

Law and Practice

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1. LEGAL FRAMEWORK

1.1 Sources of Legal Protection for Trade Secrets

Under Turkish Law, there are no laws or regulations that specifically aim to govern trade secrets and their protection. That being said, some provisions in both civil and criminal statutes safeguard trade secrets.

According to prevailing opinion in Turkish legal literature, trade secrets are subject to constitutional protection primarily under Article 17/1 of the Constitution of the Turkish Republic, which states that “Everybody has a right to live and the right to protect and improve his/her corporeal and spiritual existences.” Trade secrets are considered a part of corporeal existence.

The most specific and detailed regulations that protect trade secrets are the unfair competition provisions of Turkish Commercial Code No 6102 (TCC), Article 55 of which explicitly stipulates that “disclosing manufacturing and business secrets that belong to others unlawfully” constitutes unfair competition. Under Turkish Law, manufacturing and business secrets fall within the scope of trade secrets. The other unfair competition conduct related to trade secret protection is “utilising others’ works without authorisation”. Individuals or legal entities whose trade secrets are disclosed or whose work is utilised without authorisation may resort to legal remedies (both civil and criminal) stipulated in the TCC with regards to unfair competition.

Article 527 of the TCC also regulates the confidentiality requirement for those individuals or legal entities who review the corporate documents and books of joint stock companies in respect of their duties (such as attorneys, the officials of the notary public, experts and employees of intermediary firms). Such persons are obliged not to disclose business secrets

they have obtained from corporate documents books, or companies can claim compensation for their material and immaterial damages.

Article 396 of the Turkish Code of Obligations No 6098 (TCO) sets out a specific provision under its section on employment contracts, which aims to protect employers’ trade secrets that are disclosed to employees in the course of their work.

Under the Turkish Competition Regime, undertakings can request confidentiality with regards to their trade secrets while submitting any information or document to the Turkish Competition Authority. If the Turkish Competition Authority accepts these confidentiality requests, it will not disclose such information to the public.

Article 239 of the Turkish Criminal Code No 5237 (the Criminal Code) also regulates criminal liability regarding the misappropriation of trade secrets.

Finally, Turkey is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 39 of which stipulates the protection of trade secrets.

1.2 What Is Protectable as a Trade Secret

The unfair competition provisions of the TCC (Articles 55 to 63) do not provide a definition of trade secrets. Under Turkish Law, the decisions of the Turkish Court of Cassation (ie, the highest court of appeal) shed light on the meaning of trade secrets.

In its decision with the merit No 2016/6958, decision No 2019/4349 and date 21 October 2019, the Turkish Court of Cassation generally defines a trade secret as “information that (i) provides economic advantages to its individual or legal entity owner against its competitors, (ii) is kept as a secret by its owner, and (iii) reason-

able measures are taken by its owner to keep it confidential.” With regards to unfair competition, the Court of Cassation defines a trade secret more specifically as “a piece of information, model, formula or layout that is utilised by its owner during his/her business activities and provides economic advantages to its owner against competitors who do not have access to such information.”

In the light of this definition, any information including formulas, models, strategies, technical features of manufacturing, supply sources, research and development activities and networks will be considered as trade secrets under the Turkish Law if it fulfils the following conditions.

- The information must have secrecy – must not be known by the public and could not easily be obtained through lawful means. More specifically, the courts will assess whether the information is known by other players active in the industry and, if it is known, the degree of competitors’ knowledge.
- The owner must take necessary and reasonable measures to keep the information confidential. The owner must present that he/she put effort into maintaining the secrecy of the information in an active manner.
- The information must have economic value stemming from its secrecy nature, and this economic value must not just be in the eye of its owner but also in the eyes of the owner’s competitors.

Under the Turkish Competition Regime, the Communiqué on The Regulation of The Right of Access to The File and Protection of Trade Secrets No 2010/3 (the Communiqué) provides an explicit definition of trade secrets. Accordingly, in addition to the above-mentioned criteria, the information must be likely to result in severe

damage to the undertaking when it is disclosed to third parties, especially competitors. Moreover, information or documents related to the agreements or actions that violate competition law cannot be qualified as trade secrets.

1.3 Examples of Trade Secrets

Turkish courts have qualified the following kinds of information as trade secrets under the TCC:

- manufacturing secrets;
- technical information in relation to manufacturing;
- information on drug licences;
- lists that indicate the discounts made to customers;
- lists that indicate the payment methods of customers; and
- companies’ commercial books.

Under the Turkish Competition Regime, the Communiqué defines trade secrets as information related to corporate governance structure, the financial situation of the company, amounts of cash and loans, research and development activities, operational strategy, raw material resources, technical aspects of manufacturing, pricing policies, marketing tactics, market shares, and wholesale and retail customer networks.

1.4 Elements of Trade Secret Protection

Unfair competition conducts with regards to trade secret protection are stipulated in Article 55 of the TCC as follows:

- disclosing others’ business and manufacturing secrets to third parties in an unlawful manner;
- utilising others’ business and manufacturing secrets after obtaining them unlawfully;
- utilising someone’s work without authorisation; and

- inducing employees, attorneys or other assistants to reveal the business and manufacturing secrets of their employers and clients (ie, offering money to employees in exchange for the trade secrets of his/her employers).

Unfair competition conducts are not limited by the major forms listed in the TCC. In principle, actions and business practices that are incompatible with commercial honesty constitute unfair competition.

In this respect, acquiring trade secrets without consent, even if they are not utilised or disclosed, should also be considered unfair competition conduct. Article 39 of TRIPS requires the member states to take necessary steps to prevent the unauthorised acquisition of trade secrets contrary to honest commercial practices. In order to comply with the provisions of TRIPS, the unfair competition provisions must be interpreted in this manner.

In such cases, individuals or legal entity trade owners can apply particular legal remedies, including compensation claims, requesting the determination of the unfairness of the conduct, and requesting prevention of the unfair competition.

The only condition to apply for these legal remedies is that their clients, professional reputation, commercial activities or other economic interests must be damaged due to these conducts of unfair competition.

Under the Turkish Competition Regime, to benefit from the trade secret protection before the Turkish Competition Authority while submitting any corporate information or document, the information or document must not be the only evidence of the particular competition law violation. Otherwise, the Turkish Competition Board can disclose such information or document in

accordance with the principle of proportionality by striking a balance between public interest and the owner's interest.

1.5 Reasonable Measures

The unfair competition provisions of the TCC do not require the trade secret owner to take reasonable measures to maintain the secrecy of the information. That said, the Turkish Court of Cassation considers whether the owner has taken reasonable measures to keep the information confidential in order to qualify such information as a trade secret.

In its decision with the case No 2016/6958, decision No 2019/4349 as mentioned in **1.2 What Is Protectable as a Trade Secret**, the Turkish Court of Cassation does not explicitly address which measures are reasonable. The assessment thereof will be made on a case-by-case basis in light of the commercial customs in accordance with Article 1(2) of the TCC, which refers to commercial customs for the matters not explicitly regulated in the provisions. Although the reasonable measures will differ according to sector, in general, the following measures should be taken:

- marking the document as confidential;
- distinguishing the trade secrets from another kind of information and limiting access to documents that contain trade secrets;
- disclosing the trade secrets only to employees who need such information to fulfil their duty; and
- while disclosing the information in a contractual relationship, setting out a non-disclosure clause in the contract, or signing a separate non-disclosure agreement.

By way of illustration, in its decision No 2014/445 and dated 24 February 2020, Bakirkoy 1st Commercial Court of First Instance did not qualify a customer portfolio as a trade secret since

this customer portfolio had been open to many employees regardless of whether or not they needed it for their duties.

1.6 Disclosure to Employees

Employers can disclose their trade secrets to employees for the purposes of work. To the extent the trade secrets are disclosed to the employee in the course of their work, such disclosure will not impede the protection of these trade secrets. Under Article 396 of the TCO, employees are obliged not to disclose or utilise for their interests the employers' business and manufacturing secrets.

Although the TCO obligates employees to keep employers' manufacturing and business secrets confidential, in practice many employers prefer to set forth a non-disclosure clause in employment contracts or to sign a separate non-disclosure agreement. Stipulating a penalty clause for non-compliance provides a more intense safeguard to mitigate the risk of disclosure by employees.

1.7 Independent Discovery

Independent discovery will impede the trade secret protection of the information since it invalidates the condition of not being known by the public. In a similar manner, reverse engineering (ie, analysing the design and technical aspects of the product in order to identify manufacturing and operational secrets) invalidates the secrecy nature of the trade secret. If the technical aspects of a product that constitutes a trade secret are discovered through reverse engineering, these technical aspects will no longer be subject to trade secret protection.

Under the unfair competition provision of the TCC, obtaining trade secrets by reverse engineering does not constitute an unlawful means of obtaining, and reverse engineering does not result in unfair competition. Generally speaking,

the ground of the unfair competition concept stands upon the good faith principle. Purchasing a product and then obtaining its secrets with reverse engineering does not violate this principle. However, the courts could diverge from these general principles, depending on the circumstances of each case.

1.8 Computer Software and Technology

Under Turkish Law, there are no regulations in relation to trade secret protection that are unique and separately applicable to computer software and/or technology.

1.9 Duration of Protection for Trade Secrets

Trade secrets are subject to protection as long as they maintain their secrecy and fulfil the conditions for qualifying as a trade secret (see **1.2 What Is Protectable as a Trade Secret**). Disclosing trade secrets to third parties either in a contractual relationship under a non-disclosure clause or in the context of a contract based on a fiduciary relationship will not adversely affect the secrecy nature of the trade secrets and hence the protection.

However, if the owner discloses the trade secrets to third parties without mentioning their secrecy nature and requesting confidentiality, such disclosure will impair the trade secret protection. Publishing the information to the public also removes trade secret protection.

Therefore, trade secret owners must mention the nature of the information (ie, that it is a trade secret) and, if possible, must conclude non-disclosure agreements in writing before giving access to third parties for trade secrets.

The effect of accidental disclosure will differ upon the circumstances of the event. In contrast with intentional disclosure, in the case of accidental disclosure, the owner's intention to keep

the information confidential remains. Therefore, such disclosures will not directly lead to the dissolution of the trade secret qualification. In such cases, the conclusion will depend on whether the information has lost its secrecy (see **1.2 What Is Protectable as a Trade Secret**).

1.10 Licensing

Under Turkish law, rights with respect to licensing will depend on the nature of the trade secret and whether such trade secret is also protected separately under a patent or utility model. In addition to licence agreements relating to such patents and utility models, general licence agreements can also be concluded with regard to copyrights that are based on the rights-holders' right to authorise adaptation, reproduction, distribution, representation and the broadcast of such information. In order to permit the use of trade secrets, parties can draw up a licensing agreement or a know-how transfer agreement. It is advisable for this contract to contain a confidentiality/non-disclosure clause with a penalty clause that obliges the counterparty to pay a fixed penalty fee in the case of breach of non-disclosure. Such a penalty clause serves to mitigate the risk of a disclosure by the counterparty.

1.11 What Differentiates Trade Secrets from Other IP Rights

The main difference between trade secrets and intellectual property such as patents, trade marks and copyright is the scope of the protection. Intellectual property rights can be claimed against any person who infringes them, regardless of the fault or negligence of the infringer.

Furthermore, intellectual property owners have exclusivity (the period and scope of which will depend on the type of intellectual property right) over the intellectual property, meaning that right owners can assert claims against any persons who copy or in any other way infringe upon the intellectual property. However, the trade secret

owners cannot assert any and all claims against persons who developed the trade secrets by themselves without any use of or reference to the trade secrets.

Another point of difference is that the protection of trade secrets is closely related to the efforts utilised to keep such information confidential. However, intellectual property rights are protected regardless of confidentiality – with intellectual property rights such as patents and trade marks becoming protected upon registration and works subject to copyright being protected upon creation.

1.12 Overlapping IP Rights

It is possible to assert trade secret rights in combination with other types of intellectual property rights. The most common example is trade secret claims to be asserted along with patent claims or copyright claims.

However, other registered intellectual property rights such as trade marks are less likely to be asserted alongside trade secret claims since these rights require public registration and disclosure, while the main aspect of a trade secret is confidentiality.

1.13 Other Legal Theories

Article 55 of the TCC regulates the conduct of “tortious interference with contract by inducing employees, attorneys, or other assistants to obtain or disclose manufacturing and trade secrets of their employers and clients” as unfair competition. If the employers or clients have suffered due to such conduct, they can bring claims for tortious interference with the contract under the unfair competition provisions of the TCC.

1.14 Criminal Liability

Under Turkish Law, two different provisions set forth criminal liability in the misappropriation of

trade secrets: Article 62 of the TCC and Article 239 of the Criminal Code.

Article 62 of the TCC regulates criminal liability for unfair competition conduct. Under this provision, imprisonment or a judicial fine of up to two years will be imposed on individuals or the representatives of legal entities who:

- intentionally disclose the business and manufacturing secrets of others in an unlawful manner;
- intentionally utilise the other's works without authorisation; or
- induce employees, attorneys or other workers to reveal their employers' and clients' manufacturing or trade secrets.

In respect of this crime, the complainants could only be:

- individuals or legal entities whose customers, credits, professional reputations, commercial activities or other economic interests have suffered or are at risk due to the unfair competition conduct;
- customers whose economic interests have suffered or are at risk;
- chambers of commerce and industry, chambers of artisans, stock exchanges, and other professional and economic associations that aim to protect their members' economic interests pursuant to their statutes; or
- non-governmental organisations that protect customers' economic interests pursuant to their statutes.

However, if these conducts constitute another crime under laws that require more severe penalties, the punishment under this provision will not be imposed.

Article 239 of the Criminal Code regulates criminal liability for individuals who obtain informa-

tion or documents that constitute trade secrets, banking secrets and customer secrets because of their title, duty, profession or art. Accordingly, individuals who disclose such information or documents or provide them to unauthorised persons shall be punished with imprisonment of one to three years and a punitive fine of up to 5,000 years (the punitive fine for one day can range from TRY20 to TRY100).

If such information and documents are disclosed or provided to unauthorised persons by individuals who have obtained such information or documents unlawfully, these individuals will be sentenced with the same penalty.

If such information and documents are disclosed to a foreigner who is not resident in Turkey, the sentence will be increased by one third, and the complaint will not be mandatory for initiating the criminal lawsuit.

Individuals who violate their confidentiality obligation stipulated in Article 527 of the TCC and disclose the trade secrets that they obtained during their duty for reviewing the corporate books of joint stock companies will be punished pursuant to this provision (Article 562/5(7) of the TCC).

The trade secret owner can pursue both civil and criminal claims.

1.15 Extraterritoriality

In cases where the misappropriation happens in another country, the jurisdiction of the Turkish courts will be determined according to the rules that regulate the competence between first instance courts (Article 40 of the International Private and Civil Procedure Law No 5718).

Accordingly, a claim in relation to misappropriation that happens in another country can be

brought before the Turkish courts in the following instances:

- if the misappropriation claims involve a defendant who is resident in Turkey (Article 6 of Turkish Code of Civil Procedure No 6100 (TCCP));
- if the damage due to unfair competition conduct occurs or is at risk of occurring in Turkey (Article 16 of the TCCP);
- if the place where the contract will be performed is in Turkey in cases where the misappropriation is based on a contract (Article 10 of the TCCP); and
- if the workplace of the employee is in Turkey in cases where the misappropriation is based on an employment contract (Article 44 of the International Private and Civil Procedure Law No 5718).

2. MISAPPROPRIATION OF TRADE SECRETS

2.1 The Definition of Misappropriation

Under the unfair competition law provisions of the TCC, the unlawful disclosure of trade secrets to third parties constitutes unfair competition conduct. The following cases are classed as unlawful disclosure:

- disclosing information that was obtained without the permission of its owner and in secret (ie, by stealing or hacking);
- disclosing information that was obtained in the context of a contract that has confidentiality/non-disclosure obligations; and
- disclosing information as a breach of contract that is based on confidence/fiduciary duty.

In such cases, the owner must prove that:

- the piece of information qualifies as a trade secret;

- the defendant has obtained this trade secret by unlawful means; and
- the defendant has disclosed this trade secret unlawfully.

In cases where the disclosure is based on a breach of a contract, the owner must show that the disclosed trade secret was given to the defendant within the context of the contract. If the trade secrets are not exposed but utilised, the trade secret owner must prove that utilisation.

If the plaintiff asserts the claim in relation to the utilisation of work without authorisation, he/she must prove that the defendant has utilised the work and that this utilisation was without consent.

2.2 Employee Relationships

Under Turkish law, employees are obliged not to disclose their employers' business and manufacturing secrets to third parties and not to utilise these secrets for their own interests as long as the employment contract is in effect. This obligation survives after the termination of the contract if keeping the particular information confidential is mandatory to safeguard the employer's legitimate interest (Article 396 of the TCO).

Employers can assert claims under both the unfair competition provisions of the TCC and Article 396 of the TCO against employees who disclose or utilise their trade secrets. If the employer pursues claims under Article 396 of the TCO, he/she has to prove his/her legitimate interests with regards to that information. The elements of trade secret protection under the unfair competition will not differ.

2.3 Joint Ventures

Under Turkish law, joint ventures are regarded as "simple partnerships" and are subject to the provisions of simple partnership agreements

stipulated in Articles 620 to 645 of the TCO. None of these provisions explicitly regulates an obligation between partners with regards to the protection of trade secrets.

That being said, in Turkish legal literature, the prevailing opinion is that the partnership agreements are based on a fiduciary relationship, and that partners owe each other duties of fiduciary and loyalty. Accordingly, these duties could be seen in Article 626 of the TCO, which regulates the non-competition principle, while Article 628 of the TCO sets forth the partners' duty of care. According to Article 626 of the TCO, the partners shall not undertake transactions for their interests or other third parties' interests that might damage or hinder the aim of the partnership.

In this regard, it is argued that each joint venturer has to take the necessary measures to protect and not disclose the trade secrets belonging to the joint venture or other joint venturers. It is recommendable to conclude a non-disclosure agreement between joint venturers.

2.4 Industrial Espionage

As mentioned in **1.15 Extraterritoriality**, Article 239 of the Criminal Code regulates criminal liability for disclosure of trade, banking and customer secrets. Under this provision, individuals who disclose information or documents that constitute trade secrets, banking secrets or customer secrets, or who provide them to unauthorised persons, shall be punished with imprisonment of one to three years and a punitive fine of up to 5,000 years (the punitive fine for one day ranges from TRY20 to TRY100). If such information and documents are disclosed to a foreigner who is not resident in Turkey, the sentence will be increased by one third, and the complaint will not be mandatory for initiating the criminal lawsuit (see **1.14 Criminal Liability**).

3. PREVENTING TRADE SECRET MISAPPROPRIATION

3.1 Best Practices for Safeguarding Trade Secrets

In general, the best practices to maintain the protection of trade secrets are as follows:

- concluding non-disclosure agreements with third parties such as customers, distributors, sellers and sub-contractors;
- concluding non-disclosure and non-competition agreements with employers;
- organising documents in a way that separates the documents that contain trade secrets from those that do not, labelling the documents that contain trade secrets as confidential;
- classifying the information as publicly known, accessible for any employee, sensitive, and accessible with permission or strictly confidential, and instructing employees on the nature of each type of information in writing;
- limiting both physical and electronic access to documents with trade secrets, enabling access only for employers who need that information for their work;
- after obtaining the consent of the employee, monitoring the electronic devices of the employees and supervising whether they use the electronic data lawfully;
- taking security measures for the protection of information technology systems, such as firewalls, password protection, virus scanners, etc; and
- conducting risk assessments to detect potential means of disclosure.

3.2 Exit Interviews

Employers generally remind departing employees that they have to return any documents or other materials belonging to the employer. Human resources will also inform the employee

of the non-competition clause if such a clause exists in the employment contract. During exit interviews, employees do not have to answer any questions or make any explanation with regards to their new position.

4. SAFEGUARDING AGAINST ALLEGATIONS OF TRADE SECRET MISAPPROPRIATION

4.1 Pre-existing Skills and Expertise

Although Turkish law does not differentiate the pre-existing skills and expertise of employees from trade secrets, the courts have established a distinction between the two.

It is a natural consequence that employees will acquire professional knowledge and skills while working in a company, so such knowledge and skills cannot be regarded as trade secrets.

By way of an illustration, in its decision No 2014/445 and dated 24 February 2020, the Bakirkoy 1st Commercial Court of First Instance decided that it is natural for an employee working in the marketing department to know the customers of that company and to use this information in their subsequent employment. However, the way in which this information is utilised by the employee in question may give rise to unfair competition claims, depending on the competition clauses in the employment agreement. In addition, the distinction between pre-existing skills and trade secrets would defer, depending on the sector and the employee's position.

Under Turkish law, the inevitable disclosure doctrine (under which the former employer can interfere in the subsequent employment of the employee if the disclosure of trade secrets is inevitable) is not recognised. Under no circumstances can starting to work in a competitor

company result in a violation of unfair competition provisions or the confidentiality duty of the employee, which survives after the termination.

The TCO allows employers to obtain an undertaking from the employee with regards to non-competition for a period of up to two years following the termination of the contract. However, even this clause does not enable the employer to prevent subsequent employment in a competitor. If the employee begins to work with a competitor and violates the non-competition clause, the former employer can only claim compensation for his/her damages that occurred due to such violation.

4.2 New Employees

To mitigate risks arising from unintentional use of a former employer's trade secrets, an employer can obtain an undertaking from new employees to not disclose their former employer's trade secrets. In the case of accidental disclosure, the new employee must be obliged to inform the new employer about the trade secret nature of the information. This written undertaking will show the good faith and honesty of the subsequent employer if any dispute arises.

5. TRADE SECRET LITIGATION

5.1 Prerequisites to Filing a Lawsuit

In general, Turkish law does not provide any prerequisite before initiating a lawsuit except the mandatory mediation for money claims in relation to commercial law (Article 5 of the TCC). As unfair competition is regulated in the TCC, mediation is also compulsory for money claims arising from unfair competition. Money claims arising from employment contracts are also subject to mandatory mediation (Article 3 of the Labour Courts Law No 7063). In other words, in the case of disclosure by an employee, the

relevant employer must first apply to the mediation process.

After invoking the mediation process, the plaintiff must submit the mediation minutes stating that the parties could not settle as a result of the mediation process to the court while initiating the lawsuit. If this step is not taken, the court will reject the case without examining its merits due to a lack of cause of action.

It is worth noting that trade secret cases with the nature of a declaratory action or with a request for the prevention of unfair competition without any money claims will not be subject to compulsory mediation.

Even though it is not obligatory, it is common in Turkey for the claimant to send a cease-and-desist letter in case of trade secret violation to ex-employees and/or the competitors that hired them prior to the mediation stage.

5.2 Limitations Period

The statute of limitations in trade secret claims varies according to the relationship between the parties and the type of the claim.

If the trade secret claim constitutes unfair competition under the TCC, the limitation period is one year from the day the plaintiff learns that they are entitled to file a lawsuit, and three years from the initiation of this right in any case. However, if the act of unfair competition is also an act that requires a penalty that is subject to a longer limitation period under the Criminal Code, this period is also valid for civil cases.

If there is a contract between the parties with a confidentiality clause and the actions of the defendant constitute a breach of such contract, the limitation period is ten years in principle, according to the TCO.

5.3 Initiating a Lawsuit

The plaintiff must file a lawsuit petition before the competent court to initiate a trade secret claim, as in the general practice of Turkish civil law. The plaintiff explains the subject of the dispute along with the relevant facts and evidence. The plaintiff must identify the counterparty by including relevant information of the counterparty in the lawsuit petition.

The court fees and expenses must also be deposited with the court ahead of starting the proceedings.

As explained in **5.1 Prerequisites to Filing a Lawsuit**, the claimant must apply to the mediator first if the claim involves a money claim.

5.4 Jurisdiction of the Courts

The jurisdiction of the court authorised to review a trade secret claim varies depending on the relationship between the parties and the legal status of the claim. The jurisdiction of the court is different if the claim has arisen from a breach of contract or unfair competition.

Under Turkish law, acts that constitute unfair competition are classified as tort. As no special jurisdiction is provided in the TCC for unfair competition claims, the jurisdiction rules that apply to tort claims also apply to unfair competition claims. In this regard, unfair competition claims can be initiated before the competent court in the area where:

- the defendant is residing;
- the unfair competition has been committed;
- the damage has occurred or is likely to occur;
- or
- the plaintiff is residing (Article 16 of the TCCP).

Trade secret claims that are based on a breach of a contract can be initiated before the compe-

tent court in in the area where the defendant is residing in the execution place of the contract (Article 10 of the TCCP).

Under Article 18 of the TCCP, parties to a contract can conclude a jurisdiction agreement or draw up a clause in relation to jurisdiction in the relevant contract. Unless otherwise provided in the contract, this jurisdiction will be exclusive, and parties must bring a claim before the courts stipulated in the particular contract.

5.5 Initial Pleading Standards

Trade secret claims are subject to the general pleading standards of the TCCP, according to Article 194 of which the claimant must substantiate its claims up to a reasonable extent for the case to be heard before a civil court. In other words, the plaintiff cannot only allege facts “on information and belief”. However, the claimant may not be in possession of all evidence that will potentially support its case whilst filing the lawsuit, which is not an obstacle for the claimant to initiate its case as the claimant can ask the court to collect this evidence from either the defendant(s) or third parties.

When it comes to money claims connected to trade secret violation, claimants are expected to declare the entire amount of their damages to the extent they can at the beginning of the lawsuit, as per Article 119 of the TCCP. If the amount of this damage is to be determined according to the evidence to be collected by the court, including expert witness evidence, the claimant can be allowed to initiate the case without specifying the amount of its damages.

5.6 Seizure Mechanisms

The claimant may request civil courts to conclude preliminary injunctive relief regarding the prohibition of the supply of the accused products (ie, the products manufactured through misappropriation of the trade secrets), which

might include the seizure of products until the decision of the first instance court. However, the court may seek a high threshold of evidence with regards to the rightfulness of the complaint. The court may conclude to order such injunctive relief ex parte if the protection of the claimant’s rights requires the relief in an immediate manner.

In order to obtain preliminary injunctive relief, the claimant must provide a security, which is generally requested by the court as 15% of the value of the protection provided (ie, the quantum of the case or goods to be seized). However, as per Article 392 of the TCCP, the court may decide not to request a security if the request is based on the official document or any other similar strong evidence, or as the conditions require.

5.7 Obtaining Information and Evidence

With regards to civil law cases, the party preparation principle is recognised under Turkish law. Therefore, as a rule, parties are expected to submit their evidence or provide its whereabouts to the court. The same principle applies to civil cases arising from trade secret violations.

The inquisitorial system is used in criminal cases and therefore, in any criminal investigation initiated due to a trade secret violation, the prosecutors’ office or the criminal court would need to search for evidence in order to hand down a decision.

Prior to filing lawsuits, however, the claimants can request determination of the evidence as per Article 400 of the TCCP in cases where there is a likelihood that the evidence in question could disappear. It is common in practice for claimants to request on-site inspections and expert reports within the context of determining the evidence to process prior to filing their substantive claims.

Additionally, the Turkish Industrial Property Law stipulates that the right owner can request the

court to order the counterparty to submit and disclose the documents regarding the infringement. This mechanism can also be used by the owner if the trade secret theft or misappropriation also constitutes unlawful use of an industrial property right.

5.8 Maintaining Secrecy While Litigating

In principle, hearings of civil, administrative and criminal proceedings are open to the public in Turkey but it is not permissible to take photos, videos or voice recordings.

To avoid a public hearing, parties can request a confidentiality order from the court, or the court may decide to hold the hearing in private ex officio if public morality, public safety or the relevant person's superior interest so requires.

When it comes to the confidentiality of the court documents, only the parties and their representatives can access the court papers and obtain copies of them.

An exception to the above is that seasoned lawyers can review all court files if there is no confidentiality order but they cannot obtain copies of the court papers without power of attorney from one of the parties in the proceedings.

5.9 Defending against Allegations of Misappropriation

The defences available in trade secret litigation vary from case to case depending on the nature of the dispute and the claims asserted. In this regard, there is no general best practice for trade secret litigation, but some points are worth noting.

Defendants generally challenge the nature of information as a trade secret or as pre-existing skills or knowledge of the employee with regards to previous employee disclosure. Defendants could also argue that the disclosure of the trade

secret or use of the work was not unlawful. Also, defendants focus on the causation between the violation of trade secrets and damages occurring in money claims. In money claims, the defendants try to force the claimants to ascertain the amount of their claims to make them deposit higher application fees and use this high quantum as a basis for higher representation fee claim pro rata to the amount of the case to be denied by the court.

5.10 Dispositive Motions

Turkish law does not provide for dispositive motions before the trial.

5.11 Cost of Litigation

In Turkey, the majority of the costs and fees are collected in advance from the plaintiff while filing the case. Those include application fees, decision and judgment fees, expert and witness fees, and notification fees. There might be occasions, however, where courts order the defendants to pay the fees of expert witnesses, particularly when it is only the defendant who relies on the expert evidence, or the fees for additional expert reports if the initial reports were rejected only by the defendant(s). Another fee to consider is the pro rata decision and judgment fee for money claims, which is 6.831% of the case amount. For cases with no money claims, the decision and judgment fees are negligible fixed amounts. Other costs of litigation can also be calculated on a pro rata basis or as a fixed fee, depending on the type of the claim.

Finally, the claimants should bear the representation fee in mind, which the losing party must pay to the lawyers of the winning side and is calculated with reducing rates pro rata to the claimed amount as per an official tariff. This is separate from the professional fee determined between the lawyer and the client.

Turkish law does not allow contingency fees. The attorney fees cannot be lower than the amount stipulated under the minimum attorney fees tariff. However, lawyers are allowed to receive premiums based on their success rate.

There are no restrictions regarding litigation funding under Turkish law.

6. TRIAL

6.1 Bench or Jury Trial

Jury trials are not available under Turkish law.

6.2 Trial Process

A large percentage of trials are conducted in writing under Turkish law as a principle, including trials regarding trade secret claims. Although oral arguments are also part of the trial, the written submissions are the core element of the trial process.

The court holds hearings and summons the parties several times during the trial. Generally, interlocutory decisions are granted in these hearings, such as summoning the witnesses, requesting documents or appointing experts.

The court may hear witnesses during these hearings upon the request of the parties. During the witness statements, the parties can request the court to ask questions of the witnesses.

The timetable for trade secret claims differs according to the nature and complexity of the dispute. Because proving the arguments in a trade secret claim can be challenging without the support of expert opinions in most cases, several expert opinions may be necessary during the trial, which may cause the trial process to take longer than other kinds of lawsuits. In this regard, the first instance phase of a trade secret claim can take approximately one to two years.

6.3 Use of Expert Witnesses

Expert opinions are one of the most important pieces of evidence in civil proceedings under Turkish law. The court appoints an expert or a panel of experts to explain the technical details of a dispute in most lawsuits.

The experts can be appointed by the court ex officio or upon the request of the parties. Since trade secret claims mostly require special or technical knowledge, expert opinions are highly important in a lawsuit regarding trade secrets.

As per Turkish law, the experts can be appointed by the court or an expert opinion can be obtained by the parties from an independent expert. However, the courts give more weight to the opinions of court-appointed experts than those obtained by the parties from an independent expert.

Court-appointed experts are prohibited from giving an opinion regarding legal matters, but experts introduced by the parties are permitted to do so.

Experts submit their opinion as a written report to the court instead of attending the hearings, in principle.

7. REMEDIES

7.1 Preliminary Injunctive Relief

According to Article 389 of the TCCP, the court may order any type of preliminary injunctive relief available under the conditions, which covers changes in existing circumstances that will result in severe difficulty or impossibility to exercise the right, or if a delay would cause an inconvenience or serious damage.

A party must file a petition to court to request injunctive relief, specifying the reason and the type of the injunctive relief required. It is possible

to request injunctive relief from the court before or during the trial.

Preliminary injunction orders are a temporary legal measure and expire with the finalisation of the decision of the court given in the merits of the case, unless the court converts the order to a permanent decision in its verdict.

As a rule, the court orders injunctive relief if the requesting party provides security. This security is provided in order to cover the potential loss of the counterparty or of third parties that may occur because of an unjustified request for injunctive relief. However, as per Article 392 of the TCCP, the court may decide not to request security if the request for such is based on the official document or any other similar strong evidence, or as the conditions require. Generally, the security requested by the court is 15% of the value of the protection provided – ie, quantum of the case, goods seized or likely profit of certain duration of manufacturing if it is ceased due to the injunction.

7.2 Measures of Damages

As described in **1 Legal Framework**, there are several laws protecting trade secrets in Turkey. Actions contrary to those laws may be subject to pecuniary and non-pecuniary damage claims, as per the general rules of the TCO.

In addition, pursuant to Article 56 of the TCC, a compensation lawsuit can be filed in order to request pecuniary damages for loss caused due to the faults of the perpetrator that constitutes unfair competition.

The legal requirement for a successful claim for pecuniary damages is the existence of unfair competition, loss due to unfair competition, culpability and a causal bond.

In addition, a person whose personal rights have been unlawfully violated due to unfair competition can claim non-pecuniary damages in accordance with Article 58 of the TCO. Unlike pecuniary damages claims, non-pecuniary damages can be claimed regardless of the severity of the culpability.

Punitive damages are not available in Turkey, except for those regulated under the Turkish Competition Regime.

7.3 Permanent Injunction

There is no permanent injunctive relief mechanism in Turkey.

However, along with the pecuniary and non-pecuniary compensation awards, Turkish courts can decide on orders at the end of the proceedings that might have permanent effects on the defendants. According to Article 56 of the TCC, the claimant party may request the following from the court:

- determination of the unfairness of the act;
- the prevention of unfair competition; and
- the removal of the financial situation arising from the unfair competition, the correction of any false or misleading statements that led to the unfair competition and, if it is necessary to prevent infringement, the destruction of the means and goods that led to the unfair competition.

Among those, the prevention of unfair competition gives sufficient ground for permanent measures to limit the way in which the defendants act. Similarly, the court can order the demolition of goods that are produced as a result of the violation. These requests can be made if trade secret violations are raised within the framework of an unfair competition claim.

It is not possible to limit employees' subsequent employment in cases of the disclosure of trade secrets. In practice, claimants try to draw certain boundaries regarding the way in which the employee will share information based on his/her previous experience, but courts do not leave any room for interpretation.

Even if there is a non-competition agreement between the previous employer and the employee, the former can only request compensation for the losses and damages that have occurred, without being able to limit the employee's future employment in anyway whatsoever.

7.4 Attorneys' Fees

As per Turkish law, professional fees cannot be requested from the other/losing party. However, as mentioned in **5.11 Cost of Litigation**, the courts order official attorneys' fees to be paid by the losing party; such fees are calculated pro rata with reducing rates to the claimed amount according to an official tariff. The fees are revised every year by the circulars.

7.5 Costs

The court fees and costs are collected in advance in the civil courts, and deposited by the plaintiff before filing the case as a rule. The litigation costs include expenses such as decision and judgment charges, expert and witness fees, notification fees and documentation fees.

Since the plaintiff is required to pay the costs in advance before initiating the lawsuit, the defendant is required to reimburse the plaintiff party for the court costs and expenses if the plaintiff wins the case. The losing party is also obliged to pay the attorney fees at the end of the proceedings, as described in **7.4 Attorneys' Fees**.

The costs are calculated by the court in accordance with the Act of Fees.

8. APPEAL

8.1 Appellate Procedure

In Turkish legislation, the hierarchy of the court system is as follows:

- first instance court;
- regional courts of appeal; and
- Court of Cassation.

Both claimants and respondents can appeal the first instance court's final decision to regional courts of appeal, and the final decisions of regional courts of appeal to the Court of Cassation, under some conditions indicated in laws.

As a rule, parties can appeal only the decisions of first instance courts that exceed the amount of TRY5,880 for 2021 (this amount is amended annually) to be examined by the regional courts. Only the following decisions of courts of appeal can be appealed to the Court of Cassation:

- decisions in which the amounts do not exceed TRY78,630;
- disputes within the jurisdiction of the courts of peace, excluding disputes regarding real property rights;
- decisions of a regional court of appeal on the first instance court's decision regarding the place of jurisdiction, or the competence or authorisation of the court;
- decisions regarding ex parte proceedings;
- decisions on the correction of the Civil Registry;
- records of persons, excluding the cases that bear consequences regarding paternity; and
- decisions on temporary legal protections.

Both the final decisions of regional courts of appeal and decisions of the Court of Cassation may be appealed within two weeks of the notification being served. The appeal process is the same for all civil cases.

On the other hand, the rejection of a decision on the acceptance of a preliminary injunction request can only be appealed together with the final decision.

8.2 Factual or Legal Review

Under the first step of the Turkish Appeal Regime (ie, bringing the decision of the first instance courts to the regional courts of appeal), the regional court of appeal reviews both the factual and legal issues of the case. In other words, the regional court of appeal examines:

- whether the particular court has considered all evidence provided by the parties;
- whether the court has analysed the facts of the cases properly; and
- whether the court has applied and interpreted the law in an appropriate manner.

In this regard, the regional court of appeal may re-hear witnesses, carry out on-site inspections, and collect the evidence that was referred by the parties but not collected by the first instance court. In addition, as a rule, the regional courts of appeal hold hearings for the sake of the right of defence. However, the parties cannot assert any claims or evidence at the regional court of appeal that they did not assert in the first instance trial. At the end of the appeal review, the regional court of appeal may uphold the decision of the first instance court, and conclude a new decision.

Conversely, appealing to the Court of Cassation is a legal remedy that aims to examine the decisions of the regional courts of appeal and ascertain whether the law and legislation were applied to the case properly; the Court of Cassation is not obliged to check facts or evidence. Unlike the regional courts of appeal, in principle the Court of Cassation examines the case file without holding a hearing. That being said, in cases where the decision of the regional court

exceeds TRY117,960 and one of the parties requests the hold of hearing on their appeal petition, the Court of Cassation must hold a hearing. At the end of the appeal, if the Court of Cassation upholds the decision of the regional court of appeal, the case will be returned to the first instance court or the regional courts of appeal.

Under Turkish law, it is possible to waive the right to appeal. However, since the decision of the court of first instance or the regional courts of appeal will be deemed accepted with all its consequences in the case of a waiver, the waiving party cannot reserve any terms and conditions in its waiving petition.

9. CRIMINAL OFFENCES

9.1 Prosecution Process, Penalties and Defences

As described in **1.14 Criminal Liability**, there are two different provisions under Turkish Law that regulate criminal liability in the misappropriation of trade secrets: Article 62 of the TCC and Article 239 of the TCC. Criminal prosecution can be initiated with the complaint of the complainant for both crimes.

With reference to Article 55 of the TCC and according to the provisions in Article 62 of the TCC regarding trade secrets, imprisonment or a judicial fine for up to two years can be imposed on individuals or the representatives of legal entities who:

- disclose others' business and manufacturing secrets unlawfully (ie, in secret and without permission or by other unlawful means) and intentionally; and
- entice employees, attorneys or other workers to reveal their employers' and clients' manufacturing or trade secrets.

On the other hand, Article 239 of the TCC regulates criminal liability for individuals who obtain information or documents that constitute trade secrets, banking secrets or customer secrets in the course of their title, duty, profession or art. Individuals who disclose such information or documents, or who provide them to unauthorised persons, shall be punished with imprisonment of one to three years and a punitive fine up to 5,000 years.

The process starts with the filing of a criminal complaint before a prosecutor's office. The complainant must apply to the law enforcement authorities or the chief public prosecutor's office within six months of the occurrence of the trade secret theft (Article 73 of the Criminal Code). As soon as the prosecutor finds out about a situation that gives the impression that a crime has been committed, he/she conducts an investigation to decide whether to file a public lawsuit; if the prosecutor reaches a sufficient suspicion that the crime was committed at the end of the investigation, he/she prepares an indictment and submits it to the court, and thus the criminal trial begins.

According to Article 62 of the TCC, those who deliberately commit one of the unfair competition acts outlined in Article 55 are punished. Therefore, unlike civil proceedings, the defendant cannot be punished in cases where he/she did not disclose the trade secrets on purpose. In this scope, a perpetrator may make a defence that he/she did not disclose the trade secret or did not know that the information was a trade secret, or that they disclosed it unintentionally. However, such defence cannot be made in civil proceedings, in which the defendant can only claim that he/she did not disclose trade secrets or did so lawfully. In other words, the absence of intention cannot be the defendant's defence in civil proceedings.

The complainants can request search and seizure orders from the public prosecutor or the criminal judge, and can attend the raids to be conducted for the seizure of evidence with the law enforcement officers.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 Dispute Resolution Mechanisms

Mediation and arbitration are the most commonly used ADR processes in Turkey. However, due to the nature of trade secrets violation, civil and commercial litigation as well as criminal litigation are more likely in Turkey.

Mediation is compulsory for money claims involving trade secret civil litigation. In other words, the use of mediation for trade secrets litigation is common.

When it comes to arbitration, obviously parties must agree on this process following a request raised by the claimant in the cease-and-desist letter or during the mediation process. Given the nature of such disputes, it is less likely for the defendants to consent to an ADR process that will potentially accelerate the proceedings. The defendants in these types of cases might understandably be more lenient towards litigation with two tiers of high court review.

Cetinkaya is a full-service law firm based in Istanbul that represents international institutions, national governments, multinational companies, Turkish conglomerates and high net worth individuals. Cetinkaya regularly acts in high-value and precedent-setting cases, successfully representing clients in disputes across a range of industries in Istanbul and Turkey. Alongside

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