dawn raids were carried out on its premises, and although the investigating team recommended the Board not to grant full immunity to the leniency applicant 3M on the grounds that it did not provide all the documents that could be obtained in a dawn raid, full immunity was granted to the undertaking in question.*

*In the decision, the Board decided that there was insufficient evidence to prove the violation of the Article 4 of the LPC and did not impose a fine on the undertakings in question. With this decision, a negative implicit message was given to the undertakings that, contrary to the purpose of the leniency programs, they would not benefit from the leniency programs."* [10]

**5. CONCLUSION**

When the aforementioned exemplary decisions and all other decisions of the Board regarding leniency applications are evaluated together, the fact that inconsistent decisions have been made on issues such as whether the undertaking is a "Cartel" or not, evaluations regarding the stage and timeframe of the application, evaluation of the evidence submitted within the scope of cooperation, and cooperation with the applicant, carries the risk of causing undertakings that plan to apply for leniency to take a step back and fail to meet the purpose of the Law. I

t is thought and hoped that in time, with the increase in the practice of the Institution, it will gain operability and a more solid jurisprudence unity will be formed.

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**ALTHOUGH THE LENIENCY REMEDY HAS ITS ADVANTAGES, IT SHOULD NOT BE FORGOTTEN THAT IT IS AN EXTREMELY SENSITIVE AND RISKY INSTITUTION. THE LOW AMOUNT OF REDUCTION IN PENALTIES WILL NOT ENCOURAGE ANY ATTEMPT TO SELF-DISCLOSE AND THIS REMEDY WILL LOSE ITS INTENDED FUNCTION.**

# TESCO LOST THE APPEAL AGAINST LIDL ABOUT THE CLUBCARD LOGO DISPUTE

In 2020, Tesco revealed a new logo to more effectively market and promote its "Clubcards," or loyalty discount cards. Afterward, since Tesco's new logo strongly resembles the plain logo of Lidl, Lidl claimed that Tesco, the rival company, had violated their copyright and trademark rights by using a sign that was highly similar to their logos as well. Lidl's logo has two versions: one with the word "Lidl" (also known as "the Mark with Text") and another without it (also known as "the Wordless Mark"). The Wordless Mark is a graphical device consisting of a blue square background bearing a yellow disk, bordered in a thin red line. Meanwhile, Tesco's new logo consisted of a yellow circle within a blue rectangle, and 'Clubcard Prices' was written in black letters in the middle.

The comparison of the two logos is as follows:

*The Wordless Mark*


*The Mark with Text*


*Example of the Marks as used by Lidl*

*The Sign (Tesco)*


*Example of the Sign as used by Tesco, with overlaid text*

In the mentioned case, Lidl claimed that Tesco's use of the new logo to promote 'Clubcard Prices' infringed Lidl's registered trademark rights, constituted misleading advertising, and amounted to copyright infringement. In response, Tesco counterclaimed with a bad faith allegation, stating that Lidl filed the simple logo mark as a legal weapon, not intending to use it but rather to create broader protection.

The Court of Appeal determined that consumers might mistakenly perceive Tesco's prices as equal to or lower than Lidl's due to the distinctiveness of Lidl's trademarks and its reputation for offering low prices. Additionally, the Court of Appeal concluded that Tesco lacked a compelling reason to persist with the signage and could have opted for alternative methods to advertise its Clubcard prices. Nevertheless, Tesco's claims that it had not replicated a significant portion of Lidl's trademarks were accepted by the court. Tesco had previously employed yellow circles and blue shading, and their signs differed from Lidl's in terms of the distance between the shapes. As a result, Tesco's copyright appeal was allowed.

On the other hand, Lidl filed an appeal against the determination that their wordless trademark was registered in bad faith; however, the Court of Appeal dismissed the appeal, upholding the initial instance's ruling that Lidl had an obligation to demonstrate good faith. In conclusion, the Court of Appeal of England and Wales found that Tesco did not violate Lidl's copyright; however, it upheld the previous judgment that Tesco Clubcard logos infringed Lidl's trademarks and constituted passing off.

**Sources:** ***https://www.bailii.org/ew/cases/EWHC/Ch/2022/1434.html***

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# EVALUATION OF THE SUMMARIES OF 2023 DECISIONS PUBLISHED BY THE PERSONAL DATA PROTECTION AUTHORITY

The Personal Data Protection Law (the "Law") entered into force upon being promulgated on the Official Journal dated April 7, 2016 and bearing the issue number #29677. The Law imposes certain obligations on data controllers regarding the procedures and principles to be followed in the processing of personal data.

The Personal Data Protection Authority (the "Authority") published new decision summaries on its website on 27.12.2023 in order to emphasize the obligations of data controllers and the procedures and principles to be followed. These recent decisions of the Authority are important in revising the PDPL policies of the institutions, and please find below the summaries of the decisions.

**1.Taking the Necessary Administrative and Technical Measures to Provide the Appropriate Level of Security to Ensure Personal Data Security**

Pursuant to the Article 12 of the Law, data controllers are obliged to take all necessary technical and administrative measures to ensure the appropriate level of security in order to prevent unlawful processing of personal data, to prevent unlawful access to personal data, and to ensure the preservation of personal data. In order to ensure the security of personal data, first of all, it is necessary to determine what all personal data processed by the data controller are and the probability of realization of the risks that might arise regarding the protection of such data.

When identifying these risks;

•Whether personal data are of sensitive nature, or not

•The level of confidentiality required by its nature

•The nature and quantity of the damage that might arise for the concerned person due to breach of security should be determined.

After identifying the risks, control and solution alternatives should be put forward to reduce or eliminate these risks. [1]

Accordingly, organizations /authorities must provide training to their employees on issues such as personal data, data security, and systems used for data protection.

In cases such as unlawful disclosure or sharing of personal data, employees will be the first to intervene within their knowledge.

Therefore, the roles and responsibilities of everyone working for the data controller regarding personal data security, regardless of their position, should be determined in their job descriptions, and it should be ensured that the employees are aware of their roles and responsibilities to that end.

The decision, dated 18/05/2023 and numbered #2023/845, of the Personal Data Protection Authority;

*Briefly; it was stated, under the complaint submitted to the Authority, that the concerned person made a purchase through an online shopping site, the product purchased by the same was delivered by the courier working within the data controller one day after the order date, and then the courier sent a harassing message to its mobile phone number by the courier, the data controller failed to ensure personal data security and its employee disturbed the concerned person, and requested the necessary action to be taken. As a result of the examination made on the subject;*

*According to the relevant provisions of the Turkish Code of Obligations and the Labor Law, it is evaluated that the data controller is responsible for the unlawful data processing incident in question, however, from the response letter sent by the data controller's representative to the Authority, it is understood that the person who carried out the incident in question and worked on behalf of the data controller at the time of the incident was not given any training on protection of personal data and data security and that the necessary information was not provided.* [2]

The decision dated, 06/07/2023 and numbered #2023/1130, of the Personal Data Protection Authority;

*Briefly, it was understood, under the complaint submitted to the Authority, that the person concerned divorced its spouse, but there is still an ongoing custody case with its ex-spouse, the person concerned went to the pharmacy where it has been a customer for a long time, and under various pretexts, it ensured that the hospital report and medication records of its ex-spouse were supplied from the system called Medula used by pharmacies, and submitted these documents to the case file as evidence, and it was requested that the necessary action be taken within the scope of the Personal Data Protection Law Nr. #6698 (the "Law"). As a result of the examination made on the subject, it is evaluated that the data controller has not fulfilled its obligation to take all necessary technical and administrative measures to ensure the appropriate level of security in order to prevent unlawful processing of personal data, as set out under the Article 12 of the Personal Data Protection Law, and it has been decided to impose an administrative fine of TRY 50,000.- on the data controller within the scope of subparagraph (b) of paragraph (1) of the Article 18 of the Law.* [3]

**2. Processing/Transferring Personal Data More Than Required by the Purpose of Processing (Violation of the Data Minimization Principle)**

The principle of proportionality ensures that a reasonable balance is established between data processing and the purpose to be achieved.

In line with the principle, there must be a connection between the personal data and the purpose foreseen upon processing, and the personal data to be processed must be suitable to fulfil the specific purpose.

In addition, one of the important issues is related to the amount of personal data collected. The amount of personal data to be obtained and processed must be limited to the amount necessary for the purpose determined by the data controller. Processing of data that is not appropriate for the purpose in question should be avoided. [4]

The decision, dated 17/08/2023 and numbered #2023/1430, of the Personal Data Protection Authority;

*The Personal Data Protection Authority (the "Authority") initiated an ex officio examination upon the notification received by the Authority stating that the Turkish Republic ID number information of the persons was requested when registering to use the mobile application of the data controller providing meal card service. During examination of the mobile application, it was determined that name, surname, telephone number, date of birth, e-mail information were requested when registering to the mobile application; and when the person wanted to register a meal card to its profile, it was stated that the information entered would be compared with the Turkish Republic ID number.*

*In the event that physical meal cards are registered in the mobile application, since it is possible to verify the card in ways that will protect the data subjects more, such as processing the card and phone number information through the employer, without processing the T.R. ID number information of the persons, it was decided to impose an administrative fine of TRY 200,000.- on the data controller who is considered to have failed to fulfil its obligations under the first paragraph of the Article 12 of the Law.* [5]

**3. Evaluation of the Evidence Submitted to the Court within the Scope of PDPL**

In accordance with subparagraph (d) of paragraph (1) of the Article 28 titled "Exceptions" of the Personal Data Protection Law sets out that the provisions of the "Law" shall not apply in cases where personal data must be processed by judicial authorities or execution authorities in relation to investigation, prosecution, judgement, or execution procedures.

Accordingly, personal data may be submitted to the court as evidence without the explicit consent of the person.

Although explicit consent is not required for submission of personal data obtained under the Law/Court to any judicial and execution authorities, in order for the evidence to be evaluated by the court, the processed data must comply with the principles of compliance with the law and good faith, processing for clear and legitimate purposes and being related to the purpose for which they are processed.

The decision, dated 07/09/2023 and numbered #2023/1548, of the Personal Data Protection Authority;

*It was stated briefly, under the complaint petition submitted to the Institution, that the relevant person working within the data controller was dismissed based on the code46, an lawsuit for collection of labor receivables was filed against the data controller with the labor court, and it was stated, under the petition submitted by the data controller to the court file, that the telephone conversation with the relevant person was taken, the recordings are still stored in encrypted environment within the data controller in accordance with the PDPL, and that the voice recording will be submitted to the file in encrypted form upon the request of the court. Thereupon, the data subject claimed that the data controller acted contrary to the scope of the Personal Data Protection Law numbered #6698 (the "Law"), and that the voice recording, which was clearly taken unfairly and unlawfully, was kept within the data controller without an obligation to inspect it. Under the rebuttal petition submitted by the data controller to the records of the Institution; it was stated that the voice recording was not shared with any employee, and that it was transferred to an encrypted disk and deleted from the unsafe environment by taking the necessary administrative and technical measures, and that it was kept in an encrypted form limited to the legal retention period.*

*Based on the evaluations; it was decided that the voice recording of the data subject was transferred to the court in accordance with the provision of "Data processing is mandatory for establishment, exercise or protection of a right" under the paragraph (e) of paragraph (2) of the Article 5 of the Law with the reference of paragraph (2) of the Article 8, and that there is no action to be taken against the data controller under the Law.* [6]

As per the Law, personal data relating to health of individuals are sensitive personal data. Among the sensitive personal data, personal data relating to health and sexual life are considered more important and can only be processed by persons or authorized institutions and organizations under the obligation of confidentiality within the scope of protection of public health without seeking explicit consent. Nevertheless, the Article 28 of the Law shall also apply in cases where sensitive personal data are required to be processed by judicial or execution authorities in relation to investigations, prosecutions, trials or execution proceedings, and the provisions of the Personal Data Protection Law shall not apply.

The decision, dated 14/09/2023 and numbered #2023/1578, of the Personal Data Protection Authority;

*It was stated briefly, under the complaint petition submitted to the Authority, that the person concerned received a treatment service at a medical center, the files containing the records of the personal therapy received within the scope of the treatment and the marriage therapy received with its spouse were submitted to the court file within the scope of the divorce case between the person concerned and its spouse, the information requested by the court is the reason for the treatment and its duration. It was stated that sharing of the notes, kept during the session itself, which were listed as a result of the type of treatment (inpatient/ outpatient treatment), was read and learned by everyone, including the court staff, the opposing party and its attorney, by recording the private life of the person concerned in NJNP(National Judicial Network Project), and it was requested that the necessary action be taken against the Medical Center under the Personal Data Protection Law numbered #6698 (the "Law").*

*Although it is also stated among the allegations of the person concerned that the document in question was made accessible to third parties by uploading it to NJNP, it has been decided that there is no action to be taken under the Law since the provision "Processing of personal data by judicial authorities or execution authorities in relation to investigation, prosecution, trial or execution procedures" in subparagraph (d) of paragraph (1) of the Article 28 of the Law is applicable in terms of the works and transactions carried out by the court.* [7]

**4. Processing of Personal Data without Explicit Consent Due to the Explicit Provision of the Law**

Based on the idea that some personal data are more damaging to the fundamental rights and freedoms of the individual as a result of unlawful use compared to other data, these data are considered to be of sensitive nature. Although the Turkish Republic ID information is not among the sensitive personal data, as listed under the Article 6 of the Law, since the Turkish Republic ID information enables citizens to be uniquely identified, its processing by the Authority is subject to stricter criteria as it may cause negative effects.

The Law Nr. #5549 on Prevention of Laundering Proceeds of Crime sets out the obliged parties to determine the IDs of those who carry out transactions before them and those on whose behalf or accounts transactions are carried out. Again, when the transaction amount or the total amount of multiple interconnected transactions is above a certain amount, it is obliged to determine the ID of the customers or those acting on their behalf and account by obtaining information regarding the ID and confirming the accuracy of this information. Since there is a possibility of money laundering activity, which is characterized as laundering of proceeds of crime in the field of activity of the data controller, it should be taken into account that there is a public interest in determining the ID of the users.

The decision, dated 11/04/2023 and numbered #2023/570, of the Personal Data Protection Authority;

*It was stated briefly, under the complaint submitted to the Authority, that the photograph of the front and back side of the ID card of the person concerned was requested together with its own photograph in accordance with the request to increase the membership level on the platform belonging to the data controller, which is a crypto asset service provider, and that personal data was processed by the data controller more than necessary and disproportionately, and it was requested to take the necessary action under the Personal Data Protection Law numbered #6698 (the "Law").*

*Considering that the data controller has an obligation arising from the relevant legislation, especially the Law Nr. #5549 on Prevention of Laundering Proceeds of Crime, and in this respect, processing of personal data by the data controller in order to determine the ID of the users and to determine and confirm the transaction made by the relevant user is based on the legal processing condition of "clearly stipulated by law" within the framework of subparagraph (a) of paragraph 2 of the Article 5 of the Law, it has been decided that there is no action to be taken under the Law regarding the complaint of the data subject.* [8]

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**8.** The decision, dated 11/04/2023 and numbered #2023/570, of the Personal Data Protection Authority

**WHEN THE TRANSACTION AMOUNT OR THE TOTAL AMOUNT OF MULTIPLE INTERCONNECTED TRANSACTIONS IS ABOVE A CERTAIN AMOUNT, IT IS OBLIGED TO DETERMINE THE ID OF THE CUSTOMERS OR THOSE ACTING ON THEIR BEHALF AND ACCOUNT BY OBTAINING INFORMATION REGARDING THE ID AND CONFIRMING THE ACCURACY OF THIS INFORMATION.**

# EVALUATION OF THE CONCEPT OF ARBITRABILITY WITHIN THE SCOPE OF DISPUTES ARISING FROM RETAINER AGREEMENTS

**1- Introduction**

Arbitration is an alternative dispute resolution method in which disputes that have arisen or may arise between the parties are resolved by independent and objective arbitrators instead of national courts. The arbitrator resolves the dispute through judgement. In other words, arbitration is a private judicial activity, but the arbitral proceedings are supervised by the state. Arbitral awards are final judgements and enforced just like court judgements. Under the Turkish Law, domestic arbitration is set out through the Articles 407-444 of the Code of Civil Procedure Nr. #6100 ("CCP"). Arbitration is a judicial procedure that enables the parties to resolve their dispute before objective arbitrators instead of the state judiciary. The jurisdiction of states is one of the inalienable powers of states. However, it is possible for the parties to reach an agreement to resolve their disputes through arbitration before independent arbitrators instead of state courts. In this case, the jurisdiction belongs to the arbitral tribunal as a result of the will of the parties, instead of the state courts.

In addition, there are two different types of arbitration; namely voluntary and mandatory arbitration. In voluntary arbitration, the parties may proceed to state jurisdiction or arbitration. In voluntary arbitration, although this possibility is offered to the parties, it is left entirely to the will of the parties. However, in mandatory arbitration, the parties do not have the option to proceed with arbitration. There is an obligation to resort to arbitration proceedings to resolve the dispute. However, it should be noted that in order to apply for arbitration proceedings under the CCP procedure, there must be an arbitration agreement between the parties. However, the state has the power to impose rules that certain disputes may only be resolved before the courts by limiting the will of the parties, as arbitration is a different judicial process than state jurisdiction with public consequences.

**2- Arbitrability**

If the state, by exercising its right of limitation, decides that a dispute may not be submitted to arbitration, it is said that the dispute is not arbitrable. This situation is also referred to as non-arbitrability. It is important to point out that even if the arbitration agreement concluded between the parties is valid, if the subject matter of the dispute is not arbitrable, the arbitration agreement will become null and void and will not be effective. Although some classifications have been made in the doctrine on arbitrability, one of these classifications is subjective and objective arbitrability.

Subjective arbitrability generally refers to the authority to conclude an arbitration agreement and the capacity to be a party to arbitration proceedings. Subjective arbitrability, on the other hand, is related to the dispute itself rather than the status of the parties. It is accepted that some disputes can only be resolved by state courts, as they touch upon sensitive issues of public order. [2] Subjective arbitrability is the examination of arbitrability in terms of persons. As a matter of fact, some persons will not be able to conclude an arbitration agreement. Subjective arbitrability applies to minors and incompetent persons, bankrupt persons, and persons who do not have the special authorization required for arbitration. [3]

Objective arbitrability, as briefly mentioned above, is the condition that the subject matter of the contract is amenable to arbitration. Since certain disputes concern public order, and considering that public order must be ensured by the state, these disputes should only be heard under the jurisdiction of the state. Under the Code of Civil Procedure Nr. #6100, arbitrability is set out as follows: *"Disputes arising out of rights in rem over immovable property, or disputes arising out of works that are not subject to the will of the two parties are not arbitrable."*

However, as stated above, the concept of arbitrability is not limited to the cases as set out under the article.

Examples of disputes that are not arbitrable include divorce and paternity cases, bankruptcy, disputes where the judge's ex officio investigation principle applies, disputes regarding the establishment of foundations or associations, disputes arising from retainer agreements and other disputes concerning public order.

**3- Legal Practitioners' Service**

In the first article of the Legal Practitioners Act Nr. #4515, advocacy is described as a public service and an independent profession. In the second article of the same law, the purpose of advocacy is set out as follows; "to ensure regulation of legal relations, resolution of all kinds of legal issues and disputes in accordance with justice and equity, and full implementation of the rules of law before judicial bodies, arbitrators, official and private persons, boards and institutions at all levels." As can be seen, the Legal Practitioners Act states that advocacy is a public service and serves the purpose of ensuring application of the rules of law.

**4- Evaluation of the Arbitrability of the Dispute Arising from Retainer Agreements**

As stated above, the advocacy service is a public service, and the lawyer aims to ensure full implementation of the rules of law. Considering that the service provided by lawyers is a public service, it is possible to say that the legal service concerns public order. In this context, just as matters relating to the real property of immovable property may not be subject to arbitration due to public order, and if an arbitration proceeding is initiated in this regard, the appointed and/or selected arbitrator will be void; arbitration initiated in relation to Retainer Agreements, which directly concerns public order, will also be unfavorable.

The decision, dated 25.12.1995, and bearing the Basis number 1995/10533 and the Decision number 1995/11673, of the 13th Civil Chamber of the Court of Cassation reads as follows; *"In practice, the system of the arbitrators making awards in accordance with the applicable legal order is not adopted.*

*Arbitrators are not bound by the rules of procedural and substantive law in resolving the dispute before them. Arbitrators are rather obliged to render their awards in accordance with the principles of right and fairness. Since the reversal of arbitrators' awards by the Court of Cassation is limited to the four reasons as set out under the Article 533 of the Code of Procedure, it is not possible to check whether the arbitral awards violate the mandatory rules of the law, whether they exceed the limits imposed by public laws and whether they are contrary to the same. Since the reasons under the aforementioned article are procedural and procedural provisions, it is not possible to extend them through jurisprudence and interpretation.*

*Contrary to these legal facts, if it is accepted that arbitrators may decide to resolve disputes regarding retainer fees, it must be accepted in advance that arbitrators, who are not bound by the rules of procedural and substantive law while resolving the dispute, will be enabled to make decisions contrary to the mandatory rules of public order and therefore contrary to public order and its protection. In such a case, since the Court of Cassation will not be able to carry out its supervision as required by law (Art. 533 of the Code of Civil Procedure), the mandatory and restrictive provisions introduced by public order will be pushed aside and rendered ineffective.*

*No legal opinion that places the will of individuals above the order of acceptance has been put forward and accepted. In the face of all the legal drawbacks mentioned above, it should be accepted that disputes regarding retainer fees may not be resolved by arbitration."* [4].

As stated under the decision of the Court of Cassation; it is not possible for the dispute regarding Retainer Agreements to be arbitrable since it is closely related to public order.

The decision, dated 15.04.1987, and bearing the Basis number 1987/325 and the Decision number 1987/325, of the Assembly of Civil Chambers of the Court of Cassation reads as follows;

*"Article 164 of the Legal Practitioners' Act Nr. #1136 stipulates that the retainer agreement should cover a certain amount as a rule, and in paragraph 2 (without prejudice to the provision of the third paragraph), a certain percentage of the value of the thing sued or to be judged, varying according to the success shown in the case and not exceeding twenty-five per cent, may be agreed as a retainer fee. It is undoubted that the legislator has introduced these regulations for the purpose of public order and benefit, and that agreements to the contrary are invalid. In fact, it is not overlooked that the Retainer Agreement itself is a matter of public order. Again, matters of public order may not be referred to arbitration, as in the determination of real estate rents."* [5]

**5- Some Problems Arising in the Event of Non-Arbitrability**

The CCP sets out that the arbitrator in arbitration proceedings to decide on his/her own jurisdiction. Article 422 of the CCP reads as follows;

*"The arbitrator or arbitral tribunal may decide on its own judicial power, including challenges to the existence or validity of the arbitration agreement. In making this decision, the arbitration clause in a contract shall be considered independently of the other provisions of the contract. The decision of the arbitrator or the arbitral tribunal on the invalidity of the main contract shall not result in automatic invalidity of the arbitration agreement."*

The arbitrator's decision on his/her own authority may lead to unfair results in some cases.

First of all, the fact that the arbitrator may decide on his/her own judicial power raises questions about impartiality. Indeed, in arbitration proceedings, the arbitrator will be entitled to a fee upon conclusion of the dispute. For this reason, it is possible to say that the arbitrator, who has a financial interest in the arbitration proceedings, may violate the right to a fair trial if he decides on his own judicial power.

As a matter of fact, in the event of an erroneous review of the arbitrator's judicial power, the award to be rendered as a result of the arbitration proceedings is enforceable. In the event that the subject matter of the dispute is of a large amount, as a result of an erroneous decision made by the arbitrator, the party who has obtained an unfavorable and unlawful award in the proceedings is obliged to provide security for the stay of execution. The party who has already suffered a loss of rights as a result of an unfair and unlawful award will also be obliged to provide security for the stay of execution.

**6- Conclusion**

Arbitration is an alternative dispute resolution method in which disputes that have arisen or may arise between the parties are resolved by independent and objective arbitrators instead of national courts. The arbitrator resolves the dispute through judgement. In other words, arbitration is a private judicial activity, but the arbitral proceedings are supervised by the state.

Arbitral awards are final judgements and are enforced just like court judgements. The parties may determine arbitration as a dispute resolution method by concluding an arbitration agreement or by incorporating an arbitration clause into their contract. An arbitration agreement may be concluded only in arbitrable matters. Arbitrability can be classified as subjective and objective. Objective arbitrability means that the subject matter of the dispute is not arbitrable. Based on the public service nature of the advocacy service, the advocacy service is closely related to public order. Accordingly, it is possible to say that disputes arising from Retainer Agreements are not arbitrable.

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## COURTS ALREADY USING AUTOMATED DECISION-MAKING, THE DEPUTY HEAD OF CIVIL JUSTICE REVEALS

Algorithm-based digital decision making is already working behind the scenes in the justice system, the deputy head of civil justice has revealed. In an upbeat speech last month, Lord Justice Birss said that algorithm-based decision making - controversial because of the possibility of built-in bias - is already solving a problem at the online money claims service.

It was one of three examples of advanced technology in the justice system mentioned by the lord justice, illustrating science fiction author William Gibson's phrase 'the future is here - but not evenly distributed'. A digital justice system 'already exists to a significant extent', Birss told King's College London Law School.

In the civil money claims system, he said, an algorithmic formula is applied where defendants accept a debt but ask for time to pay. The old paper-based formula for calculating staged payments 'was not really secret but nor was it published in any clear way,' the judge said. As a result, two different formulae were used in various parts of the court system.

'The differences were small, but they did exist,' Birss said. 'In designing this bit of the online system, the relevant members of the rule committee decided which formula to use as being the appropriate one and made provision in the rules that the formula would be applied by the computer automatically.' As before, it is open to judicial override. However, the judge said, 'As far as I know this is caused no difficulty of any sort and attracted very little comment.'

**Source:** ***https://www.lawgazette.co.uk/news/courts-already-using-automated-decision-making-lord-justice-birss-reveals/5119197.article***

## EMPLOYEE WHO BACKDATED DOCUMENTS DISQUALIFIED FROM CERTAIN ROLES

A former employee at a motoring law practice has been disqualified from holding certain roles in firms regulated by the Solicitors Regulation Authority. Nathan Blake, formerly with Devon-based Patterson Law Limited, drafted an adjournment request which he backdated before forwarding to the instructed barrister. Following a review of Blake's caseload, the firm found three other documents 'that caused concern'. All had been backdated. The documents included representations drafted and sent to police and a single justice procedure notice which was still in time 'so there is no obvious reason for the backdating.' The SRA said Blake had no recollection of the single justice procedure notice.

In an agreed outcome, the regulator said Blake breached the code of conduct. Blake was disqualified from acting as head of legal practice or head of finance and administration of any licensed body or being a manager or employed by any licensed body.

The SRA said: 'It is undesirable for Mr. Blake to engage in the activities listed.'

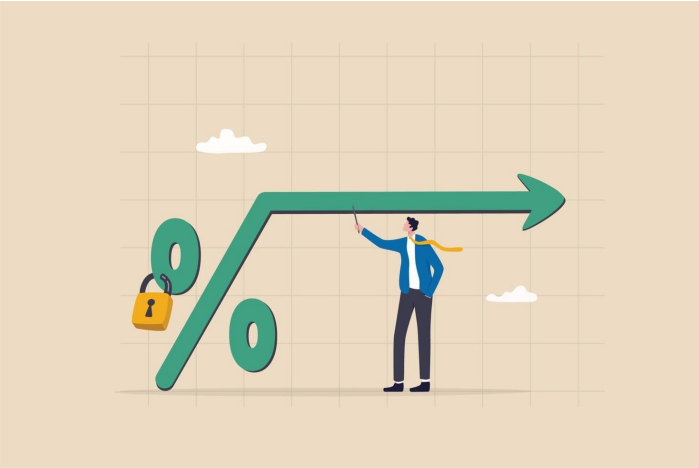
It added: 'In the matter of Client A, Mr. Blake forwarded a backdated application to present to the Court. His conduct was dishonest and lacking integrity because at the time of drafting the application he knew it had not previously been submitted and that the application did not accurately reflect the position of his client's matter. 'In the three further matters Mr. Blake has shown a propensity to mislead clients and others. He has been unable to explain why documents found to have been created on the firm's computer system have been labelled with an earlier date. His conduct was dishonest and lacking integrity.' Blake, who fully admitted the misconduct to the SRA and cooperated with its investigation, 'admitted he panicked and that there is no excuse.' The SRA said Blake received no financial benefit from his misconduct. Blake agreed to pay the £300 costs of the SRA investigation.

**Source:** ***https://www.lawgazette.co.uk/news/sra-disqualifies-employee-who-backdated-documents/5119259.article***

# THE CONCEPT OF INTEREST IN TURKISH LEGAL SYSTEM

**1-Evaluation of the Concept of Interest and Its Main Characteristics**

The concept of interest is a concept that has continued from the past to the present and has gained a place both in daily life and in commercial life. In this context, it has become an important part of the legal world. Regarding interest, the main guiding source in our law is the Code on Legal Interest and Default Interest nr. #3095. Besides Code nr. #3095, the Turkish Code of Obligations, the Turkish Commercial Code and the Banking Law are among the other guiding laws.



According to the law and established case -laws, interest has two sources. Accordingly, interest arises either from the law or from a legal transaction. While the legal transaction may be a tort, unjust enrichment, or a contract, in practice, the legal transaction that gives rise to interest is often a contract. Although there is no definition of the concept of interest in the law, interest is the civil result of money receivables under the decisions of the Court of Cassation. As a result of a loan facility agreement or other legal transaction or act, it is defined as the equivalent of the money receivables and a kind of fee and rent of the person who becomes a creditor from another person. [1]

In another definition, interest is defined as a civil benefit that the creditor has the right to demand by law or a legal transaction [2] due to the deprivation of his money for a period of time as a result of leaving the possibility of using his money to the debtor. Based on these definitions, interest arises in money debts and its existence depends on the principal receivable. In other words, interest is of accessory nature. Its arising and termination depend on the principal receivable. However, Article 131/2 of the Turkish Code of Obligations sets out that: "If the right to demand the performance of the accrued interest and penalty clause is reserved by contract or by a notification to be made until the time of performance, or if it is understood from the circumstances and conditions that it is reserved, these interests and penalty clause may be demanded."

In this regard, it is possible for the interest receivable to continue to exist even if the principal receivable is terminated. Another reflection of the ancillary characteristic of interest is the statute of limitations. As a matter of fact, even if the principal receivable is time-barred, the interest will also be time-barred. However, determination of the statute of limitation according to the principal receivable is valid for default interest. Pursuant to the Article 147 of the TCO, the statute of limitation for principal interest is five years. Even if the statute of limitation of the principal receivable is longer than five years, the interest may become time-barred before the principal receivable since the statute of limitation of the principal interest is five years - for example, if the receivable is subject to a ten-year limitation period – it becomes time-barred. [3]

Another characteristic of interest is that it works until the time it is paid, that is, it multiplies. Article 104 of the Turkish Code of Obligations sets out as follows: "If a receipt is given by the creditor for one of the periodic performances such as interest or rent without reservation, the performances of the previous periods are also deemed to have been fulfilled". As stated in the relevant provision, interest is a periodic performance. Following the concept and characteristics of interest, the types of interest will be discussed below.

**2- Types and Characteristics of Interest Types in the Turkish Legal System**

**2.1. Distinction between Simple Interest and Compound Interest**

Simple interest is the interest that almost everyone thinks of when they think of interest. Simple interest refers to interest that is charged on the principal at a certain rate over a certain period of time. [4] Here, interest is in its simplest form. There is only interest on the principal. In compound interest, also known as anatocism, in its most basic expression, it is the re-interest on the amount obtained by adding the interest on the principal to the principal.

In the doctrine, this situation is often explained with the concept of charging interest on interest. As a rule, compound interest is prohibited in our law due to its cumulative accumulation and the unpredictability of its destination, which will cause a great burden for the debtor in medium and long-term debts. [5]

Since the interest is linked to the principal receivable and interest will run until payment of the principal receivable, compound interest is prohibited as a rule with the amendments made under our law, since a situation that will force the debtor in terms of compound interest will arise.

However, although the cases where compound interest is allowed are limited, one of these cases is set out under the Turkish Commercial Code Nr. #6100.

Pursuant to the Article 8/f.2 of the Turkish Commercial Code, compound interest may be agreed in two cases. The first situation in which compound interest may be agreed is when the current account agreement, whose parties are merchants, is concluded for a period not less than three months.

The matter here is that both parties to the contract must be merchants. Otherwise, a current account agreement may also be concluded by non-merchants. The other situation where compound interest may be agreed upon by the parties is the loan agreements that are commercial business for both parties. In this regard, it is not sufficient for the contract to be a commercial business. The parties to the contract must be merchants.

The last exceptional case as set out under the Turkish Commercial Code, where compound interest may be applied, is that the applicant debtor, who has been paid due to the exercise of the right of recourse in bills of exchange, may request interest again on the interest paid while recourse to the persons who came before him. This exception is set forth under the Article 726 of the Turkish Commercial Code. The Turkish Legal System, which prohibits compound interest as a rule, has provided an exception under the said articles. As a matter of fact, these provisions have been introduced by taking the requirements of commercial life into consideration.

**2.2. Distinction between Contractual Interest and Statutory Interest**

Under the Turkish legal system, the source of interest is the law or legal transaction. The situation where interest is subject to contractual interest or statutory interest is shaped according to arising of the interest. Statutory interest is the interest accrued legally on a certain receivable. [6] In cases where interest is required to be paid, if the amount cannot be determined by contract, the interest to be paid is characterized as statutory interest.

The legal interest rate is determined by law. [7] In contractual interest, the parties determine the interest rate under the contract executed by the same. This type of interest refers to the interest applied to the principal receivable. In this context, it is possible to voluntarily agree on principal interest, default interest and anatocism. [8] As a rule, contractual interest is freely agreed between the parties. However, some limitations are also stipulated. Article 2 of the Turkish Civil Code can be taken as an example of these limitations. Accordingly, while contractual interest is agreed upon by the parties, they may not determine an interest rate that is contrary to the rule of honesty. Another limitation is found in the Article 120 of the Turkish Code of Obligations. According to the said provision, the annual default interest rate to be agreed under the contract may not exceed one hundred per cent more than the annual interest rate determined in accordance with the first paragraph. Since the Article 120/1 of the TCO refers to the Article 2/1 of the Law on Interest, in cases where the default interest rate is agreed under the contract, this rate shall not exceed one hundred per cent more than the interest rate determined pursuant to the Article 2/1 of the Law on Interest Nr. #3095. If the parties have determined a rate higher than the maximum limit, the excess default interest rate will be partially invalidated. For example, if the parties have agreed on a rate of 30%, since this rate exceeds 18%, which is one hundred per cent of 9%, the default interest rate agreed by the parties will be accepted as 18%.

**2.3. Distinction between Interest on Principal and Default Interest**

When discussing the distinction between interest on principal and default interest, it should first be underlined that principal interest is the interest accrued until the due date, while default interest is the interest accrued after the due date, depending on the condition of default.

Interest on principal, also known as capital interest, refers to the interest that will accrue from the principal until the maturity date. Interest on principal may arise from the law as well as the contract. For example, the Article 217/1 of the Turkish Code of Obligations sets out the rights of the buyer in case of full possession. According to the said provision, if the whole of the sale is taken away from the buyer, s/he may demand from the seller the return of the sales price s/he has paid together with interest, by deducting the value of the products s/he has obtained or neglected to obtain from the sale. This provision clearly states that interest on principal will be demanded. In order to claim interest for non-payment of interest on principal, it is also necessary to apply to the court or the enforcement office. [9] Interest on principal does not depend on the statute of limitations of the principal receivable. In this context, the statute of limitations for interest on principal is 5 years.

Default interest is the interest that must be paid if a monetary obligation is not fulfilled on the date when it is due, either by contract or by law. [10] Default interest arises in case of breach of the time of performance. The time of performance may be agreed under the contract or may be stipulated by law.

In order for default interest to be claimed, the debt should not become impossible despite the default in performance of the debt. Article 117 of the Turkish Code of Obligations, which sets out the default, reads as follows: "The debtor of a due and payable debt is in default upon the notice of the creditor". In order to be able to talk about the default of the debtor, the debt must become due, that is, it must be demandable by the creditor and the default notice must be given to the debtor. This is because the default interest will start to run with the notice.

Although this is the general rule, in some cases as stipulated under the law, cases where the debtor will be in default without the need for notice are set out. (Art. 117/2 of the TCO) In these cases, the debtor will be in default when the receivable becomes due without the need for any notice by the creditor. Since default interest is a right attached to the principal receivable, it is subject to the statute of limitation of the principal receivable in terms of the statute of limitation.

Default interest shall accrue automatically in accordance with the law, without the need for a provision under the contract. Article 1530 of the Turkish Commercial Code sets out the provision titled "Consequences of late payment in transactions prohibited by commercial provisions and in the supply of goods and services". In case of default without notice, it is seen that the fact of default of the debtor is set out in two different ways according to whether the due date is determined under the contract, or not.

Pursuant to this provision, if the contract sets a due date, the debtor shall be in default upon the maturity of the contract pursuant to the second paragraph, and if the contract does not set a due date, the debtor shall be in default at the end of the thirty-day period pursuant to the fourth paragraph, provided that certain conditions are fulfilled, without the need for a notice by the creditor. [11]

In cases where the due date is not stipulated under the contract, Article 1530/f.4 of the TCC (Turkish Commercial Code) shall be applicable. The said provision sets out the cases where the debtor will default gradually and automatically.

However, the debtor may always be in default with a notice after the debt is due and payable. In principle, default interest shall start to accrue from the day following the day on which the debtor is in default.

Default interest on severance pay receivable is set out under the paragraph 11 of the Article 14 of the Labor Law Nr. #1475 as follows: "At the end of the lawsuit to be filed due to non-payment of the severance pay in time, the judge decrees the payment of the highest interest applied to the deposit according to the delay period and the unpaid period."

**2.4. Distinction between Interest in Ordinary Business and Interest in Commercial Business**

Commercial interest arises in cases where the main business arises from a commercial business. It is defined under the Article 3 of the Turkish Commercial Code. Accordingly, the matters, as set out under the Turkish Commercial Code, and all transactions and acts concerning a commercial enterprise are commercial business. It is important to note that the parties are not required to be merchants.

The main difference between interest in ordinary business and interest in commercial business is in terms of demand. In order to claim interest on the principal in ordinary business, the parties must have included an interest clause in the contract. However, in some commercial transactions, interest may be claimed even if there is not any interest clause incorporated under the contract. [12]

**2.4.1. Capital Interest and Default Interest Rates in Commercial Business**

In commercial transactions, capital interest may be freely determined pursuant to the Article 8 of the Turkish Commercial Code in cases where contractual interest is in question. However, there is a freedom within general limits. In cases where statutory interest is in question, it is 9% in accordance with the Article 1 of Law Nr. #3095.

In commercial transactions, default interest may be freely determined pursuant to the Article 8 of the Turkish Commercial Code in cases where contractual interest is in question. However, there is a freedom within general limits. In cases where statutory interest is in question, there are specific conditions that apply to the determination of statutory default interest in commercial business (Art. 387 of the TCO, Art. 8 of the TCC). In cases where the amount of default interest has not been agreed under the contract, the default interest may not be less than the amount of contractual interest if the amount of contractual interest is above 36.75 determined by the Communiqué, dated 01.11.2023, of the Central Bank of the Republic of Turkey in commercial business.

**2.5. Interest Rate on Deposit**

The definition of deposit is defined in the Banking Law Nr. #4389. Accordingly, it refers to money accepted in writing or verbally or in any way, publicly announced, without consideration or in return for a consideration, to be repaid on demand or at a certain due date.

Article 144 of the said Law authorizes the Central Bank to determine the maximum interest rates to be applied in money lending transactions and deposit acceptance, profit and loss participation rates in participation accounts, the qualifications and maximum amounts or rates of fees, expenses, commissions, and other benefits to be obtained from all kinds of transactions, including special current accounts, and to release them partially or completely.

Deposits may be time or demand deposits. Accordingly, the bank determines the interest rate to be applied under the contract.

**2.6. Rediscount Interest**

Rediscount is the re-exchange of assets that have been discounted, in other words, that have changed hands for a price, in exchange for a price. [13] It is set out under the Article 45 of the Central Bank Law. The last updated rediscount interest rate is 43.25%.

**2.7. Advance Interest**

Pursuant to the Article 45/2 of the Central Bank Law, the Central Bank may also grant advances against the assets that it may accept for rediscount. The assets taken as collateral for advances are commercial bills and documents, government bonds and bonds registered in the stock exchange. The advance interest rate determined on 23.12.2023 is 44,25%.

**2.8. Interest on Foreign Currency Debt**

Unless otherwise agreed by the parties, a debt which is a money debt shall be paid in the national currency. This is in accordance with the principle of performance in national currency.

The exception to the principle of performance in national currency is performance in foreign currency. Foreign currency debt, as a rule, arises from the contract. In debts arising from torts and unjust enrichment, the rule is to make the payment in the national currency.

Although this is the rule, in cases of tort and unjust enrichment arising from a situation involving an element of foreignness, the performance of the obligation may be in foreign currency.

Especially in the case of unjust enrichment, if the enriched person is in good intentions, he must return whatever he has at the time of return, if he is in bad intentions, he must return the entire enrichment, and if the subject of unjust enrichment is foreign currency, the return will also be in foreign currency [14].

Pursuant to the Article 4/a of Law Nr. #3095, unless a higher contractual or default interest rate is agreed under the contract, the highest interest rate paid by the State Banks to a one-year term deposit account opened in that foreign currency shall be applied for the interest on foreign currency debt.

**3- CONCLUSION**

Interest has become a part of commercial life and even daily life today. Although there is no clear definition of interest, which is used so much in life, in the field of law, it is defined in the case-law of the Court of Cassation as an acceleration that compensates for deprivation of money that is not in the creditor's pocket on time.

Interest is an accessory right attached to the principal receivable. Although this is the general rule, interest is not a part of the principal receivable, although it is dependent on the principal receivable. The interest receivable is independent from the principal receivable.

Since the interest is independent from the principal receivable, it may be claimed and sued separately from the principal receivable, made subject to follow-up, transferred, pledged, and attached.

Even if the lawsuit filed for the principal receivable is filed without reserving the right to interest, it is possible to file a separate lawsuit for the claim of interest. Interest may arise from the law or a legal transaction.

Although the legal transaction is mostly a contract in practice, unjust enrichment and tort may also be the sources of interest. According to the way of calculation; interest is classified as simple interest and compound interest. Since compound interest may cause unforeseen risks by the debtor, the rule in the Turkish Legal System is that compound interest (anatocism) is prohibited. However, as a necessity of commercial life, the Turkish Commercial Code sets out three situations in which compound interest may be requested. As opposed to the former Turkish Commercial Code Nr. #818, the Turkish Code of Obligations Nr. #6098 imposes an upper limit on interest rates. These provisions are included in the Articles 88 and 120. However, since the interest rate is freely determined in commercial transactions, there is no limit in terms of commercial transactions.

The beginning of the interest obligation is the time of arising of the debt, unless it is determined by the parties in the interest on the principal. With respect to termination of the interest on the other hand; since the interest is linked to the principal receivable, the interest will end upon termination of the principal receivable, that is, upon payment thereof.

Apart from this, the interest obligation may also be terminated by the agreement of the parties or by renewal. The other situation in which interest will be terminated is the merger of the titles of creditor and debtor. In these cases, termination of interest is possible.

In this study, interest types are briefly stated and explained. Interest rates may vary depending on the types of interest, and changes may be made by law or may be published in various communiqués. It is important to follow the changes in interest rates in order to avoid loss of rights.

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**AS OPPOSED TO THE FORMER TURKISH COMMERCIAL CODE NR. #818, THE TURKISH CODE OF OBLIGATIONS NR. #6098 IMPOSES AN UPPER LIMIT ON INTEREST RATES. THESE PROVISIONS ARE INCLUDED IN THE ARTICLES 88 AND 120. HOWEVER, SINCE THE INTEREST RATE IS FREELY DETERMINED IN COMMERCIAL TRANSACTIONS, THERE IS NO LIMIT IN TERMS OF COMMERCIAL TRANSACTIONS.**

# INVALIDITY OF SALES OF VEHICLE BY FORGED POWER OF ATTORNEY

**1. Introduction**

Purchase and sales of motor vehicle are among the types of transactions that take place frequently in our country. According to the data of Istanbul Trade Gazette for 2023, 1 million 881 thousand 97 vehicle sales were made in the second-hand online passenger car and light commercial vehicle market. These types of vehicle purchases and sales can be divided into two; namely commercial and normal ones. The purchase and sale of vehicles carried out commercially by real or legal persons who carry out this business as a profession are subject to the Regulation on Trade of Second-Hand Motor Land Vehicles as well as other provisions. Apart from these, vehicle purchase and sale transactions carried out by real persons for non-commercial purposes shall be subject to the provisions of the Article 209 et seq. of the Turkish Code of Obligations and the provisions of the Turkish Civil Code, which are general provisions.

**2. Sales of Motor Land Vehicles in General**

As we have stated, whether the provisions set out under our law are in the application area varies according to the qualification of the vehicle sale. Sales for commercial purposes will be subject to the general rules regarding the sale of movables, as well as the said regulation.

**3. Form of Transfer**

The transfer of the Motor land vehicles shall, as a rule, be subject to the provisions regarding transfer of the ownership of movable property set out under the Article 762 et seq. of the Turkish Civil Code, since they are in the nature of movable property. Pursuant to the Article 763/1 of the TCC, it is stated that "Transfer of possession is required for transfer of ownership of movable property" and it is ruled that transfer of ownership of movable property is subject to transfer of possession. The Law does not stipulate a formal requirement for transfers of movables. For this reason, as a rule, transfers of movables can be realized by transfer of possession without being subject to any form, as long as the general rules are complied with.

Although this is the case as a rule, there are regulations in the Highway Traffic Law under the title of "sale, transfer and registration of vehicles and the authorization and responsibility related to these transactions".

Pursuant to the Article 20 paragraph (d) of the Highway Traffic Law, "All kinds of sales and transfers of registered vehicles are made by notaries based on the registration certificate or traffic registration records issued in the name of the vehicle owner, provided that it is determined that there is no debt of motor vehicle tax, default interest, late fee, tax penalty and traffic administrative fine due to the vehicle to be sold and transferred and, there is no measure or record restricting sale and/or transfer on the vehicle. By stating that “All kinds of sales and transfers not made by notaries are invalid”, it is ruled that the sale and transfer transactions of registered vehicles shall be carried out by notaries and that all kinds of sales and transfers other than this are invalid. Therefore, in order to validly transfer the ownership of a motor vehicle registered in the traffic registry, possession of the vehicle must be transferred based on an official contract executed with the vehicle owner. The validity of these transactions depends on their execution at a notary public.

The definition of the term "vehicle" mentioned in the provision is defined under the law as follows: "It is the general name of motorized, non-motorized and special purpose vehicles, construction machinery and rubber-tired tractors that can be used on the highway."

Therefore, transfer of motorized land vehicles, which is the subject of this article, should also be considered under this scope. As a result, although movable sales can be realized without being subject to a formal requirement in accordance with the general provisions, it is obligatory to realize the sale at notaries in terms of vehicle sales in accordance with the regulations under the Highway Traffic Law. The fact that motor vehicles are valuable movables and the need to ensure transaction security led the legislator to assign this mission to notary offices by making these special regulations.

**4. Realization of the Transfer**

As explained in detail above, realization of the sale and transfer of motor vehicles has been included under the scope of duty of notaries by the legislator. Therefore, sale of vehicles can be realized by going to a notary public with the necessary documents. In other words, although the vehicles registered in the traffic registry are movable goods in terms of their structure, transfer of their ownership is subject to a special and specific regulation condition, unlike movables and immovables.

In order to transfer the ownership of a motor vehicle registered in the traffic registry, possession of the vehicle must be transferred based on an official contract executed with the vehicle owner.

**5. Transfer by Power of Attorney**

It is possible to carry out the vehicle sale and transfer transaction to be carried out at the notary through a power of attorney. With the valid "power of attorney for sales of vehicle" given by the vehicle owner, the sale and transfer transaction may be carried out in the absence of the vehicle owner.

**6. Issuance of the Power of Attorney for Sales of Vehicle**

As mentioned, the vehicle owner may realize the sale and transfer transaction without being physically present before the notary. This transaction is carried out by a "power of attorney for sales of vehicle". Power of attorney for sales of vehicle is a special power of attorney and authorizes the relevant person to carry out transactions for and on behalf of the vehicle owner in terms of sales of vehicle. The power of attorney is issued by a notary public and signed by the person granting the power of attorney and the person receiving the power of attorney. The content of the power of attorney determines which transactions the person to whom the seller will give power of attorney may perform.

The documents required to give a power of attorney for sales of vehicle are as follows:

1- Seller's ID card or passport (original copy and photocopy)

2- Seller's vehicle license (original copy and photocopy)

3- ID credentials of the buyer (ID card or passport number, TR ID number)

4- Address information of the recipient

By providing these documents and information to the notary, the power of attorney for sales of vehicle is issued by the notary public. It should be noted that the authenticity of these documents and information should be checked by the notary public. With the validly issued power of attorney, the proxy is authorized to carry out all transactions that comply with the content of the power of attorney.

**7. Forged Power of Attorney**

It is possible that the power of attorney for sale of vehicle issued by the notary public may be forged or invalid. In particular, this transaction may be carried out with documents such as stolen ID card / passport / license. By going to a notary with a stolen ID card / passport and vehicle license belonging to a person, it will be possible to issue a forged power of attorney with the signature of a person acting as the vehicle owner.

Serious damages may arise when the notary public tries to sell the relevant vehicle by the forged power of attorney issued in this way. Similarly, issuance of a power of attorney for sales of vehicle by forged documents may have the same troublesome consequences.

The validity of the forged power of attorney and the validity of the sale/transfer transaction made through this power of attorney will be discussed in the following sections of our article.

Notary offices are perfectly responsible for issuance of the power of attorney and the transactions to be made through this power of attorney. Therefore, the necessary factual examination must be carried out by the notary offices.

**8. Invalidity of the Forged Power of Attorney and Sales of Vehicles By this Document**

Forged or stolen documents and powers of attorney created without the knowledge of the principal of the power of attorney will be invalid. A power of attorney contract is a contract in which the appointed proxy undertakes to perform a work or transaction of the principal of the power of attorney. In case of a forged power of attorney, this contract will be invalid, as there is often no valid will of the principal of the power of attorney. Pursuant to the Article 72 of the Notary Act, "The notary is obliged to learn the identity and address of the persons who will have work done and their real requests completely. It is an erroneous and incomplete transaction for the notary to perform transactions by forged documents and to fail to determine the real owner well." The responsibility of notaries in the relevant matter is underlined. Therefore, it is very likely that the responsibility of the notary arises in terms of issuing a forged power of attorney and the damage incurred for this reason.

Since the forged power of attorney will be invalid, the vehicle sales transactions performed by this power of attorney will not be valid. Pursuant to the paragraph (d) of the Article 20 of the HTL (Highway Traffic Law), in order to acquire the ownership of a motor vehicle, there is a need for an official contract executed with the vehicle owner, which creates an obligation to transfer the ownership, and the transfer of possession of the vehicle for the purpose of transferring ownership.

Since the contract between the parties in the sale and transfer transaction intended to be carried out by a forged power of attorney is based on a forged power of attorney, there is unauthorized representation, and it will not be possible to talk about a valid contract. In this case, the sale and transfer will be invalid since the condition of a valid contract cannot be met.

This is also the practice of the Court of Cassation. The decision, dated 23.3.2021, and bearing the Basis number #2017/1422 and the Decision number #2021/321, of the General Assembly of Civil Chambers of the Court of Cassation reads as follows;

*"Although the defendant is in good faith, according to the paragraph (d) of the Article 20 of the HTL (Highway Traffic Law), there must be a valid contract for transfer of ownership of the vehicles. However, since the contract between the parties in the case at hand is based on a forged power of attorney, there is unauthorized representation, and it will not be possible to talk about a valid contract. Since the registration is invalid for the defendant, who is in the position of the first hand who received the assignment by a forged power of attorney, it cannot be said that the ownership of the vehicle has passed to the defendant, considering that he is in good faith, and it cannot be accepted that the acceptance of the lawsuit filed by the plaintiff is conditional on the return of the vehicle price paid by the defendant."* [1]

It has been determined that the sale will be invalid even in the scenario where the third party who purchases the vehicle by a forged power of attorney is in good faith.

In this way, even if a registration is made in the registry about the third party who thinks that he has purchased the vehicle in good faith, this registration will be corrupt and subsequent transactions based on the corrupt registration will not be valid. The good faith of subsequent third parties who perform transactions based on this corrupt registration will also not be protected. Protection of the rights obtained by bona fide third parties on the basis of the corrupt registration depends on the existence of a special regulation on the subject in the law. For example, pursuant to the Article 1023 of the Turkish Civil Code, a third party who acquires ownership or another right in rem based on the registration in the land registry in good faith is protected. Since the land registry is kept by the official authorities and is subject to the principle of publicity, it is intended to protect the good faith of the third party who relies on these records. In terms of the traffic registry, there is no such regulation in our law. Therefore, the good faith claims of third parties who rely on the traffic registry will not be valid.

In other words, the fact that a person who is not authorized to dispose of a motor vehicle is somehow registered as the owner in the traffic registry is not sufficient to protect the acquisitions of bona fide third parties who acquire rights from this person. Because in our law, the traffic registry does not have the function of disclosing the rights in rem on the motor vehicle to the outside world, and there is no regulation on the protection of trust in the appearance reflected by the traffic registry. [2]

To summarize, since the contract between the parties is based on a forged power of attorney, there is unauthorized representation, and it will not be possible to talk about a valid contract. Therefore, whether the third party is in good faith or not, the registration made on its behalf will be invalid.

This situation will not change even if the person who intends to make a transaction by a forged power of attorney is in possession as a trustee, for example, if he holds the vehicle by renting it. In other words, the Article 988 of the TCC (Turkish Civil Code) will not be applicable.

The person who holds possession of the motor vehicle by any means with the consent of the owner (the possessor in the capacity of a trustee) will not be able to make a valid transfer agreement, since s/he cannot meet the conditions of "having a registration certificate (license)" or "being registered as the owner in the traffic registry", which are required for the notarial execution of the agreement that gives rise to the obligation to transfer the ownership, under the paragraph (d) of the Article 20 of the HTL (Highway Traffic Law). Therefore, since transfer of possession without a valid agreement will not transfer the ownership of the motor vehicle, the third party who transfers possession will not be able to acquire the ownership of the vehicle, even if s/he is in good faith [3].

As we have stated, when a fraudulent registration occurs with a transaction made in this direction, the subsequent transactions will not be valid even if they are made with bona fide persons.

**9. Responsibility**

Pursuant to the Article 162 of the Notary Act, notaries are liable without fault for any damages arising out of their acts. The plaintiff who is damaged by the action of the notaries must only prove the appropriate causal link between the damage and the action. In case of a forged power of attorney, the Court of Cassation is of the opinion that the appropriate causal link is established, and the liability of the notary arises.

The decision, dated 20.01.2018 and bearing the Basis number #2016/8992 and the Decision number #2018/385, of the 3rd Civil Chamber of the Court of Cassation, reads as follows: “It is clear that the causal link between the action of the notary and the damage incurred has not been severed, showing that the duty of care has been disrupted due to the power of attorney issued by the defendant notary based on the forged driving license document. For this reason, there is no inconsistency in the court's decision on the liability of the defendant notaries." [4] Emphasis was placed on the responsibility of the notary who issued the forged power of attorney.

In this respect, the notary public shall be strictly liable for the damages incurred in terms of issuance of a forged power of attorney and the transactions made by this power of attorney. In addition to this, the persons or institutions who issue the forged power of attorney and make transactions by this document will also be legally and criminally liable.

**10. Conclusion**

Sales and transfer of motor vehicles are set out under special laws. Unlike the general provision regarding movables, the validity of motor vehicle sales depends on the notary public and the conditions specified. There is no obstacle for purchase and sales to be made by a power of attorney. On the other hand, if the power of attorney is forged/invalid, serious damages may arise.

As we have stated, issuance of a forged power of attorney and execution of transactions by this document give rise to legal and criminal liabilities, especially on notaries. When the legal validity of the vehicle sale transaction made by a forged power of attorney is examined, it is determined that sales and transfer transaction is invalid since a valid contract will not be formed.

In addition, it has been determined that the registration made in the traffic registry in this way is corrupt, and the subsequent transfer transactions carried out on the basis of corrupt registration will be invalid regardless of the good intentions of the parties.

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**3.** Özçelik, B.: Motorlu Araç Mülkiyetinin Yetkisiz Kimseden Devralınması ve Sonuçları, Journal of the Faculty of Law, Ankara University, Vol. 68, Issue. 4, p. 847

**4.** The decision, bearing the Basis number #2016/8992 and the Decision number #2018/385, of the 3rd Civil Chamber of the Court of Cessation

## ITALY: TRENTO COUNCIL FINED FOR ILLEGAL AI VIDEO AND AUDIO SURVEILLANCE PROJECTS

The Italian city of Trento has become the first city in the country to receive a fine for its misuse of artificial intelligence (AI), according to a release from the Italian Data Protection Authority.

The authority fined Trento city council €50,000 for the deployment of two artificial intelligence-driven urban surveillance projects that violated data protection rules. After an in-depth investigation of the two projects, which were funded by EU, the authority found "multiple violations of privacy regulations" it said in a statement while recognizing the municipality acted in good faith. It said the data collected was not sufficiently anonymous, and that it was incorrectly shared with third parties.

The municipality of Trento reportedly said it is considering an appeal of the decision, saying that the actions by the regulator "highlight how the current legislation is totally insufficient to regulate the use of AI to analyze large amounts of data and improve city security."

While Rapid advances in AI across multiple industries, the Italian government has been proactive in its dealings with the evolution of AI. In March 2023, Italy became the first country to place a ban on OpenAI's popular AI chatbot ChatGPT when it first went viral.

**Source:** ***https://www.reuters.com/sustainability/society-equity/italy-fines-first-city-privacy-breaches-use-ai-2024-01-26/***

## WORLD'S FIRST MAJOR ACT TO REGULATE AI PASSED BY EUROPEAN LAWMAKERS

The European Union lawmakers have given a final approval to the world's first major regulatory framework aimed at governing AI, marking a pivotal moment for the tech industry. Garnering 523 votes in favor, against 46, with 49 abstentions, this legislative achievement underscores the EU's commitment to setting global standards in AI governance. Under the AI Act, machine learning systems will be divided into four main categories according to the potential risk they pose to society. AI applications that pose risks to citizens' rights, including biometric categorization systems based on sensitive attributes, emotion recognition, social scoring and predictive policing solely based on profiling will be classified as "unacceptable risk" and will be strictly forbidden.

AI systems that negatively affect safety or fundamental rights will be considered "high risk". Clear obligations are imposed on these high-risk AI systems, identified for their potential harm across various domains like health, safety, rights, environment, democracy, and law. These systems must undergo risk assessments, ensure transparency, accuracy, human oversight, and provide avenues for citizen complaints and explanations regarding their decisions. General-purpose AI (GPAI) systems, and the GPAI models will not be classified as high-risk but will have to comply with transparency requirements and EU copyright law. However, more potent GPAI models with potential systemic risks will face extra requirements such as model evaluations, systemic risk assessments, risk mitigation measures, and incident reporting. Moreover, artificial or manipulated content like images, audio, or videos ("deepfakes") need to be clearly labeled as AI generated so that users are aware when they come across such content.

Regulatory sandboxes and real-world testing will need to be established at the national level, accessible to SMEs and start-ups. These measures aim to develop and train innovative AI technologies before their market placement, ensuring compliance with regulations and fostering responsible AI development.
The regulation is expected to be formally adopted before the legislative session ends. It will come into force twenty days after being published in the official Journal, with full applicability after 24 months. Exceptions include bans on prohibited practices (enforced in six months), codes of practice (in nine months), general-purpose AI rules (in 12 months), and obligations for high-risk systems (in 36 months).

**Source:** ***https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law***

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