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Droit Public

Der Jurist in Der Modernen Internationalen Gesellschaft

Prof. Dr. Ingo von Münch

I. Der Jurist

Wer als älterer Mensch zu jungen Juristen spricht, wird sich zunächst an den Beginn seines eigenen Jurastudiums erinnern. Mein Jurastudium begann im Jahre 1951 an der Johann-Wolfgang-Goethe-Universität in Frankfurt am Main. Der 2. Weltkrieg war in Europa im Mai 1945 zu Ende gegangen. Deutschland lag infolge der ständigen Luftangriffe der Alliierten weitgehend in Trümmern. Als ich mein Jurastudium aufnahm, hatte der Wiederaufbau des durch den Krieg zerstörten Deutschland schon begonnen. Darf man stolz auf sein Heimatland sein? Ich bin stolz auf Deutschland, unter anderem weil aus diesem damals zerstörten, besiegten, demoralisierten und verarmten Land, das zudem noch Millionen Flüchtlinge und Vertriebene aus dem Osten Deutschlands aufgenommen hatte, die drittstärkste Wirtschaftsnation der Welt geworden ist. Einen nicht unbedeutenden Anteil an diesem eindrucksvollen wirtschaftlichen Erfolg haben auch die in Deutschland arbeitenden Türken geleistet. In Deutschland leben zurzeit fast 1,5 Millionen Türken. Scherzhaft wird Berlin als die drittgrößte türkische Stadt bezeichnet. In ganz Deutschland gibt es für zahlreiche türkische Staatsangehörige oder für 530.000 Personen mit doppelter Staatsangehörigkeit (deutsch und türkisch) Arbeitsplätze und Ausbildungsplätze.

Das Stichwort "Ausbildung" führt uns zur Wahl eines akademischen Studiums. Warum haben Sie sich für das Jurastudium entschieden? Diese gleiche Frage an jeden Einzelnen von Ihnen wird zu unterschiedlichen

Antworten führen. Bestimmendes Motiv für die Wahl des Jurastudiums kann ein Vorbild in der Familie (Eltern, Großeltern) sein; oder eine persönliche Verletzung, die das Interesse für Recht und Unrecht geweckt hat; oder die Hoffnung auf ein gutes Einkommen; oder das Wissen um vielfältige berufliche Möglichkeiten; oder eine Verlegenheitswahl für Unentschiedene. Der prominente Schweizer Rechtsanwalt Peter Nobel, einer der erfolgreichsten Juristen seines Landes, hat auf die Frage, warum er Rechtswissenschaft studieren wollte, geantwortet: "Ich war immer eine Art Gerechtigkeitsfanatiker". Und auf die Frage, was die Faszination des Rechts sei, gab er die Antwort: "Dass es allgegenwärtig ist. Dass es menschengemacht ist und trotzdem bis in die letzten Fragen der Philosophie hineingeht. Recht ist ungeheuer vielfältig. Es gibt nie zweimal den gleichen Fall."¹ Diese Feststellung ist richtig, und das Bemühen um Gerechtigkeit ist eine in hohem Maße sinnvolle Tätigkeit.²

Frage ich mich selbst, was der Grund für mich war, Jura studieren zu wollen, so kann ich – wenn ich ehrlich bin – keine sehr präzise Antwort geben. Ich kann zunächst nur sagen, welches keine Gründe für mein Jurastudium waren: Ich stamme nicht aus einer Juristenfamilie, ich hatte nicht eine persönliche Verletzung durch an mir begangenes Unrecht erlitten, und finanzielle Erwartungen spielten in meiner Generation in Deutschland noch nicht die Rolle wie heute. Studienfächer, die später in Deutschland sehr beliebt wurden, nämlich Wirtschaftswissenschaften oder Psychologie oder Sozialwissenschaften, waren damals wenig nachgefragt. Naturwissenschaftliche Fächer schieden wegen meiner zu schwachen Leistungen in Mathematik aus. Für mich kamen als Alternative zu Jura nur entweder Medizin oder Geschichte oder Journalistik in Betracht. Warum habe ich mich für Jura entschieden?

Es war, so meine Rückschau, kein felsenfester Entschluss und keine alternativlose Entscheidung, sondern mehr eine intuitive, gefühlsmäßige Wahl. Ich hatte in meiner Jugend in einem Staat gelebt, der bis zum Ende des Krieges und damit bis zum Ende der Nazi-Herrschaft kein Rechtsstaat gewesen war, sondern ein Staat, in dem Willkür herrschte und das Gegenteil von Gerechtigkeit. Menschenrechte waren ein Fremdwort in jener dunklen Zeit. Recht als Gegenteil von Unrecht war vielleicht ein

Magnet, der junge Menschen (wie auch mich) anzog. An guten Gesetzen in irgendeiner Form mitzuwirken, bedeutete ja auch, etwas für die Gesellschaft, in der man lebte, zu tun. Dies alles war aber beim Beginn meines Jurastudiums nicht fest umrissen sondern noch ziemlich vage.

Weder in meinem ersten Studiensemester, ja nicht einmal während des späteren Verlaufes meines Jurastudiums, hatte ich schon – anders als manche meiner Mitstudenten – ein festes Berufsziel vor Augen. Tatsächlich eröffnet ein mit Erfolg abgeschlossenes Jurastudium viele berufliche Möglichkeiten – ganz gewiss ein Vorzug gegenüber einigen anderen Studienfächern (die aber selbstverständlich alle ihren Wert haben). Die breite Skala der juristischen Berufe umfasst z.B.: Rechtsanwalt; Richter; Verwaltungsbeamter; Diplomat; Angestellter in internationalen Organisationen; Journalist (fest angestellt oder frei); Manager in der Wirtschaft oder in Banken oder in Versicherungsunternehmen oder in der Kultur; Hochschullehrer; schließlich auch Politiker.

Zur Rolle des Juristen in der Politik ist festzustellen, dass Politik sich nicht nur, aber doch weitgehend mit der Kreation von Gesetzen und internationalen Verträgen befasst, also mit Recht. Deshalb sind Juristen als Politiker nicht selten. Von den zehn Bundespräsidenten der Bundesrepublik Deutschland waren vier Juristen³, von den acht Bundeskanzlern waren drei Juristen⁴. Die gegenwärtige deutsche Regierungschefin Angela Merkel hat allerdings nicht Jura studiert sondern Physik (was eine Erklärung für den sehr rationalen, pragmatischen und unaufgeregten Regierungsstil der Kanzlerin Merkel ist). Der mächtigste Minister in der gegenwärtigen deutschen Bundesregierung ist Bundesfinanzminister Wolfgang Schäuble – ein Jurist. Noch mächtiger ist allerdings der Präsident der USA, Barack Obama, auch er ein Jurist (wie auch seine Ehefrau Michelle).

Wenn ein Jurist in jungen Jahren mit dem Gedanken spielt, später einmal Politiker zu werden, so würde ich ihm den Rat geben, diesen Schritt nicht zu früh zu gehen, sondern erst in dem erlernten und praktizierten juristischen Beruf etwas zu leisten und darin ein gewisses Renommee zu erwerben. Ich selbst bin nach Abschluss meines Jurastudi-

ums zwar schon in eine politische Partei eingetreten. Ich bin aber erst rd. 30 Jahre später, nämlich im Alter von 55 Jahren, politisch aktiv geworden, also zu einem Zeitpunkt, als ich schon viele Jahre als Juraprofessor tätig gewesen war. Meine Erfahrung, die ich gern an junge Menschen weitergeben möchte, ist: Wenn man als Politiker seinem ursprünglichen Beruf verbunden bleibt, diesen also nicht endgültig verlässt, gibt dieses Faktum dem Politiker eine gewisse Unabhängigkeit.

Nicht jeder Jurist kann Präsident der USA werden. Auch kann nicht jeder Jurist gigantischen finanziellen Reichtum erwarten⁵. Für das Fach Recht wird – anders als z.B. für Ökonomie, Medizin, Chemie, Physik, Literatur – kein Nobelpreis verliehen. Ein Jurist kann für seine Arbeit nur selten große Publicity erwarten, außer wenn er als Strafverteidiger in einem spektakulären Mordprozess tätig wird. Und dennoch: Die Wahl, nach abgeschlossenem Jurastudium, einen juristischen Beruf zu ergreifen, ist eine gute Wahl; denn sich mit Recht zu beschäftigen ist nicht nur für Idealisten eine schöne und sinnvolle Aufgabe.

Immer wieder ergeben sich interessante Rechtsfragen – hierzu nur drei Beispiele:

1. Bei Fußballspielen kommt es nicht selten zu Ausschreitungen von fanatischen Anhängern ("Fans"). Die Polizei muss deshalb verstärkt Einsatzkräfte an den Ort des Geschehens schicken. Dürfen die Kosten für diesen Polizeieinsatz dem Fußballverein (welchem?) oder der Fußball-Liga in Rechnung gestellt werden?
2. Wenn bei einer Parlamentswahl keine Partei die absolute Mehrheit der Sitze im Parlament erlangt und deshalb eine Koalitionsregierung aus mehreren Parteien gebildet werden muss – ist das Abkommen über die Bildung der Koalitionsregierung ein rechtlich bindender Vertrag oder nur ein Gentlemen Agreement?
3. War der Abwurf der Atombombe auf Hiroshima und Nagasaki im August 1945 ein Verstoß gegen das Völkerrecht oder rechtmäßig?

Der Jurist lernt systematisch zu denken, er muss Wesentliches von Unwesentlichem unterscheiden, er muss argumentieren können, und er muss sich in einer juristisch präzisen, aber zugleich allgemein verständlichen Sprache ausdrücken können (zur Sprache: nicht selten sind gute Juristen auch zu bekannten Literaten geworden, z.B. Louis Begley aus den USA und Bernhard Schlink aus Deutschland). Schließlich: Auch junge Juristen werden einmal alt. Der alte Jurist hat gegenüber gleichaltrigen Menschen mit anderen Berufen den Vorteil, dass er nicht – wie der Chemiker – ein Labor benötigt, nicht – wie der Mediziner – eine Arztpraxis, nicht – wie der Pilot – ein Flugzeug, sondern nur einen Schreibtisch oder einen Personal Computer. Interessant ist in diesem Zusammenhang auch, dass Richter und Professoren in Deutschland nach Erreichen der Altersgrenze (Pensionierung) nicht selten als sog. Of Counsels in Anwaltskanzleien einsteigen. Pensionierte Richter betätigen sich mehr und mehr auch als Mediatoren, d.h. als außergerichtliche Vermittler in Rechtstreitigkeiten⁶.

II. Die moderne Gesellschaft

Die bereits erwähnte Tatsache, dass ein abgeschlossenes Jurastudium den Zugang zu vielen unterschiedlichen Berufen eröffnet, führt bereits in die Position des Juristen in der modernen Gesellschaft. Unter dem Begriff "moderne Gesellschaft" wird hier die gegenwärtige Gesellschaft verstanden. Deshalb bedarf es hier keiner Erörterung, seit wann man von der "modernen Gesellschaft" sprechen kann, etwa von einem Beginn mit der Industrialisierung oder – für die Rechtsgeschichte interessant – mit der Epoche der großen Kodifikationen, vor allem im Verfassungsrecht, im Zivilrecht und im Strafrecht.

Die moderne, also die gegenwärtige Gesellschaft ist kein monolithischer Block, sondern ein Puzzle aus unendlich vielen verschiedenen Bestandteilen und aus unendlich vielen verschiedenen Entwicklungen. Trotz dieser Unterschiede im Einzelnen können vier Charakteristika der modernen Gesellschaft genannt werden; es sind dies

1. Emanzipation
2. Innovation
3. Spezialisierung
4. Internationalisierung.

Zu 1. Emanzipation: Die Emanzipation, d.h. die Verselbständigung des Menschen als Person mit eigenen Rechten, ist ein geistiges Kind der Aufklärung des 18. und 19. Jahrhunderts. In der Geschichte des Rechts ist die Emanzipation untrennbar mit der Entwicklung des Gedankens des Rechtsstaates verbunden (das in meinen Augen wichtigste Buch zur Bedeutung des Rechtsstaates in deutscher Sprache stammt von einem Professor, der an Ihrer Fakultät lehrt, nämlich von Prof. Philip Kunig⁷). Mit dem Rechtsstaat untrennbar verbunden ist die Gewährleistung von Menschenrechten, z.B. die rechtliche Gleichheit von Mann und Frau. Noch vor 100 Jahren waren Frauen in juristischen Berufen eine absolute Rarität. In der modernen Gesellschaft haben dagegen Frauen fast überall auf der Welt Zugang zu juristischen Berufen; es gibt nicht wenige Beispiele für höchst erfolgreiche Juristinnen wie die als Rechtsanwältin tätige Britin Chery Blair (die Ehefrau des ehemaligen britischen Premierministers Tony Blair, übrigens auch ein Jurist) oder die auf Menschenrechtsangelegenheiten spezialisierte libanesische Rechtsanwältin Amal Alamuddin (die Ehefrau von George Clooney) oder die frühere Chefanklägerin beim Internationalen Strafgerichtshof Carla del Ponte. Würde die nächste Präsidentin der USA Hillary Clinton heißen, würde damit wieder eine Juristin an der Spitze der Weltmacht USA stehen (deren Ehemann, der frühere US-Präsident Bill Clinton, übrigens auch ein Jurist war). In Deutschland ist gegenwärtig bei Frauen der Beruf der Richterin besonders beliebt; der Grund dafür ist, dass der Beruf als Richterin wegen der relativ disponiblen Dienstzeiten als gut vereinbar mit einer Familie gilt. Tatsache ist, dass der Anteil der Frauen im höheren Justizdienst (also als Richterinnen und Staatsanwältinnen) in Deutschland kontinuierlich steigt. Schon im Jahr 2013 lag dieser Anteil in Hamburg bei 51,7 %, in Berlin bei 50,2 %⁸. Sowohl das Amt des Präsidenten des obersten deutschen Gerichts, nämlich des Bundesverfassungsgerichts,

als auch das Amt der höchsten deutschen Anklägerin, nämlich der Generalbundesanwältin, ist bereits von Frauen bekleidet worden (Jutta Limbach bzw. Monika Harms). An der Spitze des höchsten deutschen Arbeitsgerichts (das Bundesarbeitsgerichts) steht zurzeit ebenfalls eine Frau (Charlotte Schmidt). Der Jurist in der modernen internationalen Gesellschaft ist also auch die Juristin.

Zu 2. Innovation: Die Fortschritte in den letzten Jahren in Technik, Naturwissenschaften und Medizin sind – dies kann man ohne Übertreibung sagen – phänomenal. Als ich im Jahre 1951 mein Jurastudium begann, gab es noch keine friedliche Nutzung der Kernenergie, noch keine Weltraumfahrt, noch kein weit verbreitetes Fernsehen, noch keine Hochgeschwindigkeitszüge, noch keine Organtransplantationen. Heute arbeiten die großen Automobilkonzerne bereits an der Konstruktion selbstfahrender – also durch Roboter gesteuerte – Autos. Heute werden nicht nur Herzen transplantiert sondern im Gespräch ist bereits die Transplantation von Köpfen – ein unheimlicher Gedanke.

Die für das Alltagsleben und für die Rechtswissenschaft vermutlich wichtigste Innovation betrifft die IT-Technik. In der Zeit meines Jurastudiums waren Internet, e-Mail, Personal Computer, I-Phon, Sims, Facebook, Google, Apple, Wikipedia usw. usw. unbekannt. Dies alles sind Innovationen, die für die meisten Menschen heute – im Zeitalter der Kommunikation und des Computers – selbstverständliche Gebrauchsgegenstände des täglichen Lebens sind. Es ist kein Wunder, dass alle Innovationen zu neu zu schaffenden Regelungen im Recht führen müssen. Auch wenn das Recht neben den traditionellen Methoden der Auslegung eine dynamische Auslegung kennt (deren Berechtigung bei der Auslegung z.B. der US-amerikanischen Verfassung durch den Supreme Court eine umstrittene Rolle spielt), so kann es technische Innovationen geben, auf welche die bisher geltenden gesetzlichen oder vertraglichen Regelungen einfach nicht passen oder nur in früher nicht vorgesehenen Kombinationen. Als Beispiel sei aus dem zivilrechtlichen Computerrecht der Fall genannt, in welchem die Standardsoftware Fehler enthält und an neuere Anforderungen angepasst werden muss⁹. Die Hersteller

bieten deshalb einen Service an, der "Softwarepflege" genannt wird. Der Service enthält hier folgende Leistungen

- a) Dem Kunden wird ein neuer Stand der Standardsoftware überlassen. Er bekommt also eine neu hergestellte Ware. Im System des deutschen Bürgerlichen Gesetzbuches von 1900 ist das Kaufrecht.
- b) Der Kunde hat Anspruch auf Fehlerbeseitigung. Im System des Bürgerlichen Gesetzbuches ist das Werkvertragsrecht.
- c) Der Kunde hat Anspruch auf Beratung bei Störungen. Im System des Bürgerlichen Gesetzbuches ist das Dienstvertragsrecht.

Der Wettbewerbsdruck zwischen den Herstellern in der IT-Branche führt auch dazu, dass alles immer schneller gehen muss. Die schnellste Rechenmaschine der Welt kann unvorstellbar viele Rechenoperationen in unvorstellbar kurzer Zeit durchführen. Eine der schnellsten Rechenmaschinen der Welt befindet sich im Klimarechenzentrum der Universität Hamburg; sie kann in einer Sekunde 10^{15} Rechenoperationen durchführen. Wenn Schnelligkeit in der modernen Gesellschaft ein Trumpf ist, wird auch die Gesetzgebungsmaschine in vielen Ländern schneller als früher laufen. Diese Tendenz ist eine Herausforderung nicht nur für die Politik, sondern auch für die Juristen; denn sie müssen die Fähigkeit entwickeln, sich immer wieder auf neue juristische Herausforderungen im Beruf einzustellen.

Zu 3. Spezialisierung: Die technischen Innovationen, aber nicht nur diese bewirken auch eine immer stärkere Spezialisierung des Rechts. Aus bisher schon bekannten und dem Juristen vertrauten Rechtsgebieten entwickeln sich ganz neue, umfassende Rechtsgebiete mit neuen speziellen Inhalten. Ein besonders gutes Beispiel hierfür ist das Umweltrecht. Dieses heute umfangreiche weltweite Rechtsgebiet hat sich in Deutschland aus kleinsten Anfängen, nämlich als Schutz vor Belästigungen im zivilrechtlichen Nachbarschutz und im öffentlich rechtlichen Polizeirecht, entwickelt. Aus dem Völkerrecht ist der Trail Smelter-Fall als "leading case" bekannt¹⁰. In diesem Fall ging es um Immissionen, die von einer

Fabrik auf kanadischem Staatsgebiet sich über die Grenze auf das Staatsgebiet der USA schädlich auswirkten. Heute sind der Klimawandel und die häufigen Wirbelstürme im Pazifik ein Beispiel für die Gefahren, die den natürlichen Lebensgrundlagen drohen. Es ist deshalb wichtig, dass die Rechtswissenschaft sich mit dem Schutz der Umwelt durch die Ausgestaltung des nationalen und internationalen Umweltrechtes befasst. Erwähnenswert ist in diesem Zusammenhang, dass an der juristischen Fakultät, an der Sie studieren, mit Prof. Philip Kunig einer der renommiertesten deutschen Forscher auf dem Gebiet des Umweltrechts lehrt; Prof. Kunig war z.B. an dem Projekt eines deutschen Umweltgesetzbuches beteiligt.

Für die Spezialisierung des Rechts können neben dem Umweltrecht noch etliche weitere Rechtsgebiete genannt werden, die sich zu speziellen Rechtsgebieten entwickelt haben. Beispiele hierfür sind das Lebensmittelrecht, das Recht des Verbraucherschutzes, das Medizinrecht, das Sportrecht (insbesondere auch Rechtsfragen des Dopings und der Dopingkontrolle), das Computerrecht, das Reisevertragsrecht, das Recht des Meerestiefseebergbaues, das Völkerstrafrecht, das Weltraumrecht, das Kernenergierecht, das Recht der Datenverarbeitung und des Datenschutzes (auch Recht der informationellen Selbstbestimmung genannt) und – für die Mitgliedstaaten der Europäischen Union besonders wichtig – das Europäische Gemeinschaftsrecht. Die Entwicklung dieser speziellen Rechtsgebiete hat auch die praktische Konsequenz, dass entsprechende darauf spezialisierte Juristenvereinigungen und neue juristische Fachzeitschriften gegründet worden sind. Beispiele für letztere sind die Zeitschriften "Computer und Recht", "Recht & Psychiatrie" und "Recht der Erneuerbaren Energien."

Der immer weiter um sich greifenden Spezialisierung im Recht hat der Gesetzgeber in Deutschland dadurch Rechnung getragen, dass er als eine besondere fachspezifische Qualifikation für Rechtsanwälte die Einrichtung des sog. Fachanwaltes eingeführt hat, z.B. den Fachanwalt für Arbeitsrecht, den Fachanwalt für Familienrecht und den Fachanwalt für Verwaltungsrecht. Insgesamt gibt es 21 verschiedene Arten von Fachanwälten. Die immer stärker werdende Spezialisierung im Recht

hat auch bei den deutschen Gerichten zur Einrichtung auf bestimmte Rechtsgebiete spezialisierter Spruchkörper geführt, z.B. zu Kammern für Presserecht oder für Wettbewerbsrecht. Der Jurist in der modernen Gesellschaft wird daher nicht vermeiden können, sich zu irgendeinem Zeitpunkt zu spezialisieren. Für die berufliche Orientierung des Juristen heute ist schließlich auch eine weitere Tendenz der Spezialisierung von Interesse, nämlich eine zusätzliche Spezialisierung innerhalb der Spezialisierung. Was damit gemeint ist, sei an folgendem Beispiel erklärt: Das Umweltrecht ist bereits als ein Spezialgebiet des Rechts genannt worden. Das Umweltrecht seinerseits lässt sich aber wiederum in andere (engere) Spezialgebiete unterteilen. Ein Beispiel dafür ist das Recht der Abfallbeseitigung. Zu welchen dramatischen Folgen eine unbefriedigende Abfallbeseitigung führt, zeigen die gewalttätigen Proteste der Bevölkerung in Beirut gegen die Schließung einer Mülldeponie und die daraus entstandenen Müllberge in der Stadt.

III. Die internationale Gesellschaft

Die moderne Gesellschaft, in welcher der Jurist heute tätig wird, ist mehr als früher auch eine internationale Gesellschaft. Die Welt ist zwar kein Dorf geworden, aber die fünf Kontinente sind zusammengedrückt. Ein charakteristisches Merkmal der modernen internationalen Gesellschaft ist die stark gewachsene Mobilität – nicht nur der Gedanken sondern auch der Menschen und des Kapitals über staatliche Grenzen hinweg. Die Mobilität der Menschen zeigt sich in der Migration von Arbeitskräften, im Austausch von Studierenden, im Massentourismus, gegenwärtig aber auch in der riesigen Zahl der Flüchtlinge, die sich zurzeit in der Türkei, in Griechenland, in Italien, in Österreich, in Mazedonien, in Ungarn, im Libanon, in Deutschland und in anderen Ländern aufhalten: Gründe für diese Fluchtbewegung können Bürgerkrieg oder politische Verfolgung oder auch nur die Aussicht auf bessere Lebensbedingungen sein. Politische Verfolgung wirft Fragen des Rechts auf, nämlich des Asylrechts. Der Kampf gegen Armut, z.B. durch Entwicklungshilfe an Länder der sog. Dritten Welt, ist dagegen weniger eine Frage des Rechts als der Solidarität.

Die Internationalisierung der modernen Gesellschaft dokumentiert sich auch in der wachsenden Zahl der Akteure auf der internationalen Ebene, konkret: der wachsenden Zahl der Subjekte des Völkerrechts, d.h. der Träger völkerrechtlicher Rechte und Pflichten. So hat die Zahl der nach wie vor in der Praxis wichtigsten Völkerrechtssubjekte, nämlich der Staaten, sich in neuerer Zeit vervielfacht. Allein auf dem Boden des früheren Osmanischen Reiches haben sich zahlreiche neue Staaten etabliert. "Balkanisierung" ist eine kritische Bezeichnung für die Zersplitterung eines früher einheitlichen geographischen Raumes. Das Ende der Kolonialreiche führte zur Unabhängigkeit früherer Kolonien, früherer Protektorate und früherer Mandatsgebiete und Treuhandsgebiete. Als der Völkerbund 1919 gegründet wurde, zählte er 45 Staaten zu seinen Mitgliedern, als die Organisation der Vereinten Nationen 1945 gegründet wurde, hatte sie 52 Mitglieder – eine Zahl, die inzwischen auf 193 Mitgliedsstaaten angewachsen ist (Stand: September 2015). Eine komplette Auflistung aller staatlichen Völkerrechtssubjekte müsste noch die Staaten hinzurechnen, die aus unterschiedlichen Gründen nicht Mitgliedsstaaten der Organisation der Vereinten Nationen sind, wie z.B. Taiwan und die sogenannten Zwergstaaten. Die wachsende Zahl der staatlichen Völkerrechtssubjekte vergrößert auch die Zahl der zwischenstaatlichen völkerrechtlichen Verträge. So ist z.B. die Bundesrepublik Deutschland Vertragspartner an hunderten völkerrechtlicher Verträge.

Internationale Akteure sind aber nicht nur die Staaten, sondern auch internationale Organisationen, und zwar sowohl Staatliche internationale Organisationen (International Governmental Organisations) als auch Nichtstaatliche internationale Organisationen (International Non-Governmental Organisations). Beispiele für erstere sind die bereits erwähnte Organisation der Vereinten Nationen und die Nordatlantikpaktorganisation (NATO); Beispiele für letztere sind Amnesty International und das Internationale Olympische Komitee. Der Kreis der Völkerrechtssubjekte wird schließlich über die Staaten und die staatlichen Internationalen Regierungsorganisationen hinaus erheblich erweitert, sofern auch – entsprechend einer neueren Entwicklung im modernen Völkerrecht – den einzelnen natürlichen Personen, also dem Individuum,

ein völkerrechtlicher Status eingeräumt wird. Die Internationalisierung der Menschenrechte wirkt insoweit als eine starke Schubkraft.

Der Jurist, der nicht als Diplomat im Auswärtigen Dienst seines Landes oder in einer internationalen Organisation tätig ist, wird allerdings in der Regel mit dem Völkerrecht nur wenig in Berührung kommen. International ist aber in der modernen Gesellschaft heute nicht nur das Völkerrecht, sondern auch in gewissem Umfang das Zivilrecht, z.B. in Form des Familienrechts, vor allem aber im Wirtschaftsrecht. Die Globalisierung der Wirtschaft in der modernen Gesellschaft hat zu einer im Vergleich zu früheren Zeiten unvorstellbaren Internationalisierung des Wirtschaftsrechts geführt. Die Verflechtung von Wirtschaftsunternehmen, die in verschiedenen Staaten ihren Sitz haben, durch Kapitalbeteiligungen führt auch zu einer Verflechtung des Rechts und damit wiederum zur internationalen Berufstätigkeit von zahlreichen Rechtsanwälten. Es gibt inzwischen internationale Anwaltsfirmen, in denen Hunderte von Rechtsanwälten in Büros in zahlreichen verschiedenen Staaten arbeiten. Grenzüberschreitende Zusammenschlüsse von mehreren Unternehmen werfen fast immer komplizierte Rechtsfragen auf, die unter dem Stichwort "acquisition & merger" (= Erwerb und Zusammenschluss) gelöst werden müssen. An dem – inzwischen bereits wieder rückgängig gemachten – Zusammenschluss des deutschen Automobilherstellers Daimler mit dem US-amerikanischen Automobilhersteller Chrysler sollen seinerzeit (so sagt ein Gerücht) rd. 300 Juristen mitgearbeitet haben.

Die Tätigkeit von Rechtsanwälten betrifft die Rechtspraxis. Aber auch die Rechtswissenschaft, also die Theorie des Rechts (die aber stets auch auf die Praxis Bezug nimmt) wird immer internationaler. So spielt z.B. die Rechtsvergleichung in der modernen Rechtswissenschaft eine wichtige Rolle, ebenso internationale rechtswissenschaftliche Vereinigungen als Zusammenschlüsse von Juristen verschiedener Länder; für Jurastudenten ist in diesem Zusammenhang die "European Law Students Association" [elsa] zu nennen. Rechtswissenschaftliche Lehrbücher und Monographien werden in fremde Sprachen übersetzt. Im Mai 2015, also während der Krise um die Besetzung der Krim, wurde in Moskau die Übersetzung eines von neun deutschen Professorinnen und Professoren

verfassten Völkerrechtslehrbuches in die russische Sprache in der Residenz des deutschen Botschafters präsentiert. In Deutschland erscheint eine "Zeitschrift für chinesisches Recht". Nicht wenige Jurastudenten studieren ein oder zwei Semester an einer Rechtswissenschaftlichen Fakultät im Ausland, so wie im Mittelalter viele Studenten an der damals berühmten Universität Bologna in Italien studierten. Und heute gibt es nun die Deutsch-Türkische Universität in Istanbul, mit einer Juristischen Fakultät, mit exzellenten Professoren und mit interessanten und sympathischen Studenten und Studentinnen.

Ich beglückwünsche sie alle, die Sie heute mit Ihrem Jurastudium beginnen, zu der Wahl Ihres Studienplatzes und wünsche Ihnen Freude und Erfolg beim Studium!

Fußnoten

1 Interview „Wir sind global, universell“. Interview mit Roger Köppel und Lukas Maeder, in: DIE WELTWOCHEN Nr. 29 vom 16. Juli 2015, S. 52/53.

2 Aus der umfangreichen Literatur zum Begriff und zu den Problemen der Gerechtigkeit vgl. z.B. *Dokyun Kim*, Gerechtigkeit und Verfassung. Eine Rawlssche Deutung der bundesverfassungsgerichtlichen Formel "eine am Gerechtigkeitsgedanken orientierte Betrachtungsweise", Baden-Baden 2004; *Carsten Bäcker*, Gerechtigkeit im Rechtsstaat. Das Rechtsstaatsprinzip des Bundesverfassungsgerichts zwischen Grundgesetz und Gerechtigkeit, Tübingen 2015.

3 Gustav Heinemann, Richard von Weizsäcker, Horst Köhler, Roman Herzog.

4 Konrad Adenauer, Kurt Georg Kiesinger, Gerhard Schroeder.

5 Unter den zehn reichsten Menschen der Welt befindet sich kein einziger Jurist.

6 Dazu neuestens: *Alexander Längsfeld*, Anwaltpflichten und Mediation. Zu der Haftung des Parteianwalts zwischen der Rechtsferne der Mediation und der Rechtsbindung des Rechtsanwalts – zugleich eine Darstellung aktueller Rechtsfragen der Mediation, Berlin 2015, s. auch *Ulrike Rüssel*, Mediation in komplexen Verwaltungsverfahren, Baden-Baden 2004.

7 *Philip Kunig*, Das Rechtsstaatsprinzip. Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland, Tübingen 1986.

8 Angaben mit weiteren Zahlen aus den anderen Ländern der Bundesrepublik bei *Gerda Friedrichsen*, Justitia wird weiblich, in: *liberal* H. 4/2015, S. 48 f. (49).

9 Die Information über diese Gegebenheit und seine juristischen Implikationen verdanke ich Prof. *Michael Bartsch* (Karlsruhe); s. auch ausführlich *Michael Bartsch*, Das BGB und die modernen Vertragstypen, in: *Computer und Recht* H. 1/2000, S. 3 ff.

10 *Trail Smelter-Schiedsspruch*, in: *Report of International Arbitral Awards* Bd. III, 1905, S. 1938.

Droit Privé

Austritt und Ausschluss Der Gesellschafter Aus Einer Einfachen Gesellschaft im Neuen Türkischen Obligationengesetz Unter Berücksichtigung Der Deutschen BGB-Gesellschaft

*Assoc. Prof. Dr. Bilgehan Çetiner**

I. Allgemein

Unter einfacher Gesellschaft versteht man die vertragsmäßige Verbindung von zwei oder mehreren Personen zur Errichtung eines gemeinsamen Zweckes mit gemeinsamen Kräften und Mitteln. Die einfache Gesellschaft ist außerdem kein selbständiges, von ihren Gesellschaftern unabhängiges Rechtssubjekt. Die Gesellschaft als solche hat daher keine Rechte und Pflichten, es gibt nur Rechte und Pflichten der Gesellschafter. Da sie keine Rechtsfähigkeit besitzt, besitzt sie im Prozess auch keine Parteifähigkeit; sie kann daher weder als Klägerin auftreten, noch eingeklagt werden¹. Folglich ist ein wesentlicher Unterschied zwischen dem deutschen und türkischen Recht das Auftreten nach aussen. Nach der BGH-Rechtsprechung ist die (Aussen-) GbR rechtsfähig und parteifähig, soweit sie als Teilnehmer am Rechtsverkehr eigene (vertragliche) Rechte und Pflichten begründet². Dagegen geht die türkische Rechtsprechung immer noch davon aus, dass die einfache Gesellschaft selbst nicht rechts-

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¹ **Oruc Hami Sener**, *Adi Ortaklık*, Ankara 2008, S. 154; **Nami Barlas**, *Adi Ortaklık Temeline Dayalı Sözleşme İlişkileri*, İstanbul 2008, S. 68; Ümit Yaşar Doğanay, *Adi Şirket Akdi*, İstanbul 1968, S. 31.

² BGH, Urteil vom 29. Januar 2001, II ZR 331/00, BGHZ 146, 341.

fähig sei, sondern aus den von der Gesellschaft geschlossenen Geschäften ausschließlich die Gesellschafter selbst berechtigt und verpflichtet sind.

Die einfache Gesellschaft ist durch drei Merkmale gekennzeichnet; es sind das Element der Personenvereinigung, die vertragliche Grundlage und die gemeinsame Zweckverfolgung³. Sie stellt somit eine Personengesellschaft dar, in welcher es, in erster Linie auf die Persönlichkeit des einzelnen Gesellschafters und –im Vergleich zu den Handelsgesellschaften- weniger auf dessen Kapitalbeteiligung ankommt⁴. Dies hat zur Folge, dass die einfache Gesellschaft nach dem Willen des Gesetzgebers (Art. 639 TOG⁵) *ipso iure* aufgelöst wird, wenn die persönliche Leistung des Gesellschafters, etwa wegen des Todes eines Gesellschafters, nicht mehr erhältlich ist.

Die aus dem Prinzip des höchstpersönlichen Zusammenschlusses resultierende Auflösungsfolge hat jedoch eine Ausnahme, wonach die Parteien vertraglich vorsehen können, dass die verbleibenden Gesellschafter nach dem Ausscheiden eines Gesellschafters, sei es durch Tod, Kündigung oder aus anderen Gründen, die Gesellschaft weiterführen. Die Voraussetzungen und die Rechtsfolgen einer derartigen Veränderung im Gesellschafterbestand sind im revidierten türkischen Obligationengesetz (TOG) in den Artt. 633, 634, 635, 636 geregelt, die sich grundsätzlich an den Regelungen der §§ 736 ff. BGB orientieren, aber auch von diesen in wesentlichen Punkten abweichen.

II. Ausscheiden Bzw. Austritt Eines Gesellschafters

1. Ausscheidens- bzw. Austrittsgründe

Als mögliche Ausscheidensgründe sind in § 736/Abs. 1 BGB die Fälle der Kündigung, Tod eines Gesellschafters und Gesellschafterin-

³ Patrick M. Hoch, Auflösung und Liquidation der einfachen Gesellschaft, Zürich 2000, S. 2.

⁴ Hans Bollmann, Das Ausscheiden aus Personengesellschaften, Diss. Zürich 1971, S. 21 vd.

⁵ Türkisches Obligationengesetz vom. 01.07.2012.

solvenz aufgezählt. Die Gesellschafter sind jedoch nicht gehindert, im Rahmen der Privatautonomie weitere Ausscheidensgründe festzulegen⁶. Dieselben Gründe sind auch in Art 633 TOG benannt, wobei diese anders als im deutschen Recht nicht als Ausscheidens-, sondern Austrittsgründe im Rahmen der Fortsetzungsklausel geregelt sind. Das heißt, der kündigende oder in Konkurs geratene Gesellschafter oder der Erbe des verstorbenen Gesellschafters kann in den in Art. 633 TOG genannten Fällen seinen Austritt aus der Gesellschaft erklären, damit die Gesellschaft ohne ihn fortbesteht. Mit dem Ausscheiden hat der Austritt zwar gemeinsam, dass er ebenfalls zum Fortbestehen der gesellschaftlichen Bindung dient. Obgleich zeigt sich aber ein erheblicher Unterschied zum ersteren insofern, als beim Austritt des Gesellschafters nach Art. 633 TOG es einer Gestaltungsreklärung des ausscheidenden Gesellschafters bedarf. Gemäß § 736/Abs. 1 BGB scheidet dagegen der betroffene Gesellschafter beim Eintritt des fraglichen Grundes *automatisch* und *mit sofortiger Wirkung* aus der Gesellschaft aus⁷. Auf die eigenartige Rechtsstruktur des TOG und dessen Rechtsfolgen wird im nächsten Abschnitt eingegangen. Nachfolgend seien deshalb zunächst die einzelnen Ausscheidens- bzw. Austrittsgründe erörtert.

a. Die Kündigung

Kündigung ist ein gesetzliches Gestaltungsrecht des einzelnen Gesellschafters, die Auflösung der Gesellschaft durch eine einseitige, empfangsbedürftige Erklärung herbeizuführen. Der Teilhaber hat wohl ein unentziehbares Recht auf Kündigung, doch kann dieses Recht vertraglich verschieden ausgestaltet werden. So können die Parteien vereinbaren, dass die Gesellschaft unter den übrigen Gesellschaftern fortbestehen soll, wenn ein Gesellschafter die Gesellschaft kündigt⁸.

Beim Vorhandensein einer Fortsetzungsklausel führt in erster Linie die *ordentliche Kündigung* eines Gesellschafters zu dessen Ausscheiden.

⁶ MüKo-Ulmer/Schäfer, §736 BGB, N. 15.

⁷ MüKo-Ulmer/Schäfer, § 736 BGB, N. 8.

⁸ Staudinger/Habermeier, § 736 BGB, N. 6.

Nach Art. 639/Abs. 1 Ziff. 6 TOG wird die einfache Gesellschaft durch die ordentliche Kündigung eines Gesellschafters aufgelöst, wenn eine solche Möglichkeit im Gesellschaftsvertrag vorgesehen ist oder wenn die Gesellschaft auf unbestimmte Dauer oder auf Lebenszeit eines Gesellschafters eingegangen worden ist. Auch im deutschen Recht unterliegt jede unbefristete Gesellschaft des bürgerlichen Rechts nach der in § 723/Abs. 1 BGB enthaltenen Regel der ordentlichen Kündigung. Ob auch eine Kündigung aus wichtigem Grund nach Art. 639/Abs. 1 Ziff. 7 TOG⁹, § 723 BGB von einer Fortsetzungsklausel erfasst wird, stellt eine Auslegungsfrage dar¹⁰ und ist im Zweifel zu bejahen¹¹.

Anders als im deutschen Recht bedarf es im türkischen Recht zum Ausscheiden des kündigenden Gesellschafters aus der Gesellschaft nicht nur der Kündigungserklärung des betreffenden Gesellschafters, sondern darüber hinaus noch seiner Austrittserklärung. Die Ausscheidensfolge des kündigenden Gesellschafters beim Vorliegen einer Fortsetzungsklausel tritt erst dann ein, wenn dieser (oder sein Stellvertreter) nach der Kündigung auch seinen Austrittswillen ordnungsgemäß zum Ausdruck gebracht hat. Diese Erklärung ist auch wie die Kündigungserklärung an keine gesetzliche Form gebunden. Es stellt sich jedoch die Frage, was geschehen wird, wenn der kündigende Gesellschafter das ihm nach Gesetz zustehende Austrittsrecht nicht ausgeübt hat. Soll ein derartiges Schweigen zur Auflösung der Gesellschaft führen oder soll die Gesellschaft trotz der Kündigung mit dem kündigenden Gesellschafter fortgesetzt werden? Die erste Lösung ist genau das, was die übrigen Gesellschafter durch Vereinbarung einer Fortsetzungsklausel im Gesellschaftsvertrag vermeiden wollen und steht daher gegen deren im Vertrag zum Ausdruck gebrachten Willen. Der Fortbestand der Gesellschaft in ihrer ursprünglichen Zusammensetzung trotz der Kündigung eines Gesellschafters stimmt dagegen mit der parteidispositiven Rechtslage des Art. 633 TOG nicht überein.

⁹ Nach Vorstellung des türkischen Gesetzgebers ist die Auflösung der einfachen Gesellschaft bei Vorliegen eines wichtigen Grundes nur in Form von Gestaltungsurteilen geltend zu machen.

¹⁰ **Soergel/Hadding/Kießling**, § 736 BGB, N. 11; **Bamberger/Roth/Timm/Schöne**, § 736 BGB, N. 8.

¹¹ **MüKo-Ulmer/Schäfer**, § 736 BGB, N. 11.

Zu beachten ist, dass die im Gesellschaftsvertrag vereinbarte Fortsetzungsklausel nicht auf die *Austrittserklärung des Gesellschafters*, sondern auf dessen *Kündigung* zugeschnitten sein soll. Der Sinn und Zweck der Fortsetzungsklausel liegt darin, dass die Gesellschafter im voraus durch den Gesellschaftsvertrag für gewisse Auflösungsstatbestände die Auflösung ausschließen und Fortsetzung unter den übrigen Gesellschaftern vorsehen. Erklärt ein Gesellschafter die Kündigung der Gesellschaft, so greift die Fortsetzungsklausel ein, damit die nachteilige Folge der Auflösung der Gesellschaft nicht eintritt und die Gesellschaft ohne den Kündigenden fortbesteht. Mit anderen Worten, der Gesellschaftsvertrag beseitigt die Folge der Auflösung gerade dadurch, dass für den Fall der Kündigung das Ausscheiden des Kündigenden und die Fortsetzung der Gesellschaft mit den übrigen Gesellschaftern vereinbart werden. Es ist daher unzutreffend, dass Art. 633 TOG das Eingreifen dieser Rechtsfolge davon abhängig gemacht hat, dass der kündigende seinen Austritt aus der Gesellschaft erklärt.

Wir treten deshalb sehr dafür ein, dass die Kündigung der Gesellschaft zum automatischen Ausscheiden des Kündigenden führt, damit die Gesellschaft der Fortsetzungsvereinbarung entsprechend unter den übrigen Gesellschaftern fortbesteht. Dieses Ergebnis kann *de lege lata* dadurch begründet werden, dass beim Vorliegen einer auf den Fall der Kündigung bezogenen Fortsetzungsklausel die Kündigungserklärung eines Gesellschafters immer *implizit* seine Austrittserklärung beinhaltet. Wegen der Fortsetzungsklausel ist der kündigende Gesellschafter nicht mehr in der Lage, die Gesellschaft durch seine Kündigungserklärung zur Auflösung zu bringen und deshalb muss er nach dem Grundsatz von Treu und Glauben in Kauf nehmen, dass seine Kündigungserklärung sein Ausscheiden aus der Gesellschaft zur Folge haben wird.

b. Tod eines Gesellschafters

Abweichend von § 727 BGB und Art. 639/Abs. 1 Ziff. 2 TOG ist der Bestand der Gesellschaft trotz des Todes einzelner Gesellschafter unter bestimmten Voraussetzungen möglich. So können die Gesellschafter

im Gesellschaftsvertrag bestimmen, dass die Gesellschaft nach dem Tod eines Gesellschafters ohne dessen Erben bzw. unter den übrigen Gesellschaftern fortbestehen soll (*Fortsetzungsklausel*). Soll der Bestand der Gesellschaft vom Todes wegen nicht berührt werden und ist gleichzeitig allen oder gewissen potentiellen Erben die Mitgliedschaft der einfachen Gesellschaft zu sichern beabsichtigt, kann die Fortsetzungsklausel mit einer *Nachfolgeklausel* oder *Eintrittsklausel* gekoppelt werden¹². Beim ersten führt der Tod des Gesellschafters nicht zur Auflösung der Gesellschaft, sondern zu einem automatischen Anteilsübergang auf den oder die Nachfolger/Erben. Durch Vereinbarung einer Eintrittsklausel sind dagegen die Erben berechtigt, nach dem Tod des einzelnen Gesellschafters der einfachen Gesellschaft beizutreten.

Haben sich die Gesellschafter bei Abschluss des Gesellschaftsvertrages darüber geeinigt, dass beim Tod eines Gesellschafters die einfache Gesellschaft *unter den übrigen Gesellschaftern* weitergeführt werden soll, führt der Tod des Gesellschafters zum Ausscheiden von dessen Erben. Die überlebenden Gesellschafter müssen sich dann nur mit dem Abfindungsanspruch der Erben auseinandersetzen. Das türkische Recht kennt jedoch im Gegensatz zum deutschen Recht kein sofortiges und automatisches Ausscheiden der Erben im Fall des Todes eines Gesellschafters, wenn auch im Gesellschaftsvertrag die Fortsetzung nur durch überlebende Gesellschafter festgelegt wird. Gemäß Art. 633 TOG muss der Erbe des verstorbenen Gesellschafters für diese Rechtsfolge weiterhin seinen *Austritt* aus der Gesellschaft erklären.

Diese Regelung könnte nur in dem Fall einen Sinn haben, dass die Fortsetzungsklausel mit einer Nachfolgeklausel oder Eintrittsklausel zugunsten der Erben verbunden wäre. Die Mitgliedschaft des verstorbenen Gesellschafters geht beim Vorliegen einer Nachfolgeklausel mit allen Rechten und Pflichten als Teil des Nachlasses auf die Erben über. Falls die Erben diese Mitgliedschaft nicht übernehmen wollen, haben Sie zunächst die Möglichkeit, die Erbschaft nach Art. 605 TZGB auszuschlagen. Art. 633 TOG sieht nun eine weitere Möglichkeit vor, wonach der

¹² MüKo-Ulmer/Schäfer, § 736 BGB, N. 13; Sener, *Adi Ortaklık*, S. 445.

Erbe (oder die Erben) aus der Gesellschaft ohne weiteres austreten, ohne die Gesellschaft kündigen zu müssen.

Im Falle einer Fortsetzungsklausel verbunden mit einer Eintrittsklausel haben die Erben die Möglichkeit, als Mitglied in die Gesellschaft einzutreten. Die Eintrittsklausel stellt eine die übrigen Gesellschafter bindende Offerte an die Erben dar, der Gesellschaft beizutreten. Lehnt der eintrittsberechtigte Erbe die Offerte ab, wird die Gesellschaft dank der Fortsetzungsklausel trotz des Todes eines Gesellschafters unter den übrigen Gesellschaftern fortgesetzt. Die *Austrittserklärung* eines eintrittsberechtigten Erben ist in diesem Zusammenhang dann als *Ablehnung der Offerte* zu verstehen. Dies hat zur Folge, dass der Erbe nicht Mitglied der Gesellschaft wird und die Gesellschaft unter den übrigen Gesellschaftern fortbesteht.

Haben die Gesellschafter im Gesellschaftsvertrag vereinbart, dass die Gesellschaft nach dem Tod eines Gesellschafters *nur* unter den übrigen Gesellschaftern fortgesetzt wird, soll dann der Tod des Gesellschafters folglich zum Ausscheiden des Erblassers im Zeitpunkt seines Todes aus der Gesellschaft führen. Die Erben des durch den Tod aus der Gesellschaft ausgeschiedenen Gesellschafters werden konsequenterweise nie Mitglieder der Gesellschaft. Von einem Austreten oder Ausscheiden der Erben aus der Gesellschaft kann daher keine Rede sein. Für die Fortsetzung der Gesellschaft *allein* durch die überlebenden Gesellschafter ist dann nicht nötig und auch nicht möglich, dass der Erbe eine Austrittserklärung abgegeben hat. Dass die Regelung von Art. 633 TOG auch für einen solchen Fall eine Austrittserklärung des Erben für notwendig hält, ist sinnlos, weil ja der Erblasser selbst mit seinem Tod gleichzeitig auch seine Mitgliedschaft verloren hat und der Erbe nicht mehr in der Lage ist, aus einer Gesellschaft, deren Mitglied er nie war, auszutreten¹³. In diesem Fall gehört jedoch der Abfindungsanspruch zum Nachlass und steht den Erben des verstorbenen Gesellschafters zu.

¹³ So auch **Zekeriya Kursat**, Yeni Borçlar Kanunumuzda Adi Ortaklık Hükümlerinin Değerlendirilmesi, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt 70, Sayı 1, 2012, S. 312.

c. Konkurs bzw. Eröffnung eines Insolvenzverfahrens über das Vermögen eines Gesellschafters

Gemäß § 728/Abs. 2 BGB und Art. 639/Abs. 1 Ziff. 3 TOG wird die Gesellschaft durch die Eröffnung eines Insolvenzverfahrens über das Vermögen eines Gesellschafters aufgelöst¹⁴. Art. 639 spricht eigentlich von dem *Konkurs eines Gesellschafters* aber dieser Ausdruck wird auch als *Eröffnung des Konkursverfahrens* verstanden. Entscheidend ist daher hierfür im türkischen Recht die richterliche Entscheidung zur Eröffnung des Insolvenzverfahrens, im deutschen Recht das Wirksamwerden des Insolvenzeröffnungsbeschlusses, wofür eine richterliche Unterzeichnung des Beschlusses erforderlich ist¹⁵.

Haben die Gesellschafter für den Fall der Eröffnung des Insolvenzverfahrens über das Vermögen eines Gesellschafters eine Fortsetzungsklausel vereinbart, kommt es ebenfalls nicht zur Auflösung der Gesellschaft. Im deutschen Recht scheidet somit der Gesellschafter aus der Gesellschaft bei dem Eintritt eines solchen Ereignisses ohne weiteres aus. Im türkischen Recht steht dagegen dem in Konkurs gefallenen Gesellschafter nur ein *Austrittsrecht* zu. Ein gesetzliches Austrittsrecht des konkursiten Gesellschafters würde jedoch nur dann einen Sinn haben, wenn die Gesellschafter in dem Gesellschaftsvertrag die Fortsetzung der Gesellschaft im Falle der Insolvenzeröffnung *unter Einschluss des Insolvenzschuldners* vereinbart hätten. Der Insolvenzschuldner könnte dann entweder als Mitglied der werbenden Gesellschaft bleiben, sofern der Insolvenzverwalter den Anteil –beispielsweise gegen eine Vergütung seitens der Mitgesellschafter- aus der Insolvenzmasse freigibt, oder aus der Gesellschaft austreten mit der Folge, dass der Abfindungsanspruch in die Insolvenzmasse fällt.

Aus welchem Grund die einfache Gesellschaft nach Art. 633 TOG im Falle des Konkurses eines ihrer Gesellschafter *mit dem konkursiten Gesellschafter* fortbestehen soll, wenn dieser aus der Gesellschaft nicht

¹⁴ Zu beachten ist jedoch, dass anders als im deutschen Recht (§ 728/Abs. 1 BGB) das türkische Recht die Insolvenzfähigkeit der einfachen Gesellschaft nicht kennt.

¹⁵ Şener, Adi Ortaklık, S. 455.

austreten will, ist in der Tat nicht einzusehen. Davon abgesehen ist in Art. 633 TOG anerkannt, dass die Gesellschafter, die im Falle des Konkurses die Gesellschaft *unter den übrigen Gesellschafter* fortführen wollen, dies im Gesellschaftsvertrag vereinbaren können. Der Gesellschaftsvertrag, der eine auf den Fall des Konkurses bezogene Fortsetzungsklausel enthält, wird ohnehin mit Zustimmung des konkursiten Gesellschafters abgeschlossen. Dementsprechend soll die Ausscheidensfolge des konkursiten Gesellschafters bei dem Eintritt eines solchen Ereignisses automatisch eingreifen. Eine weitere besondere Austrittserklärung des konkursiten Gesellschafters gegenüber dem Gesellschafter oder ein Gesellschafterbeschluss wäre dann entbehrlich.

d. Zwangsverwertung des Liquidationsteils eines Gesellschafters oder dessen Bevormundung

Die Vorschrift des Art. 633 TOG enthält zwei weitere Ausscheidens- bzw. Austrittsgründe, nämlich die Fortsetzung der Gesellschaft unter den übrigen im Falle der Zwangsverwertung des Liquidationsteils eines Gesellschafters oder dessen Bevormundung. Diese Abweichung von der Regelung des § 736 BGB ist darauf zurückzuführen, dass Art. 639/Abs. 1/Ziff. 3 TOG diese Fälle als Auflösungsgründe der einfachen Gesellschaft regelt.

Eine Fortsetzungsklausel ist dann als Abweichung von der in Art. 639/Abs. 1/Ziff. 3 TOG angeordneten Auflösungsfolge für den Fall der Zwangsverwertung des Liquidationsteil eines Gesellschafters zulässig. Unter dem Begriff *Liquidationsteil* ist das Recht des Gesellschafters an seiner quotenmässigen Beteiligung am Gewinn und am Nettoergebnis der Liquidation bei Auflösung der Gesamthand zu verstehen¹⁶. Der Zwangsvollstreckung zugänglich ist daher nur der Liquidationsteil und der auf dessen Ermittlung und Ausrichtung gerichtete Anspruch auf Auflösung der Gemeinschaft und Liquidation des gemeinschaftlichen Vermögens mindestens bis zur Zuweisung von dessen anteilmässigem

¹⁶ BernerK/Meier-Hayoz, Art. 652 ZGB, N. 3.

Anspruch¹⁷. Die einfache Gesellschaft wird dann ohne weiteres aufgelöst, wenn ein gepfändeter Liquidationsteil zur Zwangsverwertung gelangt. Zu beachten ist jedoch, dass die Auflösung der Gesellschaft nicht infolge Pfändung oder Verwertungsbegehren, sondern erst durch die *Verwertung des Liquidationsanteils* erfolgt. Dass Art. 639/Abs. 1/Ziff. 3 TOG nicht zwingender Natur ist, versteht sich schon aus der neuen Regelung des Art. 633 TOG, wonach die Gesellschafter bei einer Zwangsvollstreckung gegen einen Gesellschafter vereinbaren, dass die Gesellschaft unter den übrigen weiterbestehen soll. In diesem Fall wird dann den Gläubigern im Rahmen der Verwertung des Liquidationsteils dasjenige zu zahlen, was der ausgeschiedene Gesellschafter bei der Auseinandersetzung erhalten würde, wenn die Gesellschaft zur Zeit seines Ausscheidens aufgelöst worden wäre (vgl. Art. 634 TOG).

Nach Art. 633 TOG können die Gesellschafter die Auflösung der Gesellschaft auch im Falle der Bevormundung durch Vereinbarung einer entsprechenden Fortsetzungsklausel abwenden. Die Gesellschaft besteht in diesem Fall mit den übrigen Gesellschaftern weiter, wenn ein Gesellschafter bevormundet und damit handlungsunfähig geworden ist.

Wie wir gesehen haben, reicht jedoch schon das Vorliegen einer Fortsetzungsklausel bezüglich der Zwangsverwertung des Liquidationsanteils oder der Bevormundung eines Gesellschafters für dessen Ausscheiden aus der Gesellschaft nicht aus. Es bedarf dazu nach Art. 633 TOG noch dessen *Austrittserklärung*.

2. Wirkungen der Fortsetzungsklausel

Im deutschen Recht scheidet der betroffene Gesellschafter aus der Gesellschaft beim Vorliegen eines Fortsetzungsgrundes aus, ohne dass es eines Gesellschafterbeschlusses oder einer Erklärung des betroffenen oder der anderen Gesellschafter bedarf. Die Gesellschaft wird von den übrigen Gesellschaftern ohne den Gesellschafter, in dessen Person der Fortsetzungsgrund eintritt, fortgesetzt.

¹⁷ BernerK/Meier-Hayoz, Art. 652 ZGB, N. 88.

Für das Wirksamwerden einer Fortsetzungsklausel ist es nach Art. 633 TOG jedoch erforderlich, dass der betroffene Gesellschafter, dessen Stellvertreter oder dessen Erbe eine *Austrittserklärung* gegenüber den übrigen Gesellschaftern abgibt. Anders ausgedrückt, die Rechtsfolgen des Ausscheidens dieses Gesellschafters und der Fortsetzung der Gesellschaft mit den übrigen Gesellschaftern treten erst mit der Austrittserklärung des Gesellschafters ein. Hier stellt sich jedoch die Frage, ob und wie die einfache Gesellschaft fortbestehen wird, falls der kündigende, konkursite, bevormundete Gesellschafter oder der Erbe des verstorbenen Gesellschafters aus der Gesellschaft nicht austreten will. Eine Antwort kann man weder im Gesetz noch in der Gesetzesbegründung finden. Die Fortsetzung der Gesellschaft *mit Einschluss* des betroffenen Gesellschafters oder dessen Erben steht dem in der Fortsetzungsklausel verankerten Willen der Gesellschafter zur Fortsetzung der Gesellschaft *unter den übrigen Gesellschaftern* entgegen. Die Vorschrift von Art. 633 TOG regelt selbst den Fall, dass die Gesellschafter im Gesellschaftsvertrag bestimmt haben, die Gesellschaft trotz Eintritt eines Auflösungsgrundes unter den übrigen Gesellschaftern fortbestehen solle. Aus demselben Grund ist auch die Auflösungsfolge der Gesellschaft zu verneinen, weil ja die Gesellschafter durch Vereinbarung einer Fortsetzungsklausel genau dieses Ergebnis abwenden wollen.

Da kein durchgreifender sachlicher Grund ersichtlich ist, warum für die einfache Gesellschaft des TOG grundsätzlich andere Rechtsfolgen gelten sollen als für die GbR, sollte nach der hier vertretenen Auffassung auch für das türkische Recht angenommen werden, dass die Gesellschaft beim Eintritt eines in Art. 633 TOG genannten Ereignisses ohne den betroffenen Gesellschafter (oder dessen Erben) fortbesteht. Es sprechen also gute Gründe dafür, das automatische Ausscheiden des betroffenen Gesellschafters mit dem Eintritt des Fortsetzungsgrundes auch im türkischen Recht anzuerkennen. Die Gründe hierfür sind:

a. Zum einen wird es in der Gesetzesbegründung ausdrücklich betont, dass bei der Gestaltung der Vorschrift die Regelung von § 736 BGB berücksichtigt wird. Wie wir gesehen haben, scheidet nach § 736 BGB der Gesellschafter beim Vorliegen eines Ausscheidensgrundes aus der

Gesellschaft aus, ohne dass es einer Austrittserklärung des betroffenen Gesellschafters bedarf. Nach der ständigen Rechtsprechung des türkischen Kassationsgerichts sollen die Gerichte bei der Auslegung einer Gesetzesvorschrift, die von einem fremden Gesetz übernommen wird, dessen Kommentierung durch die Literatur und Rechtsprechung berücksichtigen¹⁸. Sofern der türkische Gesetzgeber von einer bewussten Abweichung von der Regelung des § 736 BGB hinsichtlich der Wirkung der Fortsetzungsklausel nicht spricht, gibt es keinen Grund, dieselbe Rechtsfolge des Ausscheidens auch für den Anwendungsbereich des Art. 633 TOG nicht anzunehmen.

b. Zum anderen ist festzustellen, dass die Funktion des Art. 633 TOG nicht etwa darin besteht, den Gesellschaftern eine Vertragsgestaltung nur entsprechend dieser Vorschrift zu ermöglichen. Diese Möglichkeit haben Sie schon aufgrund der allgemein für alle Verträge geltenden Gestaltungsfreiheit. Der Vorschrift kommt somit nur die Funktion zu, die Notwendigkeit entsprechender gesellschaftsvertraglicher Vorsorge vor Augen zu führen und ihnen ein *Regelungsmodell* zur Verfügung zu stellen¹⁹. Beim Vorliegen einer in Art 633 TOG formulierten Form gestalteten Fortsetzungsklausel („...*die Gesellschaft unter den übrigen Gesellschaftern fortbestehen soll*“) kann davon ausgegangen werden, dass diese auch auf ein automatisches Ausscheiden des betroffenen Gesellschafters gerichtet ausgestaltet wird. Haben dann die Gesellschafter im Gesellschaftsvertrag vereinbart, dass beim Eintritt des betreffenden Ereignisses die Gesellschaft mit den übrigen Gesellschaftern fortbestehen wird, liegt es folglich nahe, dass sie sich auch darüber geeinigt haben, dass diese Rechtsfolge unabhängig von dem Willen des ausscheidenden Gesellschafters eintreten soll. Deshalb wird von dem Gesetzgeber erwartet, dass Art. 633 TOG ein dahin gehendes Regelungsmodell vorsieht.

Die Gesellschafter sind freilich nicht gehindert, im Rahmen der Privatautonomie im Gesellschaftsvertrag zu vereinbaren, dass bei Eintritt eines der in Art. 633 TOG genannten Gründe der betroffene Gesellschaf-

¹⁸ S. dazu YİBK vom 28.11.1945, 13/15, RG S. 6365; YİBK vom 20.09.1950, 4/10, RG S. 7576.

¹⁹ Vgl. MüKo-Ulmer/Schäfer, § 736 BGB, N. 6.

ter berechtigt sein soll, aus der fortbestehenden Gesellschaft auszutreten und die Gesellschaft unter dessen Ausschluss fortbesteht. Soweit im Gesellschaftsvertrag nur die Fortsetzung der Gesellschaft *unter den übrigen Gesellschaftern* vereinbart und keine weitere Voraussetzung vorgesehen wird, ist anzunehmen, dass die Fortsetzungsklausel beim Eintritt eines fraglichen Ereignisses automatisch wirkt und es auf die Zustimmung des auszuschließenden Mitglieds nicht ankommt. Die Regelungsmethode des türkischen Gesetzgebers versagt deshalb dort, wo ein eindeutiger Wille der Parteien feststeht, der darin besteht, die Gesellschaft ohne Zustimmung und Beteiligung des betroffenen Gesellschafters fortzusetzen; von einem solchen Willen ist angesichts der in Art. 633 TOG genannten Fortsetzungsklausel regelmäßig auszugehen.

Es verhält sich nun anders, wenn die Gesellschafter im Gesellschaftsvertrag die Fortsetzungsklausel darauf beschränkt haben, dass die Gesellschaft bei Eintritt eines der in Art. 633 TOG geregelten Gründe nicht aufgelöst wird und fortbesteht. In diesem Fall wird zwar der Fortbestand der Gesellschaft gesichert; jedoch mit Einschluss des kündigenden, konkursiten, bevormundeten Gesellschafters oder mit den Erben des verstorbenen Gesellschafters. Beim Vorliegen einer derartigen Fortsetzungsklausel kann der betroffene Gesellschafter, der nicht mehr als Mitglied der einfachen Gesellschaft bleiben will, nach Art. 633 TOG ein Austrittsrecht geltend machen.

c. Durch Art. 633 TOG trägt das Gesetz dem berechtigten Interesse der Gesellschafter Rechnung, dass sie den Bestand der Gesellschaft von Veränderungen in der personellen Zusammensetzung unabhängig machen wollen. Hierfür bedarf es freilich nicht nur einer entsprechenden gesellschaftsvertraglichen Fortsetzungsklausel, sondern auch dessen automatischer und sofortiger Wirkung. Der Umstand, dass das Eingreifen der Fortsetzungsklausel *gesetzlich* davon abhängig gemacht wird, dass der betroffene Gesellschafter aus der Gesellschaft austritt, führt dazu, dass die Verwirklichung des Interesses der übrigen Gesellschafter an der Fortsetzung der Gesellschaft ohne den betroffenen Gesellschafter von dessen Zustimmung abhängig gemacht wird, was aber dem Sinn und Regelungszweck der Vorschrift des Art. 633 TOG widerspricht, weil in

diesem Fall dem mit der Fortsetzungsklausel verfolgten Bestandsinteresse nicht sinnvoll Rechnung getragen werden kann. Zum Ausscheiden nach einer Austrittserklärung des betroffenen Gesellschafters soll es daher nur in Ausnahmefällen kommen, wenn dies im Gesellschaftsvertrag ausdrücklich vereinbart wird.

III. Ausschluss Eines Gesellschafters

1. Unterschiedliche Regelungsmethoden im deutschen und im türkischen Recht

Das deutsche Recht befasst sich in § 737 BGB ausführlich mit dem Ausschluss eines Gesellschafters aus wichtigem Grund. Danach kann ein Gesellschafter, in dessen Person ein die übrigen Gesellschafter nach § 723 Abs. 1 Satz 2 zur Kündigung berechtigender Umstand eintritt, aus der Gesellschaft ausgeschlossen werden, soweit im Gesellschaftsvertrag eine auf den Kündigungsfall bezogene Fortsetzungsklausel vereinbart wird. Für die Gesellschafter besteht somit nach § 737 BGB die Möglichkeit, anstelle der außerordentlichen Kündigung den „Störer“ aus der Gesellschaft auszuschließen. § 737 BGB wird daher als eine Art gesetzlicher Auslegungsregel verstanden, wonach die vertragliche Fortsetzungsklausel mangels gegenteiliger Vereinbarung den Mitgesellschaftern auch das Recht zum Ausschluss des Störers geben soll, anstatt sie selbst der Gefahr des einseitigen Ausscheidens auszusetzen²⁰.

Im Ergebnis sieht zwar Art. 633 TOG ebenfalls ein Ausschlussrecht vor. Dort ist allerdings nicht vorausgesetzt, dass ein die übrigen Gesellschafter zur außerordentlichen Kündigung berechtigender Grund vorliegt und vor allem bedarf es im Gegensatz zum deutschen Recht zum Ausschluss des Gesellschafters des Vorliegens einer der in Art. 633 TOG genannten Ausscheidungsgründe. Konkret bedeutet dies, dass das Gesetz das Ausscheiden und den Ausschluss eines Gesellschafters aus einer einfachen Gesellschaft nicht nur in derselben Vorschrift geregelt,

²⁰ Rimmelpacher, AcP 173 (1973), 1, 7.

sondern auch auf dieselben Voraussetzungen abgestellt hat. Im Prinzip sind daher für den Ausschluss die gleichen Gründe maßgeblich, die auch zum Ausscheiden des Gesellschafters aus der Gesellschaft führen können. Lässt man das Erfordernis einer Fortsetzungsklausel außer Betracht, so zeigen sich zahlreiche Unterschiede zwischen § 737 BGB und Art. 633 TOG, obwohl der Gesetzgeber ausdrücklich von einer Orientierung an der Regelung des § 737 BGB spricht. Welches Motiv der türkische Gesetzgeber mit dieser grundsätzlichen Abweichung von der BGB-Regelung verfolgt, bleibt indessen unklar. Es kann m.E. lediglich darum gehen, dass der türkische Gesetzgeber beide Rechtsinstitute wegen ihrer nahen Relevanz angesichts der Rechtsfolge in einer besonderen Vorschrift zusammen regeln wollte. Dieser rechtspolitisch unproblematische Zweck hat sich ausgerechnet mit dem Bestreben verbunden, diese unter denselben Tatbeständen und Voraussetzungen zu subsumieren. Die Regelungsmethode und der Inhalt der Vorschrift des Art. 633 TOG sind freilich aus mehreren Gründen unzutreffend.

a. Laut Art. 633 TOG haben die Mitgesellschafter das Recht, den kündigenden, konkursierten, bevormundeten, dessen Liquidationsteil zur Zwangsverwertung gelangten Gesellschafter oder die Erben eines verstorbenen Gesellschafters aus der Gesellschaft auszuschließen, soweit im Gesellschaftsvertrag die Fortsetzung der Gesellschaft mit den übrigen Gesellschaftern vereinbart wird. Wie wir oben ausführlich dargestellt haben, reicht es dafür schon aus, dass ein mit der vereinbarten Fortsetzungsklausel in Bezug stehender Fall eingetreten ist; es bedarf daher weiterhin keiner Austrittserklärung des betroffenen Gesellschafters und ebenso wenig kommt es auf einen auf den Ausschluss dieses Gesellschafters gerichteten Gesellschafterbeschluss an. Die Ausscheidensfolge tritt daher mit dem Eintritt des fraglichen Ereignisses automatisch und mit sofortiger Wirkung ein. Die in Art. 633 TOG angegebene Fortsetzungsklausel, welche eine Fortsetzung allein unter den übrigen Gesellschaftern vorsehen soll, gestattet mit diesem Inhalt keine weitere Auslegungsmöglichkeit. Anders würde sich die Lage darstellen, wenn in Art 633 TOG eine von der Mitgliedschaft des betroffenen Gesellschafters unabhängige Fortsetzungsklausel geregelt wird, wie etwa in der Form

“Ist im Gesellschaftsvertrage bestimmt, dass, ... die Gesellschaft fortbestehen soll“. Dann könnte freilich sowohl ein Austrittsrecht des betroffenen Gesellschafters als auch ein Ausschlussrecht der übrigen Gesellschafter in Betracht kommen, weil die Fortsetzungsklausel in diesem Fall dahin gehend getroffen wird, dass die Gesellschaft mit Einschluss des betroffenen Gesellschafters fortbesteht.

b. Besonders problematisch ist jedoch die Anwendung dieser Vorschrift in dem Fall, dass ein Gesellschafter verstorben ist und im Gesellschaftsvertrag die Fortsetzung allein durch die übrigen Gesellschafter vorgesehen wird. Die Erben des verstorbenen Gesellschafters werden folglich nie Mitglied der Gesellschaft. Daher können sie auch aus der Gesellschaft nicht ausgeschlossen werden, in der sie niemals waren. Es ist daher unzutreffend und hat keinen Sinn, im Gesetz den Erben ein Austrittsrecht oder den übrigen Gesellschaftern ein Ausschlussrecht anzuerkennen. Dies gilt auch für den Fall, dass die Gesellschafter im Gesellschaftsvertrag sich allein auf die Fortsetzung der Gesellschaft beim Eintritt der in Art. 633 TOG genannten Gründe beschränkt haben. Da die Mitgliedschaft selbst nicht erblich ist und mit dem Tod eines Gesellschafters durch Erbschaft nicht auf dessen Erben übergeht, bedarf es für ein solches Ergebnis einer besonderen Fortsetzungsklausel verbunden mit einer Nachfolgeklausel. Dagegen wird dies in Art. 633 TOG nicht als Regelfall vorgesehen und nur im Rahmen der Privatautonomie ausnahmsweise vorkommen. Es ist daher unzutreffend und auch entbehrlich, in Art. 633 TOG ein Austrittsrecht für den Erben oder auch ein Ausschlussrecht für die übrigen Gesellschafter anzuerkennen.

c. Beim Eintritt einer der in Art. 633 TOG genannten Fälle kann der betroffene Gesellschafter oder dessen Stellvertreter oder auch dessen Erbe aus der Gesellschaft austreten oder durch einen Beschluss der übrigen Gesellschafter aus der Gesellschaft ausgeschlossen werden. Fraglich ist jedoch, ob und wie der Stellvertreter des betroffenen Gesellschafters aus der Gesellschaft ausgeschlossen werden kann, da er ja nicht einmal ein Mitglied der Gesellschaft ist. Die Stellvertretung kann daher nur im Rahmen einer Austrittserklärung im Namen des betroffenen Gesellschafters in Frage kommen. Hier ist wiederum ein unvermeidbares

Ergebnis der falschen Regelungsmethode des türkischen Gesetzgebers ersichtlich.

d. Für die Wirksamkeit des Ausschließungsbeschlusses ist es nach beiden Rechten erforderlich, dass er dem auszuschließenden Gesellschafter zugeht. Art. 633 TOG schreibt außerdem vor, dass die Mitteilung an den Betroffenen schriftlich sein soll. Hier stellt sich die Frage, ob diese eine Wirksamkeitsvoraussetzung im Sinne eines Formerfordernisses ist oder zur Beweiserleichterung dient. Falls die Formvorschrift des Art. 633 TOG als Gültigkeitsform angenommen wird, führt das Nichteinhalten der Form zur Ungültigkeit der Mitteilung. Der auszuschließende Gesellschafter bleibt dann bis zu einer ordnungsgemäßen Mitteilung Mitglied der Gesellschaft. Beim Vorliegen einer Beweisformvorschrift tritt die Ausschlusswirkung trotz Nichteinhalten der Form ein. Im Zweifel sieht Art. 12/Abs. 2 TOG eine Vermutung zu Gunsten der Gültigkeitsform vor. Da die Gesetzesbegründung keine weitere Ausführung hinsichtlich der in der Vorschrift vorausgesetzten Form enthält, ist dem Grundsatz von Art. 12/Abs. 2 TOG entsprechend auch hier von einer Gültigkeitsform auszugehen. So ist im türkischen Recht für die Wirksamkeit der Mitteilung des Ausschließungsbeschlusses die Formvorschrift des Art. 633 TOG einzuhalten.

2. Ein de lege feranda Vorschlag zur Lösung der Problematik

Es steht fest, dass die Ausschlussregelung des Art. 633 TOG mit diesem Inhalt nicht anwendbar ist. Es liegt daher in der Hand des Gesetzgebers, die Vorschrift am Maßstab des § 737 BGB neuzufassen. Bis dahin sind die Gesellschafter freilich nicht gehindert, im Rahmen der Privatautonomie die Fortsetzungsklausel dahin gehend auszugestalten, dass sie den Mitgesellschaftern das Recht zum Ausschluss des Störers geben, wenn sie aus einem wichtigen Grund, der in der Person des Störers liegt, von ihrem Kündigungsrecht Gebrauch machen können.

Nach der hier vertretenen Auffassung kann man die Zwickmühle in Art. 633 TOG auch dadurch überwinden, dass hier das Vorliegen einer Gesetzeslücke angenommen wird. Diese wird dann durch richterliche Rechtsfortbildung im Wege der teleologischen Reduktion BGB geschlossen. Die Gesetzeslücken sind gemäß Art. 1 TZG (Türkisches Zivilgesetz) so zu schließen, wie dies dem mutmaßlichen Willen des Gesetzgebers entspricht. Da in Gesetzesbegründung ausdrücklich von einer Orientierung an § 737 BGB gesprochen wird, sollen dementsprechend die Voraussetzungen und Rechtsfolgen von § 737 BGB bei der Schließung der Gesetzeslücke berücksichtigt.

Eine andere Lösung wäre auch das, dass der Richter Art. 255 THG²¹ analog anwenden, wo der Ausschluss eines Gesellschafters aus einer handelsrechtlichen Personengesellschaft aus wichtigem Grund geregelt wird. Demzufolge besteht für die Gesellschafter die Möglichkeit, den Gesellschafter, in dessen Person ein wichtiger Grund eingetreten ist, aus der Gesellschaft auszuschließen, falls die Gesellschaft im Kündigungsfalle fortbestehen soll.

Dank der Berücksichtigung des § 737 BGB und Art. 255 THG bei der Lückenschließung, zahlreiche Einzelfragen, namentlich die Bedeutung des wichtigen Grundes, des Verhältnisses von Ausschließung und Auflösung usw. ist eine Bezugnahme auf die wegen der größeren Bedeutung erheblich umfangreiche Literatur und Rechtsprechung zu § 737 BGB und Art. 255 THG sinnvoll und geboten.

²¹ Türkisches Handelsgesetz vom 01.07.2012.

ANHANG: Gesetzessynopse

BGB § 736

Ausscheiden eines Gesellschafters, Nachhaftung

(1) Ist im Gesellschaftsvertrag bestimmt, dass, wenn ein Gesellschafter kündigt oder stirbt oder wenn das Insolvenzverfahren über sein Vermögen eröffnet wird, die Gesellschaft unter den übrigen Gesellschaftern fortbestehen soll, so scheidet bei dem Eintritt eines solchen Ereignisses der Gesellschafter, in dessen Person es eintritt, aus der Gesellschaft aus.

(2) Die für Personenhandelsgesellschaften geltenden Regelungen über die Begrenzung der Nachhaftung gelten sinngemäß.

§ 737 BGB

Ausschluss eines Gesellschafters

Ist im Gesellschaftsvertrag bestimmt, dass, wenn ein Gesellschafter kündigt, die Gesellschaft unter den übrigen Gesellschaftern fortbestehen soll, so kann ein Gesellschafter, in dessen Person ein die übrigen Gesellschafter nach § 723 Abs. 1 Satz 2 zur Kündigung berechtigender Umstand eintritt, aus der Gesellschaft ausgeschlossen werden. Das Ausschließungsrecht steht den übrigen Gesellschaftern gemeinschaftlich zu. Die Ausschließung erfolgt durch Erklärung gegenüber dem auszuschließenden Gesellschafter.

ART. 633 TOG

Austritt und Ausschluss aus der Gesellschaft

Ist im Gesellschaftsvertrag bestimmt, dass, wenn ein Gesellschafter kündigt oder bevormundet wird oder in Konkurs gefallen ist oder wenn sein Liquidationsteil zur Zwangsverwertung gelangt oder wenn er stirbt, die Gesellschaft unter den übrigen Gesellschaftern fortbestehen soll, so kann bei dem Eintritt eines solchen Ereignisses der Gesellschafter oder dessen Vertreter aus der Gesellschaft austreten oder von den übrigen Gesellschaftern durch eine schriftliche Mitteilung aus der Gesellschaft ausgeschlossen werden.

Post Contractual non-Compete Agreements Concerning Agents, Distributors and Franchisees

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Commercial Law Department

1) Post Contractual Non-Compete Agreements Concerning Agents – Generally

Following termination of the contractual relationship, an agent (or a distributor or franchisee), is in principle free to engage in any commercial activity including the same type of activities and in the same geographical area which were covered under the former agency (distributorship or franchise) contract, unless otherwise agreed to the contrary. It is, however, commonplace for the parties (principal and agent) – mostly on account of the principal's wishes or indeed pressure – to enter into an agreement that restricts the business activities of the commercial agent following the termination of the contract so as to avoid a potential conflict of interest, to protect trade secret and to safeguard loyalty.

Post contractual non-compete agreements¹ are regulated under Article 123 of the (Turkish Commercial Code (TCC)). The provisions

¹ During the term of the agency contract the (principal-agent or the agent which has entered into a contract) act under the principle “*having exclusive authority and working exclusively for the principal*”. The exclusivity right/obligation is in principle reciprocal but may be agreed otherwise (Article 104 of the TCC). Hence, as a general rule, the agent is subject to a prohibition of competition for the duration of the contract unless otherwise agreed (i.e. waiver of prohibition).

The exclusivity right/obligation for the term of the agency contract is in connection with competition under the same trade mark and therefore is not in contravention of competition law. Although an agent is by law a separate legal entity it does not enjoy the economic freedom which would enable to be recognized as an undertaking under competition

of this article are especially relevant to the freedom of activity which an agency enjoys and is drafted in accordance to the *ratio legis* of agency related provisions so as to protect an agent. This protection is ensured by means of providing for (i) a specific time period, (ii) limitation of subject matter (iii) a prescribed manner (iv) a fee or compensation payment of compensation in return for the prohibition, and (v) the unilateral (relative) mandatory nature of the relevant provision.

2) Typical Agreement:

Non-compete agreement is a typical (i.e. as opposed to an atypical) agreement, the requirements for which are laid down in Article 123 of the TCC. Without prejudice to the mandatory provisions of Article 123 of the TCC and the typical elements of the contract, the latter shall be subject to the general rules of the law of obligations. A non-compete agreement may be in the form of a separate written agreement or as part of (i.e. one or more articles) an agency contract².

The characteristic performance in a non-compete agreement is that the agent does not enter into competition. In this regard, agreements which do not include provisions that restrict competition but instead comprise various prohibitions or a duty to refrain from undertaking an

law. Hence, from a perspective of competition law the principal and a single enterprise shall be treated as part of the same economic entity and therefore not be considered as undertakings in competition; they shall not be deemed competitors and therefore a restriction of competition shall not come into question (see **Saraç, Tahir:** 6102 sayılı Türk Ticaret Kanununun Acentelik İlişkisinde İnhisar Hakkı ve Rekabet Yasağı Sözleşmesine İlişkin Hükümlerinin Rekabet Hukuku Açısından Değerlendirilmesi, AÜHF, 61(2) 2012, s.728/729). It therefore follows from the above that agency contracts shall not come within the scope of Article 4 of the LPC and that as a principle they will not be subject to the provisions concerning exemptions (**Saraç,** p. 732).

² Non-competition clauses that come within the ambit of standard contractual terms and conditions shall be caught both by Article 123 of the TCC and legal requirements with respect to general terms and conditions (**Göksoy, Yaşar Can:** 6102 sayılı yeni Türk Ticaret Kanununa Göre Acentenin Sözleşme Sonrası Rekabet Yasağı, DEÜHF Dergisi, C.12,Özel Sayı, 2010, p. 913/914).

act (such as prohibition to divulge business or trade secrets) shall not by themselves be deemed non-compete agreements³.

3) The Subject Matter of Non-Competition

The scope of a non-compete agreement comprises the mutual obligations of the principal and the agent whereby the commercial activity which is the subject of the agency contract (agency) of the agent is restricted (an obligation not to engage in) so as not to compete with the principal following termination of the agency contract. Pursuant to Article 123/1 of the TCC, the scope and subject matter of the non-compete restrictions are determined in accordance with the “*activities related to the business of the agent*”.

Bearing in mind that the expression of “*activities related to the business*” in Article 123 of the TCC is exceptional and one that even prohibits the freedom to work, one should be inclined to interpret it narrowly. It is not the entire range of activities of the agent’s business that are prohibited; agency activities that an agent might have in different fields and/or concerning different goods and services, or concerning the same and/or different goods and services in different regions, shall not come within the scope of non-compete restrictions. In this respect, the terms of an agency agreement shall prevail irrespective of exclusivity. In fact, Article 123 of the TCC stipulates that a restraint of trade clause shall only be valid insofar as it relates to the geographical area for which the agent was designated or the agent’s circle of customers as well as in relation to contracts which the agent mediated⁴.

³ Notwithstanding the absence of a specific non-compete clause, agreements that allow for an *economic pressure with regard to the activities by the agent’s enterprise* such as for the agent to return any benefits made in the event that the agent enters into post contractual competition or for prevention of the use of any information concerning customers or for not allowing to work with former customers, or for prevention of attempts to divert customers to another enterprise may fall within the scope of Article 123 of the TCC and accordingly be deemed invalid (see **Göksoy**, p. 902/903).

⁴ The term “intermediary” in the provision is misleading. A non-compete agreement may be concluded by an agent or an agent that is authorized to enter into an agreement and irrespective of whether the agent has exclusivity during the term of the agreement

Notwithstanding that the scope of a non-compete agreement may undoubtedly be broadened it will not result in stretching it beyond the scope that is limited by law. For instance, a restraint may not be extended so as to encompass business activities that are not within the agent's field of business activity. The scope may only be limited further upon the condition that the said limit is taken as the widest which is admissible. In cases where a non-compete clause fails to mention the location, region or the circle of customers, the location which is stipulated in accordance with the place and subject matter in the agency contract shall be determined on the basis of the scope and content of the covenant.

4) Duration

The term of the agreement may only be for a two-year period at most following the termination of the agency relationship. The two-year period consists of an uninterrupted, absolute maximum time limit irrespective of whether the agency is engaged in any activity. It is neither possible to extend the time limit by agreement, nor is it possible to defer the commencement date of the agreement or extend this two-year time limit on account of an interruption or suspension e.g. as a consequence of sickness or suspension of activities by the agent.

Non-compete clauses that exceed the two-year period shall be void (Articles 123/1 and 1530/1 of the TCC). The maximum legal upper time limit (two years) shall be applicable. The non-compete clause will expire through effluxion of time. In the event that a particular time-limit has not been specified the legally prescribed time-limit shall prevail.

5) The time when a non-compete agreement is made

A non-compete agreement must be entered into at the earliest at any time after the agency contract has been concluded or during the term of the agency agreement but in any event prior to the expiry of the agency

(**Arslan Kaya**, *Türk Ticaret Kanunu Şerhi, Birinci Kitap, Yedinci kısım Acentelik (TTK m.102-123)*, İstanbul- 2013, p. 292, N. 09b)

contract. Article 123 of the TCC shall not be applicable to agreements concluded after the termination of the agency relationship but parties shall be entitled to enter into a non-compete agreement without being subject to the restrictions imposed by virtue of Article 123 (e.g. time, place, subject matter, formalities). A non-compete agreement that has been entered into prior to the agency contract shall, however, be invalid.

6) Formalities - Documentation:

Non-compete agreements must be concluded in writing; written form is a prerequisite of validity. Non-compete agreements must be in written form even where the agency contract may not happen to be concluded in writing. The minimum required component of a non-compete agreement is that a non-compete clause should exist. The fact that the time period or the subject matter of non-competition is not included does not render the non-compete agreement void. In such circumstances, the provisions of Article 123 of the TCC shall prevail and serve as complementary.

In addition to the requirement that the non-compete agreement should be in writing, a document (“*Urkunde*”) which incorporates the provisions of the agreement and which is duly signed by the principal must be given (i.e. delivered) to the agent within a reasonable time period⁵. In the event that the said document has not been given to the agent within a reasonable period of time, the agent may have a defence in claiming that the non-compete agreement is not valid and binding⁶. The agent is under an obligation to accept the duly drawn up document. Should the agent refrain from accepting the document without due cause, the docu-

⁵ When viewed in the light of the purpose behind the document, “reasonable time period” should be understood as a short time period following the signing of the agreement.

⁶ The relevant part of the reasoning for the provision is as follows: “... *It is not sufficient for the agreement to have been concluded only in writing; in addition, a document that includes all the terms of the agreement and that is signed by the principal must be given to the agent; if not the agent might have the agent may have a defence in claiming that the non-compete agreement is not valid and binding...*”

ment shall nonetheless be deemed to have been delivered⁷. The burden of proof regarding delivery shall be upon the principal. In the event that a duplicate or copy of the non-compete agreement has not given to the agent, such a document will serve to remove any obstacle that stands before the finalization and conditions of the agreement⁸.

According to the doctrine, delivery of a document that is signed by the principal is considered as a qualified formality requirement whereby delivery of the document is deemed as part of the written formality requirement, as a consequence of which failure to deliver is considered to result in rendering the agreement invalid⁹. It is suggested that it may not be the correct interpretation of the law to render validity dependent on the delivery of the document as this would entail a consequence which would exceed the purpose that is expected of the document. As a matter of fact, albeit not very clear, the wording of the reasoned statement behind the provision which reads as “*if not the agent may have a defence in claiming that the restraint of trade agreement is not valid*” does render the failure to deliver a reason for invalidity. The meaning alluded to the failure to deliver and the wording of the reasoning behind the clause points to the fact that there is a missing act and that the execution of the contract is dependent upon a complementary element¹⁰.

Delivery of the document may take place by providing a copy or a notarized duplicate¹¹ of the agreement, or of another document that

⁷ **Can**, Ozan: 6102 sayılı Türk Ticaret Kanuna Göre Acentelikte Rekabet Yasağı Anlaşması, Ankara- 2011, p. 83.

⁸ **Can**, p. 77/78; **Göksoy**, p. 906.

⁹ With reference to German Law, **Göksoy**, p. 906/907.

¹⁰ For a similar and reasoned comment, see **Can**, 80. There are, in fact many instances in commercial law of such incomplete acts or acts that are dependent on complementary acts. Discussions that revolve around the approval of the general assembly under Article 356 of the TCC (former Article 311) and the consequences of registration in the trade registry are instances that shed with respect to the above. See **Kaya, Arslan**: Ticaret Kanunu'nun 311 nci Maddesindeki “Muteber Olmama”nın Anlamı - Hükümsüzlük Dermeyanı Hakkının Kötüye Kullanılması, Makalelerim I, İstanbul- 2012, p. 161 et seq.

¹¹ In view of the purpose for the requirement of the document, it is submitted that the provision of a written agreement which includes a specific non-compete clause and which is signed by both parties shall have the equivalent effect of the delivery of the document.

does not necessarily need to be identical to the agreement. In the event that another document is to be provided, such document must include the essential and minimum required provisions of the agreement and be signed by the principal. Where there may be any difference between the agreement and this other document, the one which is in the favour of the agent shall prevail.¹².

7) Breach of the agreement – Consequences of breach

A non-compete agreement is a typical agreement which imposes obligations on both parties¹³. Under this relationship, the agent undertakes not to engage as an independent enterprise in activities that are prohibited under the agreement. The agent may not for instance, act as an agent for another principal or as an affiliated merchant or fulfil work on behalf of that principal. To act as a partner or manager in a simple partnership or be a member of the board of directors¹⁴ in a limited company or be involved in an activity or relationship which even if not directly may indi-

¹² For a concurring view see **Can**, p. 78. The provision with respect to providing a document is not clear. It would have been perfectly possible to achieve the intended purpose for putting in place such a document had the provision read as “*the agreement shall be in duplicate, a copy of which must strictly be given to the agent and in the event of a conflict the copy in possession of the agent shall prevail*”. Similar provisions are in fact found under Articles 9/3 and 10/1 of Law No. 4077 on Protection of the Consumer.

¹³ In accordance with Article 97 of the TCO (Article 81 of the former TCO) the party who fails to perform under such contracts i.e. the party in breach, shall not be entitled to demand performance by the other. In such cases, the typical consequences which flow from a failure not to fulfil at all or from partial fulfilment shall arise. Should the agent be in breach of its duty to not to compete, in other words should the agent wholly fail or partially fulfil in its duty, the principal shall be exonerated from its obligation to pay compensation (Among others see **Can**, p. 137. Since the main subject of the agreement consists of a prohibition against competition, vis-à-vis the agent’s right to claim compensation, the agent is primarily responsible to fulfil its duty on account of its obligation to comply with the prohibition against competition. (**Stötter, Karin**: Das Recht der Handelsvertreter, 6. Auflage, p. 242).).

¹⁴ A non-compete agreement will not stand in the way of becoming a partner in a corporation. If on the other hand, the agent’s stake is such that through his share capital or privileges, he is in a position to determine the management or the corporation is in competition with the principal (former) then the agent’s partnership shall be deemed to fall within the scope of the prohibition.

rectly be geared towards circumventing the prohibition shall constitute a breach of the non-compete agreement¹⁵.

A violation of the agreement by the agent constitutes a valid reason for the principal to terminate the agreement. In the event of a violation, the principal shall notify the agent within a month following termination that the principal is not bound by the terms of the non-compete agreement. (Article 123/3 of the TCC). Moreover, should he have incurred any losses, the principal may even have a claim for compensation. The agent shall lose his right to compensation in full or in part, as the case may be, if the principal terminates the agreement upon a violation of the agreement by the agent (Article 123/1 of the TCC).

Where the agent fails to perform his obligation despite the possibility to comply with the terms of the non-compete agreement, the principal may elect to demand performance by the agent as well as any losses he may have incurred instead of terminating the agreement. Where performance by the agent is not possible, the principal's right to compensation right is preserved.

Thus, a violation of the agreement by the agent may result in the termination of the agreement as a result of which the principal may in addition demand compensation and where previously agreed upon, claim a penalty payment.

Violation of the agreement by the agent has no impact upon contracts that have been concluded between the agent and third parties¹⁶.

¹⁵ For references and examples see **Can**, 134 e.g.; **Göksoy**, p. 903. The legislator's immediate purpose in connection with the prohibition of competition is to prevent the agent from conducting activities in regard to his own enterprise in his own right or as an agent of another principal. Since matters that may indirectly come within the scope of a prohibition of competition (such as dominant partnership, management, business activities in ventures by dominant partnerships) and are likely to be open to interpretation, it is advisable that such matters be clearly stated in the contract in order to avoid potential conflicts.

¹⁶ **Can**, p. 135.

8) Restraint payment (compensation)/ Loss of right to claim

The principal is required to pay “*reasonable compensation*” to the agent in return for complying with the restriction of competition by the agent¹⁷. The aim of the payment is to compensate the agent for restriction of his freedom to work and enter into contracts in order that the agent shall be compensated for the losses he may have incurred during the period while the restriction is in force.

Restraint payment (i.e. compensation) is a result of the legal requirement concerning non-compete agreements. Even if it is not determined in the agreement a proper compensation could still be demanded. The parties have every right to decide on the proper compensation or the conditions for the compensation however this does not mean the parties can decide to dispense with compensation payment or equivalent measures to that effect that would deprive the agent of the compensation.

In determining the appropriate amount of compensation to be paid concrete, objective facts must be taken into consideration. The fact that a high amount might be determined shall not have any effect on the criteria for the suitability of amount. On the other hand, should the amount exceed the amount stipulated in the agreement itself, this would not be appropriate¹⁸.

The agent’s right to compensation with respect to prohibition of competition shall not be affected by circumstances that might have changed subsequent to the agreement having been concluded. An agent shall not be prevented from claiming a right to compensation on account of not being in a position to compete due to health problems or being

¹⁷ The term compensation in this context does not actually refer to compensation in the proper sense of the word but denotes the obligation by the principal owed to the agent in return for the latter’s obligation not to compete. For an analysis of counter obligations in the doctrine, among others see see **Can**, p. 98. The author prefers the expression of “restraint payment” instead of “compensation” (p. 99). “Payment” is also referred to in the reasoned statements.

¹⁸ **Stötter**, p. 243.

involved in another line of business. Such circumstances shall not permit the revision of the compensation payment¹⁹.

Whilst entitled to determine the amount to be paid as compensation, parties to the agreement may also determine the conditions for “*the payment of an appropriate compensation*” in the agreement²⁰. Even where no such arrangement has been made or there are no provisions in the agreement concerning compensation, it is possible to initiate legal proceedings for a declaratory judgment and a claim for unliquidated damages (Article 107 of the Turkish Procedural Code)²¹.

In determining the appropriate amount of compensation, whilst considering in particular the business opportunities that the agent may have lost under normal conditions on account of the restraint, other factors such as the agent’s income during the term of the agency contract, especially bearing in mind the relevant income within the last year or in recent years and the potential losses that the agent (i.e. former) might have incurred due to the restraint, should be taken into account.

The compensation shall be calculated on the basis of the gross income²². The criteria which apply in relation to the determination of the compensation shall not be identical to those used for the calculation of the sum of payment in return for the restraint period, which is a counter obligation to not compete. Therefore, income that is not related to the restraint such as insurance monies us, social security allowances that have the effect of reducing the income during the period of agency, including a set-off amount where such an order has been made, shall not be deducted from the compensation payment.

¹⁹ Stötter, p. 243.

²⁰ Göksoy, p. 919. It is submitted that the time for the non-compete agreement to be concluded has been determined in the law whilst considering as essential the time when the agent would be under least pressure. In the light of this, a prohibition and the amount of compensation to be mutually agreed between the parties for an appropriate sum should only be possible under exceptional circumstances and where the necessary conditions should exist.

²¹ Göksoy, p. 917

²² Göksoy, p. 919.

In addition to the compensation, the parties are also entitled to determine the manner and time of payment. Where no such arrangement has been made, the widely held view in the doctrine would indicate that the compensation shall become due and payable outright when the agency contract expires. It is submitted that, viewed from the perspective of the set-off principle, the rule for an outright payment is subject to criticism.

9) Invalidity

Article 123 of TCC is a mandatory provision. Terms and conditions that are contrary to the provisions of subsections 1-3 of the Article shall be null and void insofar as they are “*unfavourable to the agent*”²³ Invalidity must be judged in accordance with Article 1530/1 of the TCC and Article 27/2 of the TCO (Turkish Code of Obligations; i.e. Article 19/2 of the former Turkish Code of Obligations). Accordingly, provided the condition which is contrary to the provisions of the law does not render the whole agreement meaningless or invalid, that condition shall be deemed invalid insofar as it is unfavourable to the agent and the relevant provision of the law shall be applied instead (“*modified partial invalidity*”)²⁴.

In this regard, a non-compete clause which foresees a three-year time period shall be invalid to the extent that it exceeds two years and instead the restraint period shall be reduced to two years in accordance with Article 123/1 of the TCC (Article 1530/1 of the TCC). Similarly, for instance, since in accordance with the clearly stipulated provision of the law, the requirement for a reasonable compensation to be paid by the principal to the agent on account of the restraint of trade (Karenzentschaedigung) becomes operational by itself, any contradictory condition shall be invalid while equally any omission in the contract with respect to compensation payment shall not prevent Article 123 of the

²³ A mandatory provision and sanction of invalidity in relation thereto operates unilaterally. In the agreement, clauses that facilitate competition in favour of the agent shall be valid.

²⁴ **Başpınar, Veysel:** *Borç Sözleşmelerinin Kısmi Butlanı*, Ankara, 1998, p. 155; **Can**, p. 115.

TCC from being applicable nor stand in the way of a claim for compensation²⁵.

In this context, the provision which stipulates that the compensation to be paid should be “*a reasonable compensation*” is also a mandatory provision. Therefore, an agreement between the parties for a compensation which would be considered low in the face of the nature of the work or in view of the scope of the agent’s business activity would equally be treated as exceptional.

10) Scope of the provision – Possibility of application in analogous agreements that create a continuing obligation

The direct application of the Article 123 of the TCC is dependent upon the existence of an agency contract. The *lex specialis* nature of the provision shall not preclude and be directly applicable equally to agency contracts which incorporate special provisions that pertain to other fields such as transportation, maritime commerce, insurance or tourism. Article 102 et seq. of the TCC are of an equally applicable nature in respect of agency contracts in such fields. Furthermore, none of the said provisions refer to one that regulates post termination non-competition. The same conclusion may be drawn in the light of Article 103/1(a) of the TCC which provides for the element of continuity and widens the scope of agency related provisions in accordance with special areas of interest. The fundamental issue, however, concerns applicability of the provision to analogous agreements.

In contrast to a claim for set-off (Article 122/5 of the TCC), there exists no such provision that foresees the application this provision (Article 123 of the TCC) to similar types of contracts upon expiration such as distributorship or agreements that provide a monopoly right. It is suggested that Article 123 of TCC may not be applied to distributorship or franchise agreements whether by law or by analogy, since Article 123

²⁵ **Canaris**, Claus-Wilhelm: Handelsrecht, 22. Auflage, München-1995, p. 261; **Can**, p. 114-116.

of the TCC does not include a mandatory prohibition but leaves it to the parties to enter into an agreement for a post contractual non-compete agreement. Furthermore, while the provision in respect of an indemnity claim provides the agent with a right that stems from the law, a right to a claim in respect of a post contractual restraint of trade clause is dependent upon the existence of a non-compete agreement. As a general rule, such types of contracts do not by themselves entail a restraint of trade on the parties. Therefore, the application of Article 123 of the TCC may only be applicable to these types of contracts through *lex contractus*.

11) Post Contractual Non-Compete Clauses in Franchise Agreements

The franchise agreement does not impose upon the franchisee an obligation not to compete following termination of the agreement. That is only possible by imposing a non-compete obligation under the agreement.²⁶ Once a post contractual non-compete obligation is agreed upon under the agreement, it goes without saying that the lawful scope shall principally be determined in accordance with the provisions of Articles 26 and 27 of the TCO (Articles 19 and 20 of the former TCO). Such a non-compete clause shall be void insofar as it jeopardizes the franchisee's economic livelihood at risk or eradicates or severely limits his economic freedom²⁷.

Since, however, the abovementioned protection is of a general nature, one may pose the question as to whether Article 123 of the TCC may be applied by analogy in regard to post contractual non-compete clauses so as to impliedly provide protection to the franchisee that usually represents the weaker party under such contracts. It should be mentioned at this point that under Article 418d/2 and by reference

²⁶ The doctrine would have it that, notwithstanding the franchisor has a vested interest on account of providing know-how to the franchisee, the agreement prohibits altogether secret and available know-how (**Gürzumar Osman: Franchise Sözleşmesi, İstanbul-1995**, p. 175).

²⁷ **Gürzumar**, p. 175; for a concurring view see **Kırca**, Çiğdem: Franchise Sözleşmesi, Ankara-1997, p. 190-191.

therefrom to Article 340a of the Swiss Code of Obligations, with respect to commercial agencies and service contracts, respectively, are applied equally to non-compete clauses. The same conclusion is drawn under the German doctrine whereby § 90a of the German Commercial Code is applied by analogy to franchise agreements. Following from the above, it is therefore agreed upon in the doctrine that, where a provision has been made under a franchise agreement for post contractual non-competition, the franchisee shall accordingly be entitled to compensation in return for the period of restraint²⁸.

A Turkish legal scholar, **Gürzumar** maintains that an application by analogy would be equally valid under Turkish law and that it should accordingly be acceptable since a non-compete clause aims to prevent the risks that result from the fact that the franchisee knows of the franchisor's trade secrets or knows the franchisee's customers. The author rightly reaches the conclusion that the prohibition should be clear as to the time limit, the geographical area and subject matter; that it should not be of a kind that prevents or severely restricts; and finally that just as in the case of an agency the prohibition should be lifted in the event of a material breach of the agreement. The author, on the other hand, does not consider written formality and thereby documentary requirement as a viable possibility²⁹. Where a non-compete agreement is concluded following the termination of the franchise agreement, the requirements laid down by Article 123 of the TCC with respect to agency contracts shall not be applicable³⁰.

²⁸ **Gürzumar**, 176; same view shared by **Kırca**, p. 191-192. Within the context of the new TCC see **Can**, s.69; **Gürsoy**, p. 901. Both authors agree that a similar form of protection is required for instance with respect to the protection of a distributor.

²⁹ **Gürzumar**, p. 176. While **Kırca** agrees with **Gürzumar** for an application by analogy in connection with an agency non-compete agreement vis-à-vis service agreements and in accordance with the provisions of the relevant legislation, he stresses, by citing Meyer with respect to Swiss law and **Martinek** in regard to German law, that it is not thereby precluded that application by analogy be conducted in writing (**Kırca**, p. 193-194).

³⁰ **Kırca**, p. 194.

12) Post Contractual Non-Compete Clauses in Distribution Agreements

In comparison with an agency, a distributor is under an obligation not to compete with the producer/manufacturer for the duration of the agreement. According to the German Federal the franchisee's non-compete obligation is stems from the fact that the distributor enjoys an exclusive right to sell³¹. By contrast, unless otherwise agreed to the contrary in the agreement, a distributor shall not, in principle, be subject to post contractual non-competition. The validity of such an agreement must primarily be determined in accordance with Articles 26 and 27 of the TCO.

It is suggested that, in view of the interests that are sought to be protected, The analogy between that of an agency and a franchise agreement, the significant similarities of the constituent elements of both types of agreement, and the existence of overlapping interests that are sought to be protected would it is suggested make it possible for Article 123 of the TCC to be applied by analogy for a post contractual non-compete clause in a distribution agreement. In this regard, the reasoning concerning the applicability of the said provision shall equally be deemed to be valid in respect of comments made in connection with franchise agreements.

13) A review of post contractual non-compete clauses in agency and other distribution agreements within the framework of competition law

The function of a prohibition against competition (i.e. of an obligation not to compete) is the prevention of competition by the person who is subject to the law. On the other hand the purpose of competition law is to prevent restrictions that prohibit competition. Naturally, at some point, the function and purpose of these two mechanisms do come to a clash. Since a non-compete agreement may not be in violation of the mandatory provisions that aim to protect free competition, insofar as the

³¹ **İşgüzar, Hasan:** *Tek Satıcılık Sözleşmesi*, Ankara-1989, p. 84.

agreement falls foul of Law No. 4054 on the Protection of Competition (LPC) it shall be subject to the sanctions prescribed therein and not be able to benefit from block exemptions. Hence, a non-competition agreement shall be subject cumulatively to Articles 27 and 28 of the TCO (Articles 19 and 20 of the former TCO) – if applicable – and Article 123 as well as the provisions of the LPC.

Commercial agency, distributorship, franchise or other distribution agreements all come under vertical agreements within the scope competition law³². Vertical agreements are “*agreements between two or more undertakings that are engaged in activities at different levels in the chain of production or distribution with a view to purchase, sell or resale certain goods or services.*” (Communique on Block Exemption for Agreements, No: 2002/2, Article 2). Since it is assumed to prevent competition, it shall be deemed to be contravention of Article 4 of the LPC, where parties to a vertical agreement, by acting in a concerted manner prevent the agent, distributor or franchisee from becoming a competitor or hinder their economic activities³³. Nevertheless, there is a valid legal ground and a reasonable economic justification for an agreement regarding prohibition against competition both during the term of the agreement as well as subsequent thereto. The agent, distributor or franchisee that possesses knowledge about the business, business contacts as well as has access to information and records of clients is, in a fiduciary relationship through an agreement with the principal, producer or franchisor. A non-compete agreement is thus used to serve a legitimate purpose so as to prevent such sensitive information from being used for a certain period of time or misused. The question which thus arises is whether an exception or exemption should be made to a non-compete agreement in the face of competition rules.

³² **Metin Topçuoğlu**, Rekabet Hukuku Açısından Acentelik ve Dağıtım Sözleşmesi, 1st Ed., Ankara-2006, p. 137.

³³ A non-compete agreement is considered as a condition for not competing in vertical agreements and furthermore since a prohibition of competition constitutes an obstacle against entry into the market it is seen as prohibiting competition and examined within the context of the regulatory regime for exemptions. Since the agreement in connection with the prohibition relates to that between different brands it may result in restricting competition if it results in closing access to the market (**Saraç**, p. 740 et seq.)

When the matter is considered from the perspective of competition law, with respect to vertical agreements, post contractual non-compete clauses are regulated under Article 5 of the Communiqué. In accordance with Article 5/b of the Communiqué, with regard to the period following the expiry of the agreement, any direct or indirect obligation imposed on the purchaser³⁴, that prohibits the latter from producing, purchasing, selling or reselling goods or services shall not be granted an exemption (i.e. block exemption). In other words, a post contractual non-compete obligation (i.e. a prohibition against competition) shall not be possible for a distributorship, which is a type of vertical agreement³⁵. As indicated in the Guidelines, where a non-compete obligation, which exceeds the limits permitted under this provision, is imposed upon the buyer and where those terms of the agreement that contain such obligation are severable then those terms shall not benefit from the block exemption whereas the remaining parts shall continue to do so. In the event that those terms which contain a non-compete obligation are not severable then the entire agreement shall not benefit from the block exemption. In such cases, should the requisite conditions be fulfilled, an individual exemption might be relevant.

Notwithstanding the general rule against the imposition of a non-compete obligation, an exception thereto has been stipulated under Article 5/b. Accordingly, a non-compete obligation may be imposed follow-

³⁴ Pursuant to Article 3/b of the Communiqué “purchaser” refers to an undertaking which is a party to the agreement and which purchases goods and services from the provider, including undertakings which sell goods or services on behalf of an undertaking.

³⁵ Under Article 3/d of the Communiqué, a non-compete obligation is defined as follows: *“Any type of obligation whether direct or indirect, which prevents the purchaser from producing, purchasing, selling or reselling the goods or services that are in competition with the goods or services that are the subject of the agreement. Moreover, based on the purchases effected by the purchaser in the previous calendar year, any obligation whether direct or indirect which is designed to ensure that the purchaser procures more than 80 % of the goods or services or substitute goods or services from the provider or from another undertaking as designated by the provider, shall also be deemed a non-compete obligation.”*

A non-compete obligation, therefore, as it is referred to in the Communiqué is an obligation that is designed to prevent the purchaser from producing the goods or providing the services which are the subject of the agreement, and to prevent the purchaser from procuring the above from no other than the supplier.

ing the expiry of the agreement “*provided it does not exceed one year*” and on condition that the prohibition is in connection with the goods and services that are in competition with the goods and services which are the subject of the agreement; that it is limited to the facility or land where the purchaser conducts during the term of the agreement; that it is necessary in order to protect the know-how which has been transferred by the supplier to the purchaser. The right to an indefinite prohibition in connection with the use and disclosure of know-how that has not fallen into the public domain shall remain reserved.

Hence, since non-compete agreements that are concluded within the framework of agency, distribution, franchise or similar agreements shall be subject primarily (and where implemented) to Article 123 of the TCC as well as Article 4 of the LPC, such agreements shall benefit from a block exemption in their capacity as vertical agreements. Therefore, the essential question arises as to the conditions that are required for the applicability of the provision.

One particular inclination in the Turkish legal doctrine is to give prevalence to competition law rules on the ground that a non-compete agreement that does not bear the requirements as prescribed by the LPC would not benefit from a block exemption³⁶. If one is to judge the matter as based upon the duration of an agency or distribution post contractual non-compete agreement it will be evident that a two-year non-compete agreement can be concluded pursuant to Article 123 of the TCC, in which case the parties who have entered into an agreement shall not be able to benefit from a block exemption but would only be entitled to an individual exemption. An agreement which will not qualify for an individual exemption either shall be in accordance with Article 123 but in contravention of the provisions of Article 4 of the LPC³⁷.

An interpretation of Article 123 of the TCC within the framework of block exemptions under the LPC would, it is submitted, render the special provision in the TCC redundant. This particular provision in the

³⁶ **Saraç**, p. 744; compare **Can**, p. 125, **Kaya**, p. 303, N. 21/22

³⁷ For comments on this subject see **Can**, p. 121 et seq.

TCC should be deemed a special provision and for instance, provided it complies with the requirements as laid down under Article 123 of the TCC, a two-year non-compete agreement should be exempted from the provisions of the LPC. Article 123 of the TCC, as a matter of fact, also lays down the limits in respect of the legitimacy and validity of non-compete agreements in the face of completion law rules. Put differently, an agreement which complies with the provisions of Article 123 shall not in effect infringe competition rules.

Vertical agreements have also been the subject of scrutiny in the doctrine, within the framework of Articles 6 and 7 of the LPC. In this connection, **Can** suggests that instead of a holistic approach the matter should be weighed in the light of the interests that are safeguarded by law and maintains that even though at first instance it may appear as though an agreement, which prevents an agent from dealing in the same field of activity as that of the principal where the latter enjoys a dominant position, comes within the scope of Article 6/2 of the LPC, this should not be seen as an abuse of a dominant position provided the agreement remains within the scope of Article 123 since a non-compete agreement is a type of agreement which is permitted under the law and thus legitimate, and that this agreement which is allowed provides sufficient protection to the agent³⁸.

³⁸ **Can**, p. 126-127. For an analysis with respect to Article 7 of the LPC see **Can**, p. 127-131.

Standart Essential Patent (SEP) Issue Under the Article 102 of the TFEU

*Res. Assist. Numan Sabit Sönmez**

Abstract

In the field of competition law a recent debate is focused on the SEP related Article 102 TFEU cases, mostly in form of seeking injunctions. This issue is rooted with the Commission decisions and CJEU judgements as well as the literature. As the first step, there are serious difficulties of market definition in these cases, however it has to be made with keeping sector specific issues in mind as the Commission did it in Samsung and Motorola cases. What is needed then is to identify the forms of behaviours of dominant undertakings which may lead to an abuse. Excessive price setting is the first form, it is possible to occur in SEP involved cases as in non-SEP related ones and it has to be scrutinized under established case law with a detailed economic analysis from sector's perspective. Second form is about price discrimination; there is no serious conflict in this field and there is a common understanding that an SEP holder can legitimately offer different conditions to different potential licensees according to the value they offer in return. Third one is the most recent issue, so called abusive litigation; although an SEP holder does not yield his right to seek injunctions in case of infringement, FRAND commitments and competition rules require him to behave in specific manner before exercising his rights arising from IP, in order to claim that the opposing party was not a willing licensee and avoid from responsibilities of competition rules. Conditions are set out clearly with

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Huawei judgement. Last but not the least; a separate approach is possible in conjunction with *Astra Zeneca* case, if SEP holder is dominant at the time that he made FRAND commitment and if he intended to misguide SSO in order to incorporate his patents into standards, this very behaviour can amount to an abuse itself.

A. Introduction

High technology products surrounded us with the beginning of 21. Century and became vital part of our lives. By dissemination and expansion of the internet, now it only takes seconds to find the best dinner place around, read an article about space discoveries, reach bank accounts and make transactions at the same time. Technology, specifically with smart phones, has grown with such a speed in the last decade and brought us into a position that it is almost impossible to own the latest device since the better one has already been prepared and waiting for release. That speed, inherently, creates a wide spectrum of devices appealing to different consumer tastes. Therefore we need a set of rules to ensure that these devices will be in a certain structure which will enable them to communicate with each other i.e. compatibility and interoperability.

Answer of commerce and regulators to that need has been standards to be implemented in markets. These, of course, include technologies which are subject to patents, which are protected with intellectual property (IP) rights. These are being offered as a standard to a wide spectrum of implementers. Thus conflict of interest between parties may lead them to unlawful conducts. One of the areas that involves in this conflict is competition law, which aims to protect competitive process in the market. The tension between IP rights and competition rules is obvious; one gives exclusivity over the owner of a particular right while the other tries to preserve open market, however critics to this approach also exists since they both serve for same goals¹.

¹ Richard Whish and David Bailey, *Competition Law* (Eighth Edition, Oxford University Press 2015) p 212-213.

In this paper, concepts related to legal problems are examined and explained at first. Then set of decisions and judgements are presented in order to provide a legal background over the issue. Finally, possibility of establishing an abuse of dominance under the Article 102 of the Treaty on the Functioning of the European Union (TFEU), which is the focal provision in our analysis, is discussed from different aspects related to allegedly most common types of abuses in this field.

B. Standards and Standard Setting Organisations

Standards can be defined as “a set of technical specifications which seeks to provide a common design for a product or process”². It is argued that standards have valuable benefits as well as possible dangers. To put the importance of standard setting forward, it is stated by Shapiro; “during the great Baltimore fire of 1904, fire fighters called in from neighbouring cities were unable to fight the blaze effectively because their hoses would not fit the Baltimore hydrants. The following year, national standards for fire hoses were adopted”³. First of all it obviously saves us from the complications arisen from different products that do not work together. By doing so they expand choices and convenience while reducing costs⁴. With the compatibility and interoperability effect, standards encourage development of new and improved products, contribute to the enlargement of the market and enhance utility of all⁵. It also reduces waste sources

² Damien Geradin, ‘Pricing Abuses by Essential Patent Holders in a Standard-Setting Context: A View from Europe’ [July 2008] p 4. Available at SSRN: <http://ssrn.com/abstract=1174922>.

³ Carl Shapiro, ‘Setting Compatibility Standards: Cooperation or Collusion?’ in Rochelle Cooper Dreyfuss, Diane Zimmerman, Harry First (eds), *Expanding the Boundaries of Intellectual Property* (Oxford University Press 2001) p 81-82; Enrico Bonadio, ‘Standardization Agreements, Intellectual Property Rights and Anti-Competitive Concerns’ [2013], *Queen Mary Journal of Intellectual Property* 3(1), pp 22-42, p 4 n 12. Available at SSRN: <http://ssrn.com/abstract=2237426>.

⁴ Bonadio (n 3) p 3; Damien Geradin, ‘The European Commission Policy Towards the Licensing of Standard-Essential Patents: Where Do We Stand?’ [2013] *Journal of Competition Law and Economics* 9(4), pp 1125-1145, p 1126.

⁵ Alison Jones, ‘Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars’ [2014] *European Competition Journal* 10(1), King’s College

and lowers costs which will increase competition among competitors; furthermore, firms whose technology is incorporated within standards benefit from licensing agreements and royalty payments from large body of implementers⁶.

However, from another point of view, there are some concerns in the literature pertaining to standards and standard setting procedures. These can be summarized as; creation of entry barriers for standardised sector and allowing patent holders to gain market power, exclusion of competing technologies, foreclosure of downstream competitors⁷, and reducing number of available formats and variations⁸. Hold-up is another significant problem⁹. What is meant by hold-up is that by the adaptation of standard, players in the market become locked in with it because of investments, switching costs etc., and with the increase of bargaining power of the IP holders, they will be able to exploit their position and extract better licensing conditions than it would have been in the absence of standards¹⁰. There might also occur reverse hold-up problem, which means the potential licensee knows his maximum liability under infringement does not exceed the amount of *ex ante* license rates and resists to go into negotiations¹¹ thereby feels no pressure to not to infringe IP rights. Moreover standard setting process may also lead to collusion

London Law School Research Paper 2014-19, p 3. Available at SSRN: <http://ssrn.com/abstract=2394495>; Joseph Kattan and Chris Wood, 'Standard-Essential Patents and the Problem of Hold-Up' [2013] p 1-2. Available at SSRN: <http://ssrn.com/abstract=2370113>; Geradin, *Pricing Abuses* (n 2) p 4.

⁶ Jones (n 5) p 3.

⁷ Jones (n 5) p 4.

⁸ Bonadio (n 3) p 4.

⁹ Michael A. Carrier, 'A Roadmap to the Smartphone Patent Wars and FRAND Licensing' [2012] CPI Antitrust Chronicle 4(2), p 2. Available at SSRN: <http://ssrn.com/abstract=2050743>, Kattan and Wood (n 5) p 9 et seq.

¹⁰ Miguel De la Mano, Renato Nazzini, Hans Zenger, 'Article 102' in Jonathan Faull, Ali Nikpay (eds), *The EU Law of Competition* (Third Edition, Oxford University Press 2014) p 499 N 4.747; Damien Geradin and Miguel Rato, 'FRAND Commitments and EC Competition Law: A Reply To Philippe Chappatte' [2010] European Competition Journal 6(1), p 5. Available at SSRN: <http://ssrn.com/abstract=1527407>; Geradin, *The European Commission* (n 4) p 1128.

¹¹ Kattan and Wood (n 5) p 13.

and cartels¹², which will not be covered in this paper. Besides, number of patents on a device is not limited with tens or hundreds, sometimes there are more than thousands of patents incorporated in one single device, which may lead to exorbitant royalty rates, so called “royalty stacking”, even more than the value of device itself¹³. Finally, the most recent issue is whether seeking injunctions against implementers is an abuse of dominance, i.e. “*abusive litigation*”¹⁴, under Article 102 of the TFEU.

In Commission’s Guidelines on Horizontal Cooperation¹⁵, hold-up problem is addressed¹⁶ and, in order to comply with Article 101 TFEU, ex-ante disclosure and FRAND (fair, reasonable and non-discriminatory terms which will be explained below) commitments are offered as solution to provide free standard setting system, which is transparent and players have no obligation to comply with it¹⁷. It is also stated by the Commission that it is not SSOs’ duty to observe whether terms are FRAND indeed¹⁸.

Standards can be set *de facto* by the behaviour of incumbents, via legislations drafted by governments and institutions, or by private organizations composed of market players, i.e. Standard Setting Organizations (SSOs), which are often quasi legislative¹⁹. SSOs are voluntary membership groups where participants, who may or may not have patents possibly subject to standards, meet and discuss to set the standards in order to provide aforementioned benefits²⁰. Adopted standards naturally

¹² Bonadio (n 3) p 4.

¹³ Kattan and Wood (n 5) p 5, 15-16.

¹⁴ Miguel Rato and Nicolas Petit, ‘Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?’ [2013] European Competition Journal 9(1), p 58 et seq. Available at SSRN: <http://ssrn.com/abstract=2387357>.

¹⁵ Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements [2011] OJ C 11/01.

¹⁶ *ibid* para 269.

¹⁷ *ibid* para 277-286.

¹⁸ *ibid* para 288.

¹⁹ Bonadio (n 3) p 3, Geradin, *The European Commission* (n 4) p 1126.

²⁰ Daryl Lim, ‘Standard Essential Patents, Trolls and the Smartphone Wars: Triangulating the End Game’ [2014] Penn State Law Review 119, p 9. Available at SSRN: <http://ssrn.com/abstract=2495547>.

include patents which are called standard-essential patents (SEPs). SEP is defined in Clause 15.6 of Annex 6 to the European Telecommunications Standards Institute (ETSI) Rules of Procedure (ETSI IPR Policy) as; *“it is not possible on technical (but not commercial) grounds taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate equipment or methods which comply with a standard without infringing that IPR”*²¹. For a patent to become an SEP, it must be adopted as a standard and create lock-in effect²². There are no competition concerns, at least not by lock-in effect, if the patent is not an essential one²³.

C. Fair, Reasonable and Non Discriminatory Terms

1. Emergence of FRAND

FRAND (or RAND as it is called in US) commitments are, generally, requested by SSOs from patent holders in order to incorporate their patents into standards, which envisages that right holders will license their IPs under FRAND terms in order to provide unrestricted access to standards. However, as making that commitment is not compulsory in most SSOs²⁴, it is also possible to commit these terms without involvement of an SSO in order to encourage implementers to adopt a particular technology²⁵.

Main function of FRAND commitments is to foresee that a patent holder will not refuse to license his IP under these terms²⁶. Commitments

²¹ Available at <http://www.etsi.org/about/how-we-work/intellectual-property-rights-iprs>, access date 20.07.2015.

²² De la Mano, Nazzini and Zenger (n 10) p 499 N 4.747.

²³ Carrier (n 9) p 4. An example given by the author is “slide to unlock” feature of Apple, of which alternative technologies are also possible.

²⁴ Geradin, *Pricing Abuses* (n 2) p 5; Geradin, *The European Commission* (n 4) p 1127.

²⁵ Einer Elhauge, ‘Treating Rand Commitments Neutrally’ [2015] *Journal of Competition Law & Economics* 11(1), p 3.

²⁶ Mario Mariniello, ‘Fair, Reasonable and Non-Discriminatory (FRAND) Terms: A Challenge for Competition Authorities’ [2011] *Journal of Competition Law and Economics*

basically serve as a protection for third parties, preventing SEP holders from exploiting their position gained by *ex post* standard situation²⁷. The aim of FRAND terms is to limit royalties with the value that can be attributed to the patent itself not to the value gained by standards²⁸, and to provide free access to standards for willing parties. It is also told that these terms are needed in order to protect benefits of *ex ante* standard competitive process²⁹. FRAND provides benefits for both parties; by ensuring that implementers are free to bring their products to the market without infringement or hold up problems as long as they are willing to pay fair and reasonable royalties and by awarding those who have invested and developed SEPs³⁰. Why patent holders give away their right to keep it for themselves can be explained with benefit of licensing to a large number of implementers in *ex post* standard situation, instead of making efforts to promote them otherwise³¹. Finally, there are some allegations that FRAND commitment is itself detriment to the prosperity of innovation by requiring free and open software developers to pay royalties, thus they claim these rights must be free of charge in order to support free software from which consumers will benefit at last³².

In order to give the main idea about the process, we can take a look at the provisions of the ETSI IPR Policy related to the FRAND terms³³. According to the Clause 4.1 of ETSI IPR Policy; members are required to behave reasonably and inform ETSI of their essential IPRs in proper time, specifically when they propose a technology to be adopted. Moreo-

7(3), pp 523-541, p 1. Available at SSRN: <http://ssrn.com/abstract=2186052>.

²⁷ Kattan and Wood (n 5) p 1.

²⁸ For Judge Posner's view see Kattan and Wood (n 5) p 3 n 12.

²⁹ Kattan and Wood (n 5) p 3.

³⁰ Mark A. Lemley and Carl Shapiro, 'A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents' [2013] Berkeley Technology Law Journal 28(2) p 1137 et seq. Available at SSRN: <http://ssrn.com/abstract=2243026>.

³¹ Kattan and Wood (n 5) p 4.

³² For allegations and defences from the sector see; Stephen Mutkoski, 'Government Procurement Policy, Patent Royalties and the Myth of 'Discrimination' Against Free and Open Source Software Developers' [October 26, 2011]. Available at SSRN: <http://ssrn.com/abstract=1949832>

³³ See supra p 7 n 21.

ver, as provided in the Clauses 6.1, 6.3 and 8.1; after informing ETSI they will be requested to give an irrevocable written commitment concerning that they will grant licenses on FRAND terms, if they refuse to give such an undertaking, along with the procedure of requesting patent holder to review its position, ETSI can seek alternative technologies and, if there is none, stop work on the adoption of the standard. These points illustrate how SSOs work during standard setting process and what is generally expected from patent holders.

2. Meaning of FRAND

What FRAND means is uncertain and, as far as we have observed, there has been no clear answer given yet. As it can be understood from the terms used, concerned licensing agreement must be fair, reasonable³⁴ and non-discriminatory. One possibility is that an agreement which would occur under conditions where implementers are not locked into a specific technology/standard, in other words, when there are other competing technologies that a willing implementer can use to achieve same technologic result, is “reasonable” for the purposes of FRAND³⁵. By some commentators, reasonableness is proposed to be determined with a hypothetical negotiation between SEP holder and implementer that takes place *ex ante* standard, in order to reflect the intrinsic value of the patent itself not of the standard³⁶. However it should be borne in mind that *ex ante* value of a patent cannot be predicted precisely due to the lack of information about the importance of it which occurs by use³⁷.

³⁴ Brooks and Geradin laid down six conditions of a license being fair and reasonable which include, charging only the incremental value of the product, considering proportion of all patents required in standard, not increasing the rates after adoption of standard etc. See Roger G. Brooks and Damien Geradin, ‘Taking Contracts Seriously: The Meaning of the Voluntary Commitment to Licence Essential Patents on “Fair and Reasonable” Terms’ in S. Anderman and A. Ezrachi (eds), *Intellectual Property and Competition Law: New Frontiers*, (Oxford University Press 2011).

³⁵ Lemley and Shapiro (n 30) p. 1147 et seq.

³⁶ Kattan and Wood (n 5) p 8.

³⁷ De la Mano, Nazzini, Zenger (n 10) p 502 N 4.766; Geradin and Rato (n 10) p 23; Mariniello (n 26) p 2.

Nevertheless if a comparison was to be made between *ex ante* and *ex post* royalties in order to determine which level is reasonable, despite all the difficulties, it could be said that if *ex ante* rates, which are determined in a competitive environment, are same with (or above) *ex post* situation, the latter is reasonable, yet if *ex post* is higher it is not an evidence of unfairness or being unreasonable³⁸. A reasonable suggestion here is that, considering the contractual nature of FRAND, instead of imposing detailed and scant determination of those terms, issue must be left to arm's-length negotiation between parties, which will be analysed in case of dispute under either IPR and contract provisions or competition rules³⁹. Apart from these, a mechanism to provide the functioning of the system without reasonable royalty concerns can be imitated from GEMA, where it has responsibility to license its members' copyrights under reasonable terms and if parties cannot agree on terms, potential licensee can use the concerned work as long as he pays the uncontested amount of royalty and deposit the rest⁴⁰.

Finally, "non-discriminatory" term can be interpreted as applying same conditions to the parties in the same boat, conditions may vary according to the parties, who brings additional value can get better conditions⁴¹. Interpretation of this term can also be made due to contractual relationship and "intent of parties" as in determination of "fair and reasonable" terms⁴².

Besides the terminology used, it is also not clear what making a FRAND commitment means legally. It is suggested by some authors that FRAND commitment means an "enforceable licensing agreement" in advance of future negotiations to determine details of it, SEP holder

³⁸ Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012) p 454 N 7.142; Geradin and Rato (n 10) p 24; Mariniello (n 26) p 3.

³⁹ Brooks and Geradin (n 34) p 6 et seq.

⁴⁰ Philipp Maume, "Compulsory Licensing in Germany" in Reto Hilty and Kung-Chung Liu (eds), *Compulsory Licensing*, (Springer 2015), MPI Studies on Intellectual Property and Competition Law 22, p. 17. Available at SSRN: <http://ssrn.com/abstract=2504513>.

⁴¹ Lemley and Shapiro (n 30) p 1141 n 17.

⁴² Brooks and Geradin (n 34) p 19.

has to make a “FRAND offer” to willing parties⁴³. According to some, FRAND commitment might bring compulsory licensing⁴⁴. We will leave this discussion to IP and contract lawyers. However a crucial question here is that, as it will be examined below, if FRAND commitment preclude patent holders from seeking injunctions against infringements. Some answer this question affirmatively, accordingly, making FRAND commitment means that an SEP holder will not resort to injunctions against willing licensees⁴⁵.

D. Former Cases, Investigations and in Particular Huawei Case

Before and after the adaptation of a standard some legal issues might occur: Is there any liability if a participant does not disclose its possible SEP *ex ante* standard setting? What happens if owner of an SEP refuses to license or licenses under exploitative terms, is there an abuse of dominance within the scope of the Article 102 TFEU? What if that undertaking has committed itself to license under FRAND terms? Finally what is the consequence of seeking injunctions against a willing licensee? These are the main questions related to the relationship between standards, standard setting process and competition rules. In fact, why competition rules intervene can be explained with the situation where

⁴³ Lemley and Shapiro (n 30) p 1141. It is also suggested by the authors that if parties cannot agree on terms and conditions, “baseball style arbitration”, where arbitrators choose between parties’ offers and cannot determine conditions themselves, must step in and determine binding final agreement. There is no need for SSOs to be involved in determining what is reasonable, no need for jurisdictional concerns, and even no need for antitrust intervention under their approach, according to the authors. For details, see Lemley and Shapiro (n 30) p 1139 et seq.

⁴⁴ Geradin, *The European Commission* (n 4) p 1127.

⁴⁵ Lemley and Shapiro (n 30) p 1142-1143. In US same approach has been taken by United States Department of Justice and United States Patent & Trademark Office, see Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments p 6. Available at <http://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf>.

breach of FRAND commitment also violates competition rules by abuse of dominance gained with the *ex post* standard situation⁴⁶.

1. Early Cases

There have been several occasions where European Commission (the Commission) and the Court of Justice of the European Union (CJEU) had chance to deal with IP and SEP related issues under competition law provisions. In *Magill*⁴⁷ and *IMS*⁴⁸, it was accepted as a principle that in exceptional circumstances, IP holders may have to grant license when the opposite would amount an abuse of dominance. *Magill* was introduction of compulsory licensing to competition law within essential facilities doctrine⁴⁹. This approach led to the decision of the Commission in *Microsoft*⁵⁰ case, where Microsoft had abused its dominant position by refusing to share interoperability information.

Another case was *Rambus*⁵¹, where potential SEPs had been intentionally concealed during the standards were set. The Commission condemned so called “patent ambush” and Rambus gave commitments. Former competition commissioner Neelie Kroes said in *Rambus*: “... *For its part, the Commission will vigorously enforce the competition rules in this area, for the benefit of technical progress and European consumers*”⁵². However *Rambus* case is claimed to be a “*weak precedent*” since it was a

⁴⁶ Mariniello (n 26) p 2.

⁴⁷ Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743.

⁴⁸ Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECRI-5039.

⁴⁹ Whish and Bailey (n 1) p 842.

⁵⁰ Commission Decision of 24.03.2004, Case COMP/C-3/37.792, *Microsoft*.

⁵¹ Commission Decision of 09.12.2009, Case COMP/38.636, *Rambus*.

⁵² See press release of the Commission on 09.12.2009. Available at: http://europa.eu/rapid/press-release_IP-09-1897_en.htm.

decision under Article 9 of Regulation 1/2003⁵³. In *Qualcomm*⁵⁴, Commission decided to open investigations to find whether Qualcomm's pricing policy of the patents incorporated within standards was not FRAND and led to an abuse, however after the complainants had withdrawn their complaints, the Commission decided to not going further on that investigation, considering the difficulty in determination of reasonable rates.

Another example is *Google/Motorola Mobility*⁵⁵ merger decision where the Commission confirmed that seeking injunctions or threat of injunctions based on SEPs against good faith potential licensee may impede effective competition⁵⁶. Despite the fact that Google agreed to adhere FRAND commitments formerly given by Motorola, the Commission held that there would still be ability to seek injunctions, which could impede competition⁵⁷. However since Google agreed to not to raise the royalty levels already applied and to enter licensing negotiations in good faith on FRAND terms, moreover because of the fact that seeking injunctions was not merger specific -it had already been done by Motorola-, the Commission found no competition concerns with evaluation of ex merger situation and Google's internal documents⁵⁸.

2. Samsung, Motorola and Huawei

Most recent issue under examination is Huawei Case⁵⁹, which is referred to the CJEU by Landgericht Düsseldorf for preliminary ruling so as to decide under which circumstances an SEP holder abuses

⁵³ Nicolas Petit, 'Injunctions for Frand-Pledged Standard Essential Patents: The Quest for an Appropriate Test of Abuse under Article 102 TFEU' [2013] European Competition Journal 9(3), p 32. Available at SSRN: <http://ssrn.com/abstract=2371192>.

⁵⁴ Qualcomm Commission Memo of 01.10.2007, MEMO/07/389. Available at http://europa.eu/rapid/press-release_MEMO-07-389_en.htm.

⁵⁵ Commission Decision of 13.02.2012, Case M.6381 *Google/Motorola Mobility* [2012] OJ C75/1, para 107.

⁵⁶ *ibid* para 107.

⁵⁷ *ibid* para 112-114.

⁵⁸ *ibid* para 105-160.

⁵⁹ Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* [2015].

dominance by seeking injunctions against potential licensees. In order to further elaborate on the case first we need to briefly look at *Orange Book Standards* of Bundesgerichtshof (German Federal Court of Justice) and *Samsung* and *Motorola* decisions of the Commission, since the application of these was also assessed in *Huawei*.

It was set by the German Federal Court of Justice in *Orange Book Standard* that abuse of dominant position by seeking injunctions related to standard essential patents is only possible under following conditions, briefly; first, defendant has to take first step and make an unconditional offer which is binding and cannot be refused legitimately by patent holder; second, defendant must act as if he is a licensee and render an account for uses of that patent⁶⁰. It is argued that *Orange Book Standard* is “patentee friendly”⁶¹ since the burden for using so called “competition law defence” is more on the defendant, yet, in *Samsung* and *Motorola* cases, which will be examined below, the Commission relaxed the burden for proving to be a “willing licensee”⁶². There have been comments that in *Huawei* case, referring court asked questions in such a way to have *Orange Book Standard* established as general approach in EU law vis-à-vis decisions of the Commission⁶³.

In *Samsung* decision⁶⁴ (a commitment proceeding under Article 9 Regulation 1/2003), after market definition and finding of dominance, the Commission reached the conclusion, despite the fact that *Samsung* had withdrawn its actions, it may nevertheless abuse its dominant position again by seeking injunctions against *Apple*⁶⁵. It was recognized by the Commission that an SEP owner could seek injunctions as a part of exercising IP rights, unless exceptional circumstances occur, which were

⁶⁰ German Federal Supreme Court, Judgment of 6 May 2009, KZR 39/06 *Orange Book Standard*.

⁶¹ Michela Angeli, ‘Willing to Define Willingness: The (Almost) Final Word on SEP-Based Injunctions In Light of *Samsung* and *Motorola*’ [2015] *Journal of European Competition Law & Practice* 6(4), p 227 n 50.

⁶² Petit (n 53) p 14 et seq.

⁶³ Petit (n 53) p 18.

⁶⁴ Commission Decision of 29.04.2014, COMP/C3/39.939, *Samsung*.

⁶⁵ *ibid* para. 52-54.

UMTS standard setting process and FRAND commitments in this case⁶⁶. It was told that standard setting process locked implementers in and by giving FRAND commitments, Samsung had agreed to achieve royalties instead of injunctions for exercising its IPRs⁶⁷. Accordingly, Samsung's conduct had anticompetitive effects of excluding and inducing Apple to licensing conditions that would not have been accepted in the absence of injunctions⁶⁸. There was no objective justification identified by the Commission in the decision as well, reasoning of which were as follows; mere existence of IPR cannot be a justification itself, Apple was neither unwilling nor in financial distress, assets were not located in a jurisdiction jeopardizing enforcement of rights, eliminating injunction threat is also important for functioning of standard setting process and finally no benefit for consumers exists⁶⁹. Samsung offered commitments to remedy these concerns such as not seeking injunctions for a foreseen "licensing framework" period which will result with determination of terms by a court as a last resort if parties cannot agree and leaving the possibility open for validity, infringement and essentiality examination by defendant and the court⁷⁰.

In *Motorola*⁷¹, the Commission reached an infringement decision under Article 7 of Regulation 1/2003. Following the same reasoning in the Samsung decision, the Commission identified exceptional circumstances as GPRS standard setting process and FRAND commitment given by Motorola⁷², and found anticompetitive effects which were temporary ban on Apple, inducing Apple to disadvantageous Settlement Agreement -specifically the clause which gives Motorola right to terminate license if Apple challenges validity of SEPs- and undermining stand-

⁶⁶ *ibid* para 56.

⁶⁷ *ibid* para 57-61.

⁶⁸ *ibid* para 62-64.

⁶⁹ *ibid* para 65-70.

⁷⁰ *ibid* para 75-104.

⁷¹ Commission Decision of 29.04.2014, COMP/C3/39.985, *Motorola*.

⁷² *Ibid*, para 281-300.

ard setting process⁷³ without any objective justification⁷⁴. However the Commission did not impose a fine due to the lack of decisional practice and diverging national jurisprudence⁷⁵.

According to Professor Whish, *Samsung* and *Motorola* decisions are good exhibitions of Article 7 and 9 implementation of the Commission and they provide “an efficient and effective resolution”, since in *Motorola*, the Commission made a substantial analysis of infringement and in *Samsung* possible remedies/negotiation procedure were provided⁷⁶. These decisions were welcomed at least as a guidance on enforcement policy of the Commission in a balance between parties’ interests⁷⁷.

If we turn back to Huawei, what actually asked from CJEU was to provide guidance on SEP involved Article 102 cases since it had become highly complicated after differential decisions of national courts⁷⁸. Advocate General (AG) Wathelet delivered his opinion on 20.11.2014⁷⁹, and the Court delivered its judgement on 16.07.2015⁸⁰.

In his opinion, AG stated that *Orange Book Standard* was not applicable to the Huawei case since in the former standards were set *de*

⁷³ Ibid, para 308-420.

⁷⁴ Ibid, para 421-491.

⁷⁵ Ibid, para 561.

⁷⁶ Richard Whish, ‘Motorola and Samsung: An Effective Use of Article 7 and Article 9 of Regulation 1/2003’, [2014] *Journal of European Competition Law & Practice* 5(9), p 603-604.

⁷⁷ Angeli (n 61) p 241; Whish (n 76) p 604.

⁷⁸ German courts are highly preferred for injunction requests because of the market, expert judges, fast rulings, generous approach to injunctions and no need for validity argument for injunctions if there is a 20 percent chance of validity. In Netherlands High District Court rejected Samsung’s injunction request, since Samsung was obliged to give license to Apple under FRAND terms, in Mannheim the Karlsruhe Higher Regional Court rejected MMI’s request for injunction and upheld Apple’s compulsory license objection, since market participants willing to comply with standards have to use the patent and Apple had offered to MMI a license agreement under FRAND terms. See Carrier (n 9) p 3-4.

⁷⁹ Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* [2015], Opinion of AG Wathelet (Opinion).

⁸⁰ *Supra* p 12 n 59.

facto, yet in the latter ETSI was involved in standard setting process and Huawei undertook FRAND commitments⁸¹. It is also criticised in German literature that applying Orange Book Standard to SEP related cases, where there are SSOs involved in and FRAND commitments, would be over compensation of patent holders by acquiring additional rewards stemming from standards⁸². As regards to the Samsung press release⁸³ pointed out by the referring court, AG said that “a mere willingness on the part of the infringer to negotiate in a highly vague and non-binding fashion cannot, in any circumstances, be sufficient to limit the SEP-holder’s right to bring an action for a prohibitory injunction”⁸⁴. Finally AG stated that it would be over or under protection of the SEP holders, implementers and the consumers to implement *Orange Book Standard* or *Samsung* in this case⁸⁵.

AG expressed that owning an SEP could not necessarily result in dominance, it must be examined case by case basis, and even if holding an SEP did result a presumption that owner had dominance, it must be rebuttable with specific and detailed evidence⁸⁶.

Considering balance between different interests and right of access to the courts⁸⁷, AG told that Huawei, by giving a FRAND commitment, had not waived its right to seek prohibitory injunctions yet it had accepted to offer SEPs under adequate and fair compensation⁸⁸. AG shared the opinion that using IP related rights, such as injunctions in this case, could not itself amount to abuse⁸⁹, and limitation of these rights must be under exceptional and clearly defined circumstances⁹⁰. AG believes that

⁸¹ *Opinion* (n 79) para 48.

⁸² Maume (n 40) p 14.

⁸³ European Commission press release IP/12/1448 of 21 December 2012 and Commission Memorandum 12/1021 of the same date.

⁸⁴ *Opinion* (n 79) para 50.

⁸⁵ *ibid* para 51.

⁸⁶ *ibid* para 53 et seq.

⁸⁷ *ibid* para 59.

⁸⁸ *ibid* para 60.

⁸⁹ *ibid* para 61.

⁹⁰ *ibid* para 62.

*“the commitment given by Huawei in the dispute before the referring court to grant licences to third parties on FRAND terms bears some similarity to a ‘licence of right’, and where a patent licensee has a licence of right, an injunction may not, in principle, be issued against him”*⁹¹. Also this case dissociates itself from the precedents with the fact that conduct under examination cannot be seen as a refusal because of the notification of Huawei to ETSI of its IPRs and FRAND commitments⁹².

Finally it was found that, despite giving FRAND commitments, if an SEP holder seeks prohibitory injunction against a willing licensee, this amounts to a method out of normal competition and, with its anticompetitive effects, to an abuse of dominance under Article 102 TFEU⁹³.

In its judgement, Fifth Chamber of the CJEU gave a decision highly overlapping with the views of AG. Court confirmed that *“the Court must strike a balance between maintaining free competition ... and the requirement to safeguard ... intellectual-property rights ... ”*⁹⁴. It was accepted that, by pointing out case law, exercising exclusive IPRs, even if the holder was dominant, could not amount an abuse itself, however in exceptional circumstances it may, and in this case before the court making FRAND commitment created *“legitimate expectations”*⁹⁵ on the part of third parties ... and a refusal by the proprietor of the SEP to grant a license on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU”, therefore parties may raise that defence on injunction requests⁹⁶.

It was concluded by CJEU, there was no abuse as long as; the SEP owner alerts infringer by specifying the infringement and, if the infringer is willing, makes a specific written licensing offer on FRAND terms including the royalties and the calculation method, provided that alleged

⁹¹ *ibid* para 65-66.

⁹² *ibid* para 70.

⁹³ *ibid* para 74.

⁹⁴ *Huawei* (n 59) para 42.

⁹⁵ In literature legitimate expectations created by FRAND commitments is approached critically, see Petit (n 53) p 38.

⁹⁶ *Huawei* (n 59) para 46, 47, 52, 53.

infringer does not continue to use the patent in bad faith and diligently responds the offer without any delaying tactics⁹⁷.

This is in line with the framework offered by AG⁹⁸. It was also stated in the judgement that bringing actions for past acts of the infringer and claiming damages was not contrary to the Article 102 TFEU⁹⁹.

Huawei is welcomed by the Commission officials since it is in line with the Commission's reasoning in *Motorola* and *Samsung*; confirming the unique characteristics of SSO involved SEP related litigations, once FRAND commitment is made, SEP holders accept to exercise their rights only in form of royalties, not by injunctions, as long as the implementer is a willing licensee and burden of proving unwillingness is on the SEP holder, in contrast with the *Orange Book Standard*¹⁰⁰.

E. Article 102: Implementation on IP Related Issues

As we can see from the case law and Commission decisions, apart from the standard setting process and its examination under Article 101 TFEU which is out of scope for this work, competition law provision dealing with the above mentioned issues is Article 102 TFEU-abuse of dominance- and its counterparts in national laws. In order for there to be infringement of Article 102, there have to be a dominant undertaking and a conduct which constitutes abuse with anticompetitive effects. Commission's Article 102 Guidance¹⁰¹, despite the fact that it cannot constitute the law and its confliction with case law, is an important document to provide clarity on the Commission's priorities¹⁰². In following pages, relevant market definition will be analysed then existence of

⁹⁷ *Ibid* para 71.

⁹⁸ *Opinion* (n 79) para 103.

⁹⁹ *Huawei* (n 59) para 77.

¹⁰⁰ Nicholas Banasevic, 'The Implications of the Court of Justice's *Huawei/ZTE* Judgment', [2015] *Journal of European Competition Law & Practice* 6(7), p 463-464.

¹⁰¹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7.

¹⁰² Whish and Bailey (n 1) p 187.

dominance on that market will be questioned then types of conduct will be scrutinized so as to examine whether or not it amounts an abuse.

1. Market Definition and Dominance

In order to establish dominance, two step analysis is required; market definition and assessment of competitive constraints in that market¹⁰³. Market definition can be made by hypothetical monopolist test¹⁰⁴, and dominance is defined in *United Brands* by CJEU as; “A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”¹⁰⁵ Therefore determining competitive constraints over an undertaking is important for dominance examination. These are stated as constraints imposed by actual competitors, potential competitors (in which entry barriers are particularly important) and countervailing buyer power¹⁰⁶. Having said that, we need to point out sector specific features and possible constraints coming from those.

To begin with, we will not try to define relevant market for SEP related issues and leave the matter to practice on case by case analysis. Normally, relevant market must include the licensed technology and its substitutes as long as customers can switch those in response to a small but significant non-transitory increase in price¹⁰⁷. However, this is not an end itself and caveats are in order for market definition step and the existence of dominance because of the specific characteristics of so called “technology-enabled” or “high technology” markets¹⁰⁸. These can

¹⁰³ Whish and Bailey (n 1) p 191.

¹⁰⁴ By asking the question what happens in case of a small but significant non-transitory increase in price, i.e. SSNIP test. Relevant product market is the one worth monopolising. Whish and Bailey (n 1) p 26 et seq.

¹⁰⁵ Case 26/76 *United Brands v Commission* [1978] ECR 207, para. 65.

¹⁰⁶ *Guidance* (n 101) para 20.

¹⁰⁷ Geradin, *Pricing Abuses* (n 2) p 5-6.

¹⁰⁸ Rato and Petit (n 14) p 2; Geradin, *Pricing Abuses* (n 2) p 5.

be summarized as follows; markets are highly innovative and innovation is quiet rapid; they are usually covered with intangible property, such as trademarks, patents, designs and the result being that (marginal) costs are low compared to the conventional markets; network effect, "first-mover advantage" and "winner-takes-all effects" are felt stronger in these markets; also there are switching costs, even if not in monetary terms, such as time, effort etc., which lock consumers in to the products that they are used to¹⁰⁹. Moreover, implementers usually obtain licenses as a portfolio, not separately, in order to have all the patents needed for manufacturing a compliant product¹¹⁰. Besides since a product might have thousands of SEPs read on it, there are other patents to get license which are not substitutes but complements for manufacturers¹¹¹, in other words, licensing a single SEP is not an end itself, others have to be considered as well. As opposed to this, a counter argument might be, as expert witness in Motorola told, it only takes one bullet to kill, and therefore even a single patent is important itself¹¹².

Demonstrating these characteristics, now implications are to be put forward, especially in conjunction with the dominance examination. First of all, because of the rapid innovation, lower costs and other features, one day's monopolist might be swept out of market next day as we have witnessed before. Thus, market shares and profit margins, while they are just one of the indicators of dominance in conventional cases, will be even less powerful¹¹³. Furthermore since distinct products become substitutes by time from consumers' point of view, e.g. we use same devices in different sizes for mobile, tablet and even computer and most companies produce them all, demand and supply side substitution is expanding day by day, therefore a product which seems in a distinct market might become a substitute restraining the first product. This

¹⁰⁹ Rato and Petit (n 14) p 3-5.

¹¹⁰ Geradin, *Pricing Abuses* (n 2) p 6.

¹¹¹ Geradin, *Pricing Abuses* (n 2) p 6.

¹¹² Jones (n 5) p 22; "Motorola Likens Its Enforcement of FRAND Patents to Bank Robbery: 'It Only Takes One Bullet to Kill'", 7 February 2012, <http://www.fosspatents.com/2012/02/motorola-likens-its-enforcement-of.html>, access date 20.08.2015.

¹¹³ Rato and Petit (n 14) p 11-12.

effect makes it difficult to draw boundaries of the market and to find dominance¹¹⁴. However it must be noted that R&D costs can be really high, therefore, with switching costs it might create entry barriers. Lock in effect is another factor which enhances market power.

In *Huawei* case, dominance was not asked by referring court thus it was not examined in the judgement. In *Samsung* (and *Motorola*) decision(s), relevant product market was defined as “the licensing of the technologies as specified in the UMTS (GPRS) standard technical specifications, on which each of Samsung’s (Motorola’s) UMTS (GPRS) SEPs reads”¹¹⁵. Moreover, the Commission had an approach to consider each SEP a separate market in *Google/Motorola*¹¹⁶ decision. It is stated in the paragraph 61 of the decision that;

“The Commission considers that each SEP can be considered as a separate market in itself as it is necessary to comply with a standard and thus cannot be designed around, i.e. there is by definition no alternative or substitute for each such patent. The relevant market in this case is thus the (at least) EEA-wide market for the licensing of each of the relevant SEPs that Google will acquire from Motorola Mobility following the transaction.”

In *Samsung*, the Commission found dominance of which reasons are as follows; first, *Samsung* had %100 market share on its technology and even if ownership of SEP did not mean dominance UMTS was an indispensable standard in EEA; second, adaptation of UMTS was approved with a decision (128/1999/EC); third, encouragement of implementers by FRAND commitments to apply UMTS standards; fourth, industry players were locked-in due to significant sunk costs; fifth, there were no substitute standards, existing alternatives were complementary; sixth, there were no substitutes for neither standard nor Samsung’s technology, therefore there was no countervailing buyer power restraining

¹¹⁴ Rato and Petit (n 14) p 13-14.

¹¹⁵ *Samsung* (n 64) para 41, *Motorola* (n 71) para 213.

¹¹⁶ *Google/Motorola* (n 55).

Samsung¹¹⁷. This set of reasoning and finding of dominance was also approved in Motorola case¹¹⁸.

This approach is criticised by some authors for there being other constraints with the ones mentioned above; alternatives coming from non-standard solutions or new standards and reputational (or institutional) constraints¹¹⁹; if SEP holders “exercise market power, ... they risk being punished by standard setting participants in future generations...”¹²⁰. However, once the standard is set, commercially, implementers might have to comply with it for producing compatible devices with other manufacturers’ in order to market those devices¹²¹, and also switching to other technologies might be cumbersome¹²². In other words, once there are standards and compatible devices with the standards out in the market, what a prudent merchant does is also offering devices capable of complying with others considering the interaction between different technologies. Besides, it is also pointed out that, reputational issues cannot be a restraint for an already losing business and Patent Assertion Entities (PAEs), since the former will try to utilize its SEP portfolio as much as possible and the latter are already out of standard-setting process¹²³, their primary goal is to acquire and exploit patents.

Another view is that the position of downstream market is also a constraint on the upstream market; if high royalties pass on to final consumers and they switch to alternative products, the upstream players will no longer increase their prices permanently¹²⁴. Furthermore it is argued that since there are lots of complementary SEPs read on a technology, an SEP holder cannot independently determine royalties, others have to be considered too as implementers can only pay to a certain level¹²⁵. How-

¹¹⁷ Samsung (n 64) para 45-51.

¹¹⁸ Motorola (n 71) para 221-270.

¹¹⁹ Geradin, *Pricing Abuses* (n 2) p 8.

¹²⁰ Rato and Petit (n 14) p 15-16.

¹²¹ Kattan and Wood (n 5) p 2.

¹²² Geradin, *Pricing Abuses* (n 2) p 11.

¹²³ Kattan and Wood (n 5) p 10.

¹²⁴ Geradin, *Pricing Abuses* (n 2) p 6-8.

¹²⁵ Geradin, *Pricing Abuses* (n 2) p 8.

ever this approach has to be questioned with the presence of requested royalty rates exceeding the price of product itself¹²⁶.

Consequently, there is a discussion about market definition and dominance in SEP related markets. It has to be borne in mind that dominance is a binary concept; an undertaking is either dominant or not which will result its responsibility under Article 102¹²⁷. Moreover dominance is not established once an SEP is owned by an undertaking¹²⁸, each case has to be considered on its own merits with the assessment summarized above.

2. Types of Conduct

Abuses have no exhaustive list¹²⁹, the Commission and the CJEU have identified types which are not explicitly mentioned in Article 102. For assessment, considering sector specific features, it is suggested that Article 102 should be interpreted in a more effect-based manner, with using modern economic and legal methods, e.g. prioritising exclusionary conducts, requiring proofs on anticompetitive effects, looking for a direct effect of foreclosure on as-efficient existing/potential competitors, seeking high evidentiary burden, providing credible counterfactual despite difficulties arisen from being new-emerged market¹³⁰. In any case, what is meant by “abuse” can be explained as the behaviour of dominant undertaking “*which recourse to methods different from those which condition normal competition*”¹³¹, in other words, “*by using methods other than those which come within the scope of competition on the merits*”¹³². It is also stated that “*competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less*

¹²⁶ See supra n 13.

¹²⁷ Whish and Bailey (n 1) p 190-191.

¹²⁸ Geradin and Rato (n 10) p 36.

¹²⁹ Alison Jones and Brenda Sufrin, *EU Competition Law* (Fifth Edition, Oxford University Press 2014) p. 556; Whish and Bailey (n 1) p 202.

¹³⁰ Kattan and Wood (n 5) p 18-21.

¹³¹ Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para 91.

¹³² C-280/08 P *Deutsche Telekom v Commission* [2010] ECRI-I-9555, para 177.

efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation”¹³³. Apart from that, causation link is not needed for an abuse, as it was put forward by case law¹³⁴. Therefore a conduct can be abusive even if it is not intended to exploit market power/dominance, abuse is an objective concept¹³⁵. This means a dominant undertaking holding an SEP has a special responsibility to control its conducts to be in competition on merits, thus, for example, while normally it is free to seek injunctions or exercise its IPRs in anyway, only being dominant itself can preclude it from doing so under specific circumstances if the conduct has anticompetitive effects, from the competition law point of view.

Before going into detail, a warning has to be made. FRAND commitments and competition rules do not have to overlap in all cases. What FRAND commitment means is an irrevocable undertaking for future behaviour of a patent holder which may also create a compulsory license under patent laws¹³⁶. It is a contractual relationship between patent holder and SSO, violation of commitments means breach of contract, not an abuse of dominance by itself¹³⁷. It is even argued, despite being weak, that FRAND commitments cannot be binding, since commitments in Commission investigations are only binding if the Commission made them so with a decision, therefore same logic applies for a commitment made before an SSO¹³⁸. Putting that aside, what competition rules are concerned is not about breach of a contract, rather it focuses on whether a conduct is out of the “competition on merit”. Therefore, if a conduct falls within abuse, it does not matter whether it is a breach of a contract or not, and same is valid vice-versa. For a competition law assessment,

¹³³ C-209/10 *Post Denmark A/S v. Konkurrenceradet* [2012] ECR I-000, 27 March 2012, para 22.

¹³⁴ Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215.

¹³⁵ Whish and Bailey (n 1) p 214-215.

¹³⁶ Geradin, Layne-Farrar and Petit (n 38) p 457 N 7.155; Geradin, *The European Commission* (n 4) p 1127.

¹³⁷ Geradin and Rato (n 10) p 16.

¹³⁸ Petit (n 53) p 35-36.

as the Commission stated in *Samsung and Motorola*, FRAND commitments can be interpreted as exceptional circumstances¹³⁹. Some might say that competition rules should be the last resort for these cases¹⁴⁰, we do not agree with that type of thinking since competition rules step in with infringement, there is no need to wait for sector specific or patent law remedies to fix anticompetitive behaviour.

It is possible to say that, legal discussion here should be on “lock-in” effects of FRAND commitments regardless of SSO involvement or announced standards, i.e. what matters here is whether switching to alternative technologies is feasible or not and impact of commitments to that situation¹⁴¹, considering competition law is concerned with lock-in effects¹⁴². In this respect, even if a technology is asserted as a standard by an SSO, there may not be “lock-in” effect, thus no competition concerns, if it is possible to design around it without incurring significant costs¹⁴³.

Another distinction has to be made about compulsory licensing. Under national patent laws, countries provide compulsory licensing system when public interest requires¹⁴⁴. There is also compulsory licensing provided under competition law, where refusal to license amounts an abuse. If this is the case, it has to be scrutinized under competition law methods and principles. *Magill* and *IMS* cases, which are mentioned above, are pioneers of CJEU decisions of compulsory licensing under EU competition law. An example from the world can be given from China, where in particular cases the Supreme People’s Court decided use of a patent which is incorporated within a standard without an authorization does not amount a patent infringement, since by participating standard setting process patent owners give their consent for use of it, however

¹³⁹ Jones (n 5) p 21-22.

¹⁴⁰ Geradin and Rato (n 10) p 38.

¹⁴¹ Elhauge (n 25) p 4; Jones (n 5) p 15.

¹⁴² De la Mano, Nazzini, Zenger (n 10) p 500 N 4.750.

¹⁴³ Elhauge (n 25) p 8, 10.

¹⁴⁴ Maume (n 40) p 3.

they should be compensated with royalties which are above the normal level¹⁴⁵.

After these explanations, now we can take a look at different types of abuse which are common in SEP related cases.

a) Excessive Price Setting

Despite the Commissions approach of secondary importance for exploitative abuses¹⁴⁶, it is one of the complaints in this field. *United Brands* test is applied to such abuses. Accordingly, a two-step assessment is needed; first, a price is excessive if it has no reasonable relation to the economic value of the product; second, if the answer of first question is affirmative, it can be either excessive itself or when compared to competing products¹⁴⁷. In IPR related markets problems arise for both steps of the test.

First of all, IPRs are intangible properties to which a certain cost or value cannot be attributed easily¹⁴⁸. Therefore, where it is already quite hard to assess what level has “reasonable relation to the economic value of the product”, it becomes even harder to make that evaluation and allocate common R&D costs to a single IPR¹⁴⁹. Secondly, next step of the test is also complicated since once a standard is set and an SEP is included in it, against what benchmark that value of SEP can be measured? Is it other technologies not included in standards or other technologies included in the standard but for different technical solutions regardless of importance of those solutions. Royalty rates that were applied actually, or would have been applied between competing technologies, ex-ante standard setting, might be a benchmark¹⁵⁰ however it is not again flawless

¹⁴⁵ Adrian Emch and Liyang Hou, ‘Antitrust Regulation of IPRs – China’s First Proposal’, [August 2014] Competition Policy International, Asia Column, p 4-5. Available at SSRN: <http://ssrn.com/abstract=2485703>.

¹⁴⁶ *Guidance* (n 101) para. 7. For further analysis see Jones (n 5) p 16-18.

¹⁴⁷ *United Brands* (n 105) para 250-252.

¹⁴⁸ Geradin, Pricing Abuses (n 2) p 16; Mariniello (n 26) p 3.

¹⁴⁹ Mariniello (n 26) p 3.

¹⁵⁰ For excessive royalty evaluation, confirming difficulty in assessing economic value of

considering the facts that former licensing rates might not be adequate with the intrinsic value of the patent understood by use, and also that would deprive SEP holders incentive to offer favourable terms to early contractors¹⁵¹. Qualcomm case is shown as a proof of difficulty that the Commission faced on determining what excessive price was¹⁵².

It is argued by some authors that application of excessive pricing practices to SEP related cases would not be correct because of the case law, *Magill/IMS Health*, since it is only possible on exceptional circumstances preventing development of the secondary market, and if refusal to license is possible under this test, it is also possible under same conditions patent holder can set any price that seems fit¹⁵³. This analysis is inappropriate for our case because what we need to bear in mind, as pointed out in Huawei case, is FRAND commitments given by SEP holders lack in exemplary cases. What FRAND commitment means is already explained, it is insurance of SSOs to set standards without any hold-up, ex-post opportunism concerns. Therefore it is already possible to confer exceptional circumstances from it, as in Samsung and Motorola. Moreover, stretching a test for refusal to license into excessive pricing seems incompatible; despite some amount to constructive refusal to supply, below that level excessive pricing has its own conditions and examination.

Additionally, despite the argument that a contractual relationship such as FRAND commitment cannot give rise an antitrust duty to limit royalties and this must stem from EU law itself¹⁵⁴, commitment is not even needed for excessive pricing case since Article 102 is a prohibition itself, as laid out in the *United Brand*, it is already an antitrust duty to seek what price is not “reasonably” related to the economic value of the product. A role that FRAND can play in here is that if it was abided by SEP holder, there would not be any excessive payment caused by adaptation of the

IPR, ex-ante ex-post comparison is also suggested by *the Guidelines* (n 15) para 289.

¹⁵¹ Geradin, *Pricing Abuses* (n 2) p 17.

¹⁵² Geradin, *The European Commission* (n 4) p 1133.

¹⁵³ Rato and Petit (n 14) p 26.

¹⁵⁴ Rato and Petit (n 14) p 26.

standard¹⁵⁵. Therefore it would be erring in law to claim that royalty rates cannot be limited under competition law, provided problems mentioned above on determining economic value of the product are solved¹⁵⁶.

In conclusion, it is harder to establish exploitative abuse in IP related cases than conventional ones. As it was discussed above, what “reasonable price” for the aim of FRAND is explained with the intrinsic value of the specific patent ex-ante standard setting and the result of arm’s-length negotiations between parties. In excessive price investigations this approach might be used as a benchmark. It is argued that standard setting does not give additional market power to SEP holders, it only increases the value of the patent in question since generally no alternative -sufficiently substitutable- technology exists before standard setting, hence the outcome is not based on a conduct of SEP holder, it is result of the standard setting itself, thus maybe the value of standard setting can also be included in reasonable level¹⁵⁷. However this is unlikely to be followed due to opposite view of the Commission¹⁵⁸.

b) Price Discrimination

Price discrimination is a type of abuse included in the Article 102 TFEU as “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”. In our discussion it has a particular importance because of the “non-discriminatory” component of FRAND. However, as it is obvious from the wording of Article 102, there have to be equivalent transactions for a discrimination. It is argued that, since cross-licensing is a common

¹⁵⁵ Elhauge (n 25) p 13.

¹⁵⁶ A four step test is proposed by *Mariniello* in order to analyse whether such a conduct leads to an abuse which are as follows; “... (1) *Ex-ante*, a credible alternative to the adopted technology exists; (2) *Ex-ante*, prospective licensees cannot reasonably anticipate the licensor’s ex-post requests; (3) *Ex-post*, the licensor requests worse licensing conditions than ex-ante; (4) *Ex-post*, the licensee is locked into the technology.” If these four conditions are satisfied then competition authority needs to evaluate defendant’s arguments. *Mariniello* (n 26) p 14

¹⁵⁷ Geradin, *Pricing Abuses* (n 2) p 12-13.

¹⁵⁸ *Guidelines* (n 15) para 189.

practice, SEP holders must not be forced to offer similar royalties to all potential licensees, they must be free to evaluate it according to patent portfolios offered in return¹⁵⁹. Vertically integrated firms will be more prone to price discrimination in order to favour their own downstream firm, however non-integrated firms are told to be more reluctant on doing it as they have more interest on escalating downstream competition and increasing royalties with number of sales¹⁶⁰.

In Germany, *Standard-Spundfass*¹⁶¹ case, VCI (German Chemical Industry Association) summoned proposals for a new draining mechanism then announced the best proposal as official recommendation by doing so which became a de facto standard, however, the owner of best proposal was required to give royalty free licenses to other companies participated in proposals. An Italian company had not submitted a proposal however demanded a royalty free license by claiming otherwise would be discrimination¹⁶². The Federal Court of Justice held that, although compulsory licensing is available under competition law in special circumstances where patent is essential to access downstream market, competition law does not provide most favoured nation clause, in other words, discrimination is possible where it is supported with economic and entrepreneurial facts¹⁶³.

c) Seeking Injunctions

Another abusive conduct to be scrutinized under Article 102 TFEU is so called “abusive litigation”¹⁶⁴. Question to be answered here is that whether or not seeking injunctions, which will result paralyzing implementers’ business, by an SEP holder who gave FRAND commitment

¹⁵⁹ Geradin, *Pricing Abuses* (n 2) p 9.

¹⁶⁰ Geradin, *Pricing Abuses* (n 2) p 9-11.

¹⁶¹ German Federal Courts of Justice, Judgement of 13 July 2004, KZR 40/02 *Standard Spundfluss*, reported in BGHZ 160,67, English translation available at 36 IIC 741 [2005].

¹⁶² Maume (n 40) p 5.

¹⁶³ Maume (n 40) p 6.

¹⁶⁴ Rato and Petit (n 14) p 58.

amounts an abuse of dominance, in other words, does FRAND mean that SEP holder forgoes his right to seek injunctions against willing licensees. There have been cases and decisions confirming this view. Controversially, it is argued that patent litigation might be a good choice for licensees at all, considering that litigation might result with the invalidity of the patent¹⁶⁵.

In Google/Motorola it was told that *“it may be that the threat of injunction, the seeking of an injunction or indeed the actual enforcement of an injunction granted against a good faith potential licensee, may significantly impede effective competition”*¹⁶⁶. This approach is also approved in Samsung, Motorola decisions and Huawei judgement. Despite it does not mean a waiver as explained below, FRAND commitment itself conflicts with the idea of seeking injunctions against a willing licensee as long as he is ready to agree on fair, reasonable terms¹⁶⁷. Moreover, injunctions are also related to excessive royalties in such a way that by seeking injunctions patent holder gains an unfair advantage over implementers to force them pay royalties above FRAND terms¹⁶⁸. How competition law can deal with these problems is the essence of the discussion.

Before proceeding with the assessments, we should look at a controversial work held by Kirti Gupta and Mark Snyder about the threat of SEP related litigations¹⁶⁹. In the light of empirical data concerning patent litigations between 2001 and 2013, they have concluded following points; most of these cases were not related to SEPs, in SEP related ones there had been no injunctions granted, judgements were determined by quality of patents rather than being an SEP or not, so called smart phone wars were caused by the new entrants’ effort to make a room in the market for themselves¹⁷⁰. This study reveals an interesting point, for US based

¹⁶⁵ Kattan and Wood (n 5) p 14.

¹⁶⁶ *Google/Motorola Mobility* (n 55) para. 107.

¹⁶⁷ Jones (n 5) p 22, 24; Kattan and Wood (n 5) p 11.

¹⁶⁸ Kattan and Wood (n 5) p 13.

¹⁶⁹ Kirti Gupta and Mark Snyder, ‘Smart Phone Litigation and Standard Essential Patents’ [May 16, 2014] Hoover IP² Working Paper Series No. 14006. Available at SSRN: <http://ssrn.com/abstract=2492331>.

¹⁷⁰ *ibid* p 4 et seq.

discussions that problem of hold-up and threat of injunctions do not cohere with the case data. The argument that the problem of hold-up is not as serious as it is thought is advocated by some authors from across the Atlantic as well. *Petit* had a similar approach based on empirical data that SEP does not grant injunctions itself, there are other factors influencing the outcome¹⁷¹. It is argued that, since there are generally no close viable and capable substitutes *ex ante*, thus no eliminated alternative exists with the standard and licensing conditions are foreseeable, furthermore for other serious constraints that SEP holders face, hold-up problem is not that likely to occur¹⁷². We will not go into detail of these arguments, rather focus on the case law.

This type of conduct can be an abuse itself or put under “refusal to supply” concept¹⁷³. Refusal to licence in IP related cases is subject to conditions set out in *Magill* and *IMS Health*¹⁷⁴. It is argued that application of the test in abusive litigations has some implications such as; it only covers where dominant firm is vertically integrated; “indispensability” concept, which means input has to be indispensable to operate in the market, is relaxed because of the sector specific investments for use of particular standard; and the Commission itself stated test could only apply to non-essential patents in paragraph 59 of *Google/Motorola Decision*¹⁷⁵. We agree with the idea that the established test can be applied in refusal to supply cases for non-SEPs however there is no reason to exclude SEPs if the conduct of a dominant undertaking satisfies these conditions.

Another approach can be holding the conduct as an abuse itself without categorizing it under existing ones, as in *Huawei* case. First of all, seeking injunctive relief is a right of a patent holder stemming from the exclusive rights provided by IP. It can only be abusive in exceptional circumstances¹⁷⁶. As stated in the *ITT Promedia*; “...As access to the Court

¹⁷¹ *Petit* (n 53) p 40-41.

¹⁷² *Geradin and Rato* (n 10) p 5-9, 13.

¹⁷³ *Jones* (n 5) p 20; *Petit* (n 53) p 6.

¹⁷⁴ *IMS Health* (n 48) para 52.

¹⁷⁵ *Petit* (n 53) p 7-8.

¹⁷⁶ *Jones* (n 5) p 19-20.

is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article [102] of the Treaty¹⁷⁷. It is told that an SEP holder fails the test when he refuses to make an offer or negotiate an offer by implementer, or when an offer made by SEP holder is in bad faith¹⁷⁸. For the second leg of ITT Promedia test, a plan to eliminate competition, it is really hard to demonstrate and impossible for non-practicing entities, who only licenses not implements, since they have no competitive relation with others¹⁷⁹.

Consequently a wholly exceptional circumstance has to exist in order for a litigation to amount an abuse. This finding accepted in *Huawei* case¹⁸⁰. Considering the principle of right of access to the courts¹⁸¹ and the principle that a waiver of a right has to be explicit¹⁸², FRAND commitments do not preclude patent holders from using their very right to seek injunctions and claim damages against unlawful use. However, as stated in *Huawei* judgement¹⁸³, it may create legitimate expectations and encumber on SEP holder to behave in a specific manner, which is also determined in judgement¹⁸⁴, without eliminating injunction option at all. This reasoning provided clarity in this discussion and seems coherent with general principles of competition law where dominant undertaking has special responsibility on its conducts.

¹⁷⁷ Case T-111/96 *ITT Promedia NV v Commission* [1998] ECR II-2937, para 60. For assessment of decision see Rato and Petit (n 14) p 60. It is also said in the judgement that “... it is necessary that the action (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition” *ITT*, para 55.

¹⁷⁸ Rato and Petit (n 14) p 62.

¹⁷⁹ Rato and Petit (n 14) p 63.

¹⁸⁰ *Huawei* (n 59) para 47.

¹⁸¹ Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391, article 47.

¹⁸² Geradin and Rato (n 10) p 21.

¹⁸³ *Huawei* (n 59) para 53-54.

¹⁸⁴ *Ibid*, para 77.

d) Is another approach possible?

As we have discussed above, FRAND commitment can be contractual in nature and there must not be a link created between unfaithful FRAND and abuse of dominance, competition law does not deal with breach of contracts¹⁸⁵. However one possible resemblance can yet be established between breach of FRAND commitment and *AstraZeneca* case¹⁸⁶. In that case misleading public authorities in order to acquire extension on patents was held to be abusive under Article 102. If we adapt this reasoning in our case, giving FRAND commitment in order to be incorporated into standard without any intent of following can amount to an abuse, along with other abuses. However assessment must be careful since monopolization is not prohibited under EU competition law. It is argued excessive pricing is a tool of Commission to close the monopolization gap in the EU competition rules, which was the essence of *Rambus* decision, where acts leading to a dominant position were not condemned in isolation¹⁸⁷. Instead of seeking a proper cover for prohibiting misleading conduct, courts can prohibit patent holders from giving false commitments by adopting *AstraZeneca* judgement, where appropriate.

There have been some critics against this approach; first while *AstraZeneca* misled the public authorities as a dominant undertaking, in our examination during *ex ante* commitment patent owner can hardly be considered as dominant¹⁸⁸. However in *Rambus* decision, the Commission found that the unlawful conduct of *Rambus* was claiming excessive royalties by concealing its patents resulting deliberate frustration of the legitimate expectation of third parties¹⁸⁹. In other words, the fourth condition of the test was acquiring dominant position by deception and subsequently exploiting it (anticompetitive effect) together¹⁹⁰, yet it does

¹⁸⁵ Petit (n 53) p 28.

¹⁸⁶ Case C-457/10 P *AstraZeneca v Commission*, 6 December 2012.

¹⁸⁷ Geradin, Layne-Farrar and Petit (n 38) p 454 N 7.140; Rato and Petit (n 14) p 30 n 106.

¹⁸⁸ Petit (n 53) p 31.

¹⁸⁹ *Rambus* (n 51) para 28.

¹⁹⁰ De la Mano, Nazzini, Zenger (n 10) p 501 N 4.761.

not entail monopolization is condemned or prohibited. In our discussion, acquiring dominance by misleading standard setting process, and even monopoly over the whole portfolio, obviously has exclusionary effects if alternatives has been existed *ex ante*. However deceptive conduct occurs just before acquiring dominance and elimination of other competitors. Finding of an abuse in this situation depends on the competition policy, what competition rules prohibit is not the monopolization, under EU law¹⁹¹, but the conduct of dominant undertaking which are not part of competition on merit¹⁹². In other scenario, if an undertaking had already been dominant since no substitutes and competitive constraints had existed before standards, there would not be any problem since deceptive conduct occurred during dominance; in *AstraZeneca* and *Tetra Pak*¹⁹³, responsibility of dominant undertakings has been laid down clearly. Deception, by concealing in *Rambus*, by misleading in *AstraZeneca* or, in our case, by giving FRAND commitments on the surface in order to be included in standard, has anticompetitive effects by reducing choices, enhancing market power, damaging the confidence in standard setting process, subsequently foreclosing implementers by above mentioned types of abuse. Moreover it should be borne in mind that, effects do not have to be concrete, it is enough to demonstrate potential anticompetitive effects¹⁹⁴.

Second argument is that SSOs are not public authorities yet in *AstraZeneca* a public authority was misled¹⁹⁵. However SSOs' position in sector is not completely distant from being a public authority. ETSI, as an example, is a formally recognised standardisation body¹⁹⁶, and standards set by ETSI or any other SSO generally have lock-in effect over the implementers, which will grant sort of exclusivity for SEP holders.

¹⁹¹ *Post Denmark* (n 132) para 21.

¹⁹² *Post Denmark* (n 132) para 25.

¹⁹³ Case T-51/89, *Tetra Pak Rausing v. Commission* [1990] ECR II-309. See Jones and Sufin (n 129) p 557.

¹⁹⁴ *Astra Zeneca* (n 184) para 112.

¹⁹⁵ *Petit* (n 53) p 32.

¹⁹⁶ Regulation 1025/2012 of the European Parliament and of the Council [2012] OJ L 316/12.

Therefore this should not be a reason for not applying *AstraZeneca*. Finally it is argued that FRAND does not entail an unconditional licensing commitment, terms has to be FRAND, and therefore it cannot be an “objective misleading”¹⁹⁷. Essence of competition assessment under abusive litigation is the conduct against “willing licensee”. Thus for competition concerns misleading can be an abuse if there is even a single undertaking ready to get license under FRAND terms, thus FRAND commitment might lead to a compulsory licensing agreement.

Eventually, abuses have no exhaustive list, there is no formal obstacle for finding of such an abuse. It should be also noted that binding courts and the Commission only with existing case law and reasoning will paralyze implementation of Article 102 against new emerging sectors and new methods of interaction such as presented in SEP related markets.

F. Conclusions

The Commissions and CJEU had few circumstances to provide guidance on SEP related Article 102 cases. First of all lack of judicial experience on dominance in this field, especially with abusive litigation, has to be stated. Unfortunately, in Huawei case, CJEU could not have the chance to scrutinize over the issue since it had already been accepted by the referring court. It must be noted that, as explained above, dominance is a binary concept and all competitive analysis is built upon it, however, it is quite hard to be accomplished accurately owing to the complex structure of the sector in question. Nevertheless, an attentive explanation on dominance must be provided on judgements and decisions considering the aforementioned points on case by case basis.

When it comes to the abuse, there is neither an exhaustive list nor any intention of competition authorities to limit possibilities of types of conduct. Any behaviour of a dominant undertaking which is out of competition on merit and has anticompetitive effects without any objective justification falls within Article 102 TFEU. As regards to exploitative

¹⁹⁷ Petit (n 53) p 32.

abuses, despite the Commission's approach, there is nothing that withholds EU courts to implement competition rules to it, considering its common form, so called 'hold up', in this field. It might seem unachievable to apply conventional tests to SEP related cases, nevertheless with the caveats arisen, there is no reason to avoid making this assessment. Exploitative abuses can be evaluated with a general assessment including *ex ante-ex post* comparison, real or hypothetical arm's length negotiation and other factors relevant. Price discrimination is relatively less contradictory, traditional approaches might suffice for adequate assessments, what is straightforward here is that discrimination is legitimate as long as it is supported with facts.

Abusive litigation is another hotly-debated topic and judgement of CJEU in Huawei provides clarity on this matter. Essentially, under Article 102, dominant undertakings have special responsibility to control their conducts, and the Court basically explained the test to check. Accordingly, SEP holder has to warn infringer and offer a written specified licensing agreement as long as infringer diligently responds to him. Fulfilling these, SEP holder cannot be held abusing his dominant position by exercising his very rights. Last but not the least, in line with *AstraZeneca* case, there is no reason to exclude an already dominant undertaking from abuses by misguiding SSOs, giving unfaithful statements. However under current EU law, existence of dominance during the possible infringement is the matter of fact, if dominance does not exist neither do responsibilities.

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The Influence of International Conventions on National IP Laws: Especially on Turkish Trademark Law *

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I. The Main Questions

The purpose of this article is to identify the effect of international treaties on the Turkish trademark law. Our primary focus, therefore, will be to specify the relation between the international treaties governing trademark law to which Turkey is a party and the Turkish statutory trademark law, in particular, the Decree-Law on the Protection of Trademarks (= *DLPT*). For these purposes, the following questions and responses to them will provide a valuable guidance:

1. Why is trademark law -and even intellectual property law- rooted in, and enhanced by, the law of international treaties?
2. What are the international treaties to which Turkey is a party and that have a legal effect on the Turkish trademark law? How can we classify them?
3. How can we categorise the provisions contained in these treaties?
4. What are the types of “effects” of the provisions contained in international treaties on our national law in general?

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5. What are the specific spheres or points of influence of treaty norms?

II. A General Legal View to “Trademark”

Trademark is an intangible property that lacks a physical existence but have an economic value^{1 2}. The main function of this property is to distinguish the product (goods or service) to which the trademark is affixed from products in the same field or the other, and eventually to associate the product with a specific firm, enterprise, person or entity³.

¹ Ali PASLI, Uluslararası Antlaşmaların Türk Marka Hukukunun Esasına İlişkin Etkileri, Vedat Kitapçılık, İstanbul 2014, p. 8 et seq. For intangible property analysis and comparison see: Haydar ARSEVEN, Nazari ve Tatbiki Alameyi Farika Hukuku, İsmail Akgün Matbaası, İstanbul 1951, p. 32 et seq., 38; Nuşin AYİTER, İhtira Hukuku, Sevinç Matbaası, Ankara 1968, p. 1-2; İlhan ÖZTRAK, Fikir ve Sanat Eserleri Üzerindeki Haklar, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, Ankara 1971 p. 1-2; Şafak EREL Türk Fikir ve Sanat Hukuku, Dayınlarlı Yayınları, Ankara 1988, p. 4-5; Mücahit ÜNAL, Marka Tescilinden Doğan Haklarla İlgili Hukuki İşlemler, Seçkin Yayınları, Ankara 2007, p. 22-23; David VAVER, “General Introduction”, Intellectual Property Rights, Critical Concepts in Law, ed. by David Vaver, V. I, Routledge Taylor&Francis Group, London-New York 2006, p. 3.

² The statement of Hesse as “*The concept of intellectual property– the idea that an idea can be owned–is a child of the European Enlightenment.*” is interesting although it is not correct from legal technique. Carl HESSE, “The Rise of Intellectual Property: 70 BC to AD 2000: An Idea In The Balance”, Intellectual Property Rights, Critical Concepts in Law, ed. By David Vaver, V. I, Routledge Taylor&FrancisGroup, London – New York 2006, p. 51. Intellectual property is divided into two parts: first, inventive works that protect creativity in patents and copyrights; second, rules aimed at protecting marking goods and distinguishing them thereby creating goodwill. Howard C. ANAWALT/E. ENAYATI POWERS, IP Strategy – Complete Intellectual Property Planning, Access, and Protection, West Group, New York 2002, N. 1.01. For the argument that trademark law does not protect and encourage creativity as in copyright and patent law, therefore it must exist as long as the goods and the mark exist without time limits see Jürg SIMON, TRIPS Agreement: Section 2: Trademarks, in Concise International and European IP Law, TRIPS, Paris Convention, European Enforcement and Transfer of Technology, ed. by Thomas Cottier/Pierre Veron, second ed., Wolters Kluwer, AH Alphen aan den Rijn, p. 59.

³ See Lionel BENTLEY/ Brad SHERMAN, Intellectual Property Law, 4th Edition, Oxford University Press, 2014, p. 809 et seq.; Ünal TEKİNALP, Fikri Mülkiyet Hukuku, S. Bası, Vedat Kitapçılık, İstanbul 2012, p. 20-21; Cahit SULUK/Alı ORHAN, Uygulamalı Fikri Mülkiyet Hukuku, C II: Genel Esaslar-Fikir ve Sanat Eserleri, Arıkan Yayıncılık,

Whenever a person chooses, uses and introduces to the public a sign constituting a trademark for the first time, he/she acquires an entitlement or an exclusive right to use it for a product that he/she determines, to enjoy the economic benefit derived from it, and to prevent others from exploiting it without his/her prior consent⁴. This authority is rooted in the ownership rights of the trademark. Owner of a trademark is the person/entity, who possesses ownership rights on the trademark constituting an asset in terms of “idea” and “usage”. From this perspective, trademark right is both “intellectual” and “proprietary”⁵.

On the other hand, since trademark is an abstract property, “trademark” itself and its “owner” should be identifiable. “Trademark registration” is the answer of the law to this need⁶. Registration ensures the recognition of a trademark or sign as a “property”⁷, and by identifying its owner, it materialises the property and the right attached to it⁸. Thus, it provides the certainty that the business life requires. Commoditization of the trademark as an active constituent of assets in a real sense is based upon its capability of being registrable. However, the effect of the need for commoditization of a trademark by virtue of its abstract nature and of the indispensable importance of the registration function has embod-

İstanbul 2005, p.18.

⁴ Arslan KAYA (Hüseyin ÜLGEN/Mehmet HELVACI/Abuzer KENDİGELEN/N. Füsün NOMER ERTAN), *Ticari İşletme Hukuku, Dördüncü Bası, On İki Levha Yayınları, İstanbul 2015*, p 448 et seq.; PASLI, p. 11 et seq.

⁵ For the assessment of the relationship between “property” and “intellectual property” from the perspective of property theory and the approach of Locke, Hegel and law of nature see ed. by Anthony D’AMATO/Doris Estelle LONG, *International Intellectual Property Law*, Kluwer Law International, London – The Hague - Boston, 1997, p. 28 et seq.

⁶ VAVER, p. 2. National registry systems occurred after second half of 19th century for its importance and influence on existence of the right. Transferring rights and licensing via registry emerged mostly in 20th century. See VAVER, p. 2.

⁷ PASLI, p. 36.

⁸ Dilek CENGİZ, *Türk Hukukunda İktibas Veya İltibas Suretiyle Marka Hakkına Tecavüz*, Beta Yayınları, İstanbul 1995, p. 40. For the argument of analogy between the emergence of trademark and its registry and two people living together and their marriage, see Jeremy PHILLIPS, *Trade Mark Law, A Practical Anatomy*, Oxford University Press, Oxford – New York, N. 1.10. For functions of registry see PHILLIPS, N. 3.27.

ied itself into the principle of territoriality, enabling each state to keep records of registration of trademarks through its own national or special centres/offices, and to maintain its sovereignty over the trademark⁹.

III. Territorial Attribution of Trademark

The principle of territoriality, which especially dominates industrial property law as a whole, means that a trademark and rights attached thereon that are protected by the laws of a country are recognised by the laws of that country and are only protected within the territory of that country in accordance with its national laws, rules and regulations¹⁰. The term of “territoriality” refers to the firm bound between the trademark and the state where absolute interest therein is recognised and protected¹¹. Therefore, the principle of territoriality plays a determining role in identifying the applicable law, existence of a right and the sphere of influence of the right¹². Consequently, the principle should not be discussed from one single point of view, but rather from all these following aspects:

⁹ PHILLIPS, N. 3.22. For the French and English enlargement towards colonies see. PHILLIPS, N. 3. 22. The cause and effect relation between registry and territoriality is further confirmed by efforts for rejecting territoriality principle in copyrights law where registry has almost no effect. See B. Bahadır ERDEM, “Fikri Haklarda Ülkesellik Prensipleri”, Prof. Dr. Nihal Uluocak’a Armağan, İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı Yayınları, İstanbul 1999, p. 49.

¹⁰ PASLI p. 177 et seq. Countries’ desire to not to lose their sovereignty in this field and the fact that only in their territory certainty can be provided, this principle covered to all IP law field. See Alexandre La PERU, Branding and Territories, The Conflict of Applying Domestic Law to Universal Trademarks, A Thesis submitted to McGill University, Montreal October 2004, p. 34; VAVER, p. 11. Moreover since the protection is provided by legal regulations, laws, the sphere of the protection will also be restricted with the sovereignty of the country that law belongs. See, Peter J. GROVES, Sourcebook On Intellectual Property Law, Cavendish pub., London-Sydney 1997, p. 14, (Sourcebook).

¹¹ Peter J. GROVES, Intellectual Property with Competition Law and Practice, Cavendish pub., London 1994, p. 4; GROVES, Sourcebook, p. 14, ERDEM, p. 45.

¹² Sabih ARKAN, “Yabancı Markaların Türkiye’de Korunması”, Batider 1999, XX/1, p. 5. The principle is also related with international private law and law of nations. First author who approaches the principle of territoriality from several aspects is *Bouche*. Nicolas BOUCHE, Le principe de territorialité de la propriété intellectuelle, L’Harmattan, Paris 2002, p. 21, 35/n. 118 (from La PERU, p. 34-35).

- Which Law? The primary focus is to identify the law that is applicable to trademark related issues. At first, it should be noted that the regulations pertaining to “laws of state in which protection is sought” in the International Private and Procedure Law¹³ comply with the territoriality norm¹⁴. That means the laws of the state apply where trademark protection is sought. Secondly, in the event of an infringement of a foreign or a domestic trademark within the territory of Turkey, the owner of the trademark may seek protection only under Turkish law. Strictly speaking, the classification of trademark, determination of ownership and designation of protection means and terms are all subject to Turkish law¹⁵.
- Existence of Right: Although there are some exclusions such as well-known marks, representative brand, right of priority, etc.¹⁶ the rule is as follows: Only those trademarks that have been used in Turkey as recognised by the Turkish law or registered in Turkey “exist” in Turkey¹⁷. Proprietor of the trademark is the person who has registered or used it in this manner in Turkey¹⁸. That is to say, applicable law protects and recognises a trademark, which is an intangible good, as a property/asset to the extent it is used or registered in its jurisdiction; and the title holder is recognized as the one whoever has used or registered the trademark for the first time within its jurisdiction¹⁹. In Turkey, apart from the

¹³ Code of International Private and Procedure Law art. 23.

¹⁴ See Aysel ÇELİKEL/B. Bahadır ERDEM, *Milletlerarası Özel Hukuk*, 12. Bası, Beta Yayınları, İstanbul 2012, p. 316.

¹⁵ PASLI, p. 185.

¹⁶ Acknowledgement of provisions of the TRIPs and PC regarding the protection of geographical indications, enterprise names and service marks “existing” as an exception of principle of territoriality in our country does not necessarily require cross border protection. In the context of principle of territoriality, a sign that does not exist in Turkey may not be protected. Protection of those that exists in our country is secured by the special provisions in accordance with the treaty norms.

¹⁷ Anthony TAUBMAN/Hannu WAGER/Jayashree WATAL, *A Handbook on the WTO TRIPS Agreement*, Cambridge University Press, reprinted, Cambridge 2013, p. 56.

¹⁸ PASLI, p. 186.

¹⁹ This argument is same for all intellectual property issues which are subject to territoriality. Acknowledging an owner of a distinguishing sign, but not a trademark, as a right

exclusions, even for the protection of a trademark under unfair competition rules, it should “exist” in Turkey. Therefore, it is possible that same sign may occur in more than one country as an “intangible property/trademark” owned by different persons²⁰.

- Sphere of Influence of the Right: When the principle of territoriality is explained in the doctrine, it is stated that, subject to the fulfilment of material and formal requirements, each state protects intellectual property only within its jurisdiction, and allows the registered owner to exercise only the rights and remedies conferred upon him under its law, in the event of an infringement²¹. This perception reveals the third aspect of the principle of territoriality, which is parallel to the second aspect discussed above. This is in fact a reflection, or rather a confirmation, of the rule of law stipulating that each state is able to exercise its authority within its sovereignty²². In the protection system

holder in Turkey depends, as a rule, existence of a use or a registry which confers right holder status on him in that country.

²⁰ It is also possible for someone to assign his self-created and owned trademark to a third party in order to be used in other countries. Hamdi YASAMAN/Sıtkı Anlam ALTAY/Tolga AYOĞLU/Fülürya YUSUFOĞLU/Sinan YÜKSEL, Marka Hukuku, 556 Sayılı KHK Şerhi, C:I, Vedat Kitapçılık, İstanbul 2004, p. 6. Trademark can be existing in different locations belonging different owners without time or place concerns. Fatma KARAMAN, Marka Hukukunda Markanın Ülkeselliği İlkesi, Yayınlanmamış Yüksek Lisans Tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü Hukuk Anabilim Dalı Özel Hukuk Bilim Dalı, İstanbul 2008, p. 83. Consequently, due to the meaning of territoriality, even if trademarks are same as signs, in each country trademarks/rights differ. This is also emphasised in Paris Convention art. 6/3. For this situation leading numerous international conventions in order to ease registration in every country, see TAUBMAN/WAGER/WATAL, p. 56 and n. 3.

²¹ TEKİNALP, p. 48; ERDEM, p. 47. For the argument that principle of territoriality is a part of principle of sovereignty see Daniel C. K. CHOW/Edward LEE, *International Intellectual Property, Problems, Cases, and Materials*, American Casebook Series, Thomson/West, Minnesota 2006, p. 17. Moreover the authors state that territoriality is the reflection of states' power on establishing rules. See. CHOW/LEE, p. 17-18, Paul GOLDSTEIN, *International Intellectual Property Law, Cases and Materials*, New York Foundation Press, New York 2001, p. 15-16.

²² PASLI, p. 190 et seq. For the view that territoriality is a part of a wider theory, i.e. nations sovereignty, see. CHOW/LEE, p. 17.

based on registration, sphere of rights is unavoidably restricted with the geographical borders of the registration institute²³.

IV. Exceeding Territoriality: International Treaties as a Tool

Intellectual property rights and surely trademark rights are among the most susceptible rights to potential cross-border infringement by third parties considering the flourish of technological means in our times²⁴. Indeed, the functionality of the trademark in the commerce between countries comes to the forefront in the emergence of trademarks. Protecting a trademark and its owner only on a national basis and within the national borders, therefore, does not necessarily mean a real protection²⁵. Only initially bilateral²⁶, but over time multilateral, treaties can render means to provide a real protection and to overcome the issue that is rooted in the principle of territoriality²⁷. Treaties confirm and recognise the principle of territoriality, but also provide exceptional solutions that allow the protection to stretch cross-border despite the principle of territoriality.

In the field of trademark law, which has developed during the past 150 years, there are so many -and diversely named- bilateral and multilateral international treaties in force. However, the important ones for us are those multilateral international treaties, namely conventions, which

²³ Territoriality can be described as termination of holders rights at the national border. Ed. by D'AMATO/ LONG, p. 231.

²⁴ For the argument that one of the most important features of IP is exceeding national borders which lacks in tangible properties see S. R. SHARMA, *Encyclopedia of Cyber Laws and Crime Series: Laws on Intellectual Property*, Anmol pub., New Delhi 2004, p. 124.

²⁵ Frederick W. MOSTERT, "Well-Known and Famous Marks: Is Harmony Possible in Global Village?", *The Trademark Reporter*, 1996/86-2, p. 176 in Graeme B. DINWOODIE/William O. HENNESSEY/Shira PERLMUTTER/Graeme W. AUSTIN, *International Intellectual Property Law and Policy*, Second ed., Lexis Nexis, 2008.

²⁶ It is stated in doctrine that there were at least 69 bilateral agreements before PC. DINWOODIE/ HENNESSEY/PERLMUTTER/AUSTIN, p. 138.

²⁷ PASLI, p. 49.

incorporate the trademark and aim at creating a trademark law in its context in global terms.

Intellectual property world may be broadly categorised into two groups: “industrial property law” and “copyright law/royalties”. As early as in the last quarter of 19th century, basic rules that deal with the intellectual property as a whole in the international arena, or in a manner of speaking, the “constitution” of intellectual property²⁸, were introduced with the Paris Convention (1883) and the Bern Convention (1886). We can categorise the international treaties governing trademark law into four main groups in terms of their scope or their substantive content:

1. Those Governing The Substantive Aspects Of The Trademark Law: These treaties are those that regulate the substantive aspects of the trademark law such as concept of trademark, emergence and termination of rights, rights and obligations of proprietors, and legal proceedings dealing with the rights attached to trademarks²⁹: *Paris Convention (= PC) and Agreement on Trade-Related Aspects of Intellectual Property Rights (= TRIPs)*.
2. Those Governing The Executive Aspects Of The Trademark Law: These treaties are those that regulate the executive means/remedies that an owner of trademark may seek in the event of an infringement such as seizure at customs, damages, etc., in other words, that allow the registered owner to exercise his legal rights³⁰: *From certain respects, PC and TRIPs as well as ACTA to which Turkey is not a party*.
3. Those Directly Dealing With Registration Aspect: These treaties are those that aim at establishing a central registration system or determining the procedures that should be followed with

²⁸ PASLI, p. 51.

²⁹ Howard C. ANAWALT, “Intellectual Property Scope: International Intellectual Property, Progress, and the Rule of Law”, *Economics, Law and Intellectual Property, Seeking Strategies for Research and Teaching in a Developing Field*, ed. by Ove Granstrand, Kluwer Academic pub., Boston/Dordrecht/London 2003, p. 60/n. 20.

³⁰ PASLI, p. 85. As stated in the doctrine, instead of “executive”, “procedural” term may also be used. ANAWALT, p. 60.

respect to application on a national basis³¹: *Madrid Protocol and the system established by the Protocol, Nice Treaty, Vienna Agreement, Trademark Law Treaty (= TLT) and Singapore Treaty.*

4. Those Aiming At Establishing An International Organisation: These treaties are those that are independent from states, but admit states -and supranational organisations such as EU- as their parties, which regulate and govern the intellectual property world, and that lead up to the creation of private and independent organisations³²: *World Intellectual Property Organization (= WIPO) Convention and World Trade Organization (= WTO) Convention.*

In terms of general objective of international treaties and their reflections in Turkey, it should be noted that the general functions of the international treaties that aims at minimising the disadvantages of principle of territoriality, which pose a threat particularly for trademark owners who are the players of international trade, are listed as follows:

- National/Equal Treatment Principle: This principle points out that a state should provide equal treatment to its citizens and foreigners and it should not make any discrimination between its citizens and citizens covered by treaty³³. For instance, not only citizens of Turkey but also citizens of 187 countries that are parties to the Paris Union are able to apply protection on equal terms and enjoy trademark protection obtained through registration at the Turkish Patent Institute (= TPI) in the same way³⁴.

³¹ PASLI, p. 113.

³² PASLI, p. 136 et seq.

³³ This principle is actually non-discrimination. See Aaron Xavier FELLMETH, *The Law of International Business Transactions*, second ed., American Casebook Series, West pub., 2009, p. 42; GOLDSTEIN, p. 20. In order for a member country citizen to benefit from equal treatment principle when seeking protection, it cannot be a condition to reside or have/run an enterprise in the country asked for protection. PC art. 2/2. In this way member countries are prevented from restricting the sphere of "foreigners" concept by their own initiatives.

³⁴ For the argument that Art. 3 of PC expands the protection in PC 2 see Christopher MORCOMA/Ashley ROUGHTON/Simon MALYNICZ, *The Modern Law of Trade Marks*, LexisNexis, London 2008, N. 25.7.

That is to say, citizens of Union members may not be subjected to less favourable conditions than those applicable to citizens of Turkey when they file an application or initiate a legal action³⁵.

- Minimum Rights Rule: This rule aims at defining several basic norms pertaining to, including but not limited to, the substantive aspects of trademark law in the respective state party, and promoting the harmonisation of trademark law in terms of both substantive and procedural/executive aspects among all member states as much as possible³⁶. By doing so, it is not only possible to provide equal treatment to the owners of foreign trademarks in other countries, but also to secure a minimum protection degree for all concerned parties. In this regard, exclusive regulations particularly related to the principle of territoriality should be noted. Many provisions contained in DLPT are rooted from international treaties in this sense. That shows us the specific effects of treaty norms on our national legislation.
- Ease of Registration: What is aimed by regional or global systems is to ensure that an application filed with a single centre secures a protection in a multiple countries and preferably on a global basis, and eliminates the requirement to make separate applications in each country³⁷. Turkey is a party to the Madrid Protocol and an international registration application filed with the TPI is recognised in many countries other than Turkey. Similarly, it is not necessary to file an application with the TPI to obtain protection for a trademark registered in another country, if an application covering Turkey is made in another country included in the Madrid system. Thus, in this way, an applicant is able to enjoy protection for his trademark in Turkey through a

³⁵ See PASLI, p. 66-67/n. 184-185.

³⁶ PASLI, p. 71. It must be noted that these rules are related to minimum rights, which means parties may create a protection system exceeding minimum rights. Martin PFLÜGER, Paris Convention: Introductory Remarks, Article 1, 2, 3, 6, 6bis, 6ter, 6quater, 6quinquies, 7, 7bis, 8, 9, 10, 10bis, 10ter, 11, 12-30, in Concise International and European IP Law, TRIPS, Paris Convention, European Enforcement and Transfer of Technology, ed. by Thomas Cottier/Pierre Veron, second ed. Wolters Kluwer, AH Alphen aan den Rijn 2011, p. 192.

³⁷ PASLI, p. 113 et seq.

registration application in another country³⁸. However, excluding regional systems³⁹ such as Community Trademarks, global/central protection through a registration with a single centre is not yet available.

Furthermore, these types of treaties enable harmonisation with respect to rules that may be followed when filing an application and registration procedures that may be employed. The registration system in Turkey is -broadly- harmonised with the TLT, and the Turkish translation of the Nice classification system is strictly complied with for the classification of goods and services⁴⁰. Besides, for the purpose of numbering the signs constituting the trademarks in the TPI, the special tiered order as defined by the Vienna Agreement is followed. The Turkish Draft Trademark Law also takes note of the Singapore Treaty⁴¹.

V. General Transition Models/Methods of International Treaties into the National Legal System

Turkey has adopted monist system for transferring international treaties to its national law⁴². In other words, there is no need to enact a separate act in order to incorporate a duly executed international treaty into the national law⁴³. A treaty that duly enters into force on the part of

³⁸ Along with the territoriality principle, these provisions provide opportunity for a trademark to belong same person in each country. Registry acquired by international application is national/territorial registry within this system. Although the application under Madrid system is named as international, acquired registry is national/territorial. MORCOM/ROUGHT/MALYNICZ, N. 24.1. Madrid system, with its effects of easing national registries required for existence of trademark right overseas, serves elimination of drawbacks arisen from territoriality principle. Sabih ARKAN, *Yabancı Marka*, p. 6. See also PASLI, p. 120/n. 331.

³⁹ For the list of regional systems see PHILLIPS, N. 3.09.

⁴⁰ Participation to Nice Agreement is one of Custom Union undertakings of Turkey.

⁴¹ PASLI, p. 114 et seq.

⁴² For list of countries implementing monist system see Ian BRONLIE, *Principles of Public International Law*, seventh ed., Oxford University Press, Oxford – New York 2008, p. 51.

⁴³ In monist system, based on Kelsen, international and national laws form a single law

Turkey is an act in the force of law⁴⁴, and becomes automatically a part of the national legislation, and readily enforceable, if it has been drawn up in an appropriate form⁴⁵. Furthermore, in accordance with Article 90(5) of the Turkish Constitution, if there is a conflict between the provisions of international agreements concerning fundamental rights and freedoms and the respective provisions of a statute, norms introduced by international agreements will prevail and no appeal may be made to the constitutional court with regards to these provisions of the treaty⁴⁶. Thus, these types of agreements take precedence over the national laws in the hierarchy of norms and gain prevalence categorically over statutes at least in practice. Therefore, treaties in the field of intellectual property/trademark law can be recognised in the same manner as they pertain to the property right, which is a fundamental constitutional right⁴⁷. Besides,

system. Andres Monyaco von HASE, "The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights", Intellectual Property and International Trade: The TRIPS Agreement, ed. by Carlos M. Correa/Abdulqawi A. Yusuf, second ed., Wolters Kluwer, the Netherlands 2008, p. 86. TRIPS is argued to be directly enforceable for dualist systems within EU since EU is a party to the TRIPS. See and compare; Reports of Patent Cases, p. 134 (MORCOM/ROUGHT/MALYNICZ, N. 25.3.8-25.3.9); Thomas COTTIER, "The Impact Of The TRIPS Agreement On Private Practice And Litigation", Dispute Resolution in the World Trade Organisation, ed. by James Cameron/Karin Campbell, in Trade and Intellectual Property Protection in WTO Law, Collected Essays, ed. by Thomas Cottier, Cameron May, London 2005, p. 276. For the argument there is no need for special change in UK law for adaptation to TRIPs see Jennifer DAVIES, Intellectual Property Law, Second Edition, Oxford University Press, London 1998, p. 29.

⁴⁴ Constitution of the Republic of Turkey art. 90/5: "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail"

⁴⁵ Melda SUR, Uluslararası Hukukun Esasları, 6. Bası, Beta Yayınları, İstanbul 2013, p. 53.

⁴⁶ Although there might be international agreements including different issues of law, in the field of trademark, since always trademark or intellectual property issues are subjected and these are related to the fundamental right of "property" it can be accepted that fundamental rights are concerned from the perspective of Art. 90/5 of Constitution. PASLI, p. 162/n. 46.

⁴⁷ Jurisprudence of European Court of Human Rights and Constitutional Court of the Republic of Turkey confirms this view. H. Burak GEMALMAZ, Avrupa İnsan Hakları

in addition to the provision of the Constitution, Article 4 of DLPT states that where an international treaty contains a more favourable provision compared to the Decree-Law, any person entitled to protection may choose the enforcement of the favourable provision.

Minimum rights identified by the international treaties and their general method of impacts on the Turkish trademark law can be grouped into three headings:

- Reference Method: Here, national law makes an explicit reference to the rule contained in the international treaty. Therefore, rule contained therein becomes a part of the code or decree-law in which reference is made. By way of clear reference of the treaty in the provision, it is ensured that the treaty has an impact -even indirectly- on the legal relationship between the citizens eliminating the debate regarding the capacity of direct implementation without repeating the rule introduced by the treaty, or treaty norm is taken as a reference for the designation of the definition of a term rather than laying down a rule for the resolution of a legal matter⁴⁸.
- Adaptation Method (Material Norm of Law in the National Legislation): Here, the rule contained in the international treaty is inserted into the national regulation word-for-word or with the same content but paraphrased⁴⁹. This procedure is similar to the adaptation of an international rule into national legislation in the dualist systems. With respect to harmonisation of international regulations into Turkish trademark law, the most frequently used method is the adaptation method. The rule specified by an

Sözleşmesinde Mülkiyet Hakkı, Beta Yayınları, İstanbul 2009, p. 311; PASLI, p. 217 /n. 173; Hakan KARAN/Mehmet KILIÇ, Markaların Korunması 556 Sayılı KHK Şerhi ve İlgili Mevzuat, Turhan Kitabevi, Ankara 2004, p. 24. For opposing view see ANAWALT, p. 56.

⁴⁸ PASLI, p. 166.

⁴⁹ It must be noted that the wording of adapted provision might differ according to each national law system and it is not required to take provision word by word. Furthermore, adaptation method also covers when international agreement requires from a member state to make a general regulation or provide protection but member state makes more comprehensive regulation so as to fulfil its commitments. PASLI, p. 169/n. 58-59.

international treaty is introduced into our national legislation, particularly, the DLPT as norm of law in exactly the same way or in a harmonised manner, but eventually in a manner that complies with the commitment contained in the treaty.

- Direct Enforcement/Effect (Implementation Despite Its Absentia In The National Legislation): In this method, which applies only in the monist systems such as in Turkey, the rule contained in the international treaty is either not included in the Turkish trademark legislation or exists either to a limited extent or more comprehensive than the one contained in the international treaty⁵⁰. Moreover, a norm contained in an international treaty is taken into consideration in interpreting the disputable wording of a rule in the domestic regulations or identifying the enforcement method of a basic rule. Thus, three direct practices arise: “regulative”, “interpretive”⁵¹ or “complementary”. In all three practices, as stipulated in Article 90(5) of the Constitution and Article 4 of the DLPT, in the event of a dispute, the rule that is more favourable for the trademark owner applies. In other words, even if a norm contained in the international treaty does not exist one way or another, or exists to the contrary in the Decree-Law, the said norm has, or at least should have, a direct effect on the settlement of disputes between private parties in our country. For the enforcement of the norm, it is not necessary to insert it into the national legislation, e.g. the Decree-Law. Thus, the law enforcement authorities, particularly the courts and the TPI, as an administrative authority, decide directly in accordance with the provisions of the international treaty.

⁵⁰ PASLI, p. 173 et seq.

⁵¹ In doctrine, interpretation of national provisions in accordance with international agreements is named as “consistent interpretation principle” and though the result is same it is thought separately from direct enforcement. See COTTIER, *The Impact*, p. 27; Thomas COTTIER, “The Agreement On Trade-Related Aspects Of Intellectual Property Rights (‘TRIPS’), The World Trade Organisation: Legal, Economic and Critical Analysis”, ed. by Patrick F. J. Macrory/Arthur E. Appleton/Michael G. Plummer, Springer Verlag, New York 2005, p. 30-31, (online) http://www.turnin-ip.com/paste-editions/2008-edition/slides/prof-cottier/trips-agreement-cottier-2005-pdf/at_download/file.

VI. Specific Appearances of International Treaties over the Substance of Turkish Trade Mark Law

In light of these facts, specific sphere of influence of international treaties on the Turkish trademark law should be discussed with the related substantive aspects of the said law. At this point, the PC and TRIPs come to the forefront among the international treaties, since they define the “minimum rights” in the trademark law through the rules they set regarding the substantive aspects of the right and identify the standardisation to a certain extent in this field on a global basis. These two treaties complement each other with their provisions⁵². After WTO member states which had ratified the TRIPs undertook to enforce the substantive rules pertaining to the right contained in the PC, the jurisdiction mechanism in the WTO has entered orders that interpret the provisions of both treaties⁵³. These two treaties should be recognised and adapted into our national law without disregarding the decisions of the respective Panel and Appeal Organ. Concept of trademark, creation of trademark right and registration thereof, scope of trademark right, i.e. powers, liabilities and obligations of the trademark owner, including but not limited to the requirement or burden of use, and legal proceedings pertaining to trademark have been discussed together with the PC and TRIPs - particularly, Madrid Protocol, Nice Treaty and TLT- as points of influence on the substantive aspects of the Turkish trademark law, and the following specific

⁵² PASLI, p. 74, Jerome H. REICHMAN, “Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement”, *Intellectual Property and International Trade: The TRIPs Agreement*, ed. by Carlos M. Correa/ Abdulqawi A. Yusuf, Second ed., Wolters Kluwer, the Netherlands 2008, p. 42.

⁵³ TRIPs’ characteristic of complementing PC is called “Paris plus” approach. Daniel GERVAIS, *The TRIPs Agreement: Drafting History and Analysis*, Fourth ed., Sweet Maxwell, London 2012, p. 187; Thomas COTTIER/Raimund E. GERMANN, *TRIPs Agreement: Part I: General Provisions and Basic Principles*, in *Concise International and European IP Law, TRIPs, Paris Convention, European Enforcement and Transfer of Technology*, ed. by Thomas Cottier/Pierre Veron, second ed., Wolters Kluwer, AH Alphen aan den Rijn 2011, p. 14; PFLÜGER, p. 193. For WTO Panel decision regarding inclusion of PC provision in its jurisdiction, see Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, 15.03.2005, p. 22-23.

points of influence, *inter alia*, that treaty norms can be enforced directly have been identified:

1. Concept of Trademark

- General trademark definition in Article 5 of the DLPT, which is identical to the definition contained in the TRIPs, should be determinative in our legal system for non-registered trademarks as well⁵⁴, since TRIPs covers non-registered trademarks⁵⁵.

Rules of international treaties pertaining to the substantive notion of trademark law rather than the registration of trademarks and that have been adopted into the Decree-Law evidence that these rules are also applicable for non-registered trademarks. Basic rules of international trademark law protect all trademarks whether they are registered or not⁵⁶. Thus, for example in unfair competition practice for non-registered trademarks, identical/similar product requirement is sought⁵⁷.

- As the “enterprise” in Article 5 of the DLPT does not have a restrictive effect -at least initially- on the right holder, it will not be wrong to say that the term enterprise also includes the “person”⁵⁸.
- Existence of the term “combinations of colours” included in the definition of trademark in the TRIPs and the assumption that the expression also covers individual colours under the TRIPs⁵⁹

⁵⁴ PASLI, p. 236.

⁵⁵ For definition of trademarks a different conclusion cannot be reached because of the fact that in TRIPs art. 16 rights of registered trademarks are regulated. Specific reference for registry in art. 16 does not exist definition provision in art. 15.

⁵⁶ For German trademark protection including non-registered markets, see MarkenG § 4. In English system, with Article 2/2 of TMA 1994, protection of non-registered trademarks with passing off is remarkable.

⁵⁷ PASLI, p. 237.

⁵⁸ For comparison see KARAN/KILIÇ, p. 33. Authors justify their opinion with the fact that some services (attorneys, public accountants) does not require an enterprise or an undertaking.

⁵⁹ Carlos M. CORREA, Trade Related Aspects of Intellectual Property Rights, A Commentary on the TRIPS Agreement, Oxford University Press, Oxford – New York 2007,

had a direct effect on the Turkish trademark law⁶⁰. Thus, it is no more disputable in trademark registrations in Turkey whether a categorically abstract colour can be registered as a trademark or not⁶¹.

- Sampling method included in the definition of trademark in both DLPT and TRIPs does not bring a restriction for the types of signs that may be registered as a trademark, and does not hinder new trademark forms⁶². For the purpose of the definition of trademark, Turkey did not use the visually perceptible exception set out in Article 15(1) of the TRIPs. Therefore, it is not possible to argue that there is a restriction for the term of ‘sign’ in Turkish law⁶³. A sign is registerable as long as it is precise enough to be understandable and perceptible⁶⁴. From this standpoint, considering this approach towards the TRIPs, the following two deductions can be made from the definition of trademark as given in Article 5(1) of the DLPT:

p. 177.

⁶⁰ For jurisprudence over negative approach of single colours being trademarks see; Republic of Turkey Supreme Court 11. Civil Chamber 03.12.1998, 9198/8485; 10.03.1997, 8650/1586 (available at Kazancı İBB), 11. Civil Chamber 10.03.1997, 8650/1568 (see YASAMAN C:I, p. 91 et seq. for judgements). TPI rejects single colour trademark applications because of the lack of distinctiveness and for acquired distinctiveness it is possible for a quite narrow group of goods or services. See Guidelines, p. 8, 21 et seq. For positive view of European Courts of Justice on registration of single colour under specific circumstances, see ECJ Decision, *Libertel Group BV vs Benelux-Merkenbureau*, C-104/01, 06.05.2003, N. 65 et seq.

⁶¹ PASLI, p. 245.

⁶² See SIMON, p. 53; Jayashree WATAL, *Intellectual Property Rights In The WTO and Developing Countries*, Kluwer Law International, the Hague/London/Boston 2001, p. 248.

⁶³ For discussion about the meaning of “being visually perceptible” see and compare, UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPs and Development*, Cambridge University Press, New York 2005, p. 229; GERVAIS, p. 319; CORREA, p.176; Nuno Pires de CARVALHO, *The TRIPs Regime of Trademarks and Designs*, second ed., Austin, Kluwer Law International, AH Alphen aan den Rijn 2011, p. 315; PASLI, p. 247/n. 64.

⁶⁴ PASLI, p. 247.

Even though samples of signs contained in the DLPT are related to visual perception⁶⁵ -as those given in the TRIPs-, not only visual signs that possess the particulars stipulated in the article, but also signs that are subject to other types of perception can be admitted as a trademark.

The boundlessness in the TRIPs⁶⁶ should be adapted to our law as a “favourable provision” at least through interpretation⁶⁷. This interpretation will create favourable circumstances for trademark holders, and “publication and reproduction by printing” of a sign should be treated as a method used to introduce the sign to the public. Thus, it will be correct approach to assess and admit that the wording at the end of Article 5(1) of the DLPT saying “*sign ... capable of being published and reproduced by printing*” as an attribution not the ‘sign’ but rather related to registration and method of publication in a manner that widens the area of signs that can be recognised as a trademark and that encourages the trademark ownership in compliance with the TRIPs⁶⁸. For this reason, the practice adopted by the TPI⁶⁹, where signs in a form of “taste” and “smell” do not fulfil the requirement of being displayed by drawing or similar fashion and therefore they do not “categorically” fulfil the requirement of graphical representation, thereby failing to be recognised as a trademark, is not an acceptable approach vis-à-vis TRIPs⁷⁰.

⁶⁵ PASLI, p. 247/n. 65.

⁶⁶ See de CARVALHO, p. 314-315.

⁶⁷ See and compare Kutlu OYTAÇ, *Son Uluslararası Değişiklerle Mukayeseli Markalar Hukuku*, Beta Yayınları, İstanbul 1999, p.7-8.

⁶⁸ PASLI, p. 249-250.

⁶⁹ See Guidelines p. 27. For discussion over smell marks see; PASLI, p. 250/n. 72.

⁷⁰ “Visually perceptibility” is different from “graphic representation”. Everything that visually perceptible can be graphically represented however vice versa is not possible in all cases. For example, sound and smell can be graphically represented by diagrams and formulas. de CARVALHO, p. 314, n. 640. Besides smell and sound are not visually perceptible. Therefore, where being “visually perceptible” is included in trademark definition, smell and sound marks are not possible. Nevertheless in most of developed countries and in Turkey as well, there is no such restriction, at least legally.

2. Registration of Trademark – Creation of Right

- Right of priority is a mainstay of the PC that facilitates the registration of foreign trademarks in member countries of the Paris Union. Articles 25 et seq. of the DLPT regulates the right of priority with respect to applications at the TPI. These provisions do not introduce a separate registration system, but rather prioritise foreign trademarks that fulfil certain requirements for applications in Turkey. Precedence that rights acquired overseas have over domestic rights, makes the right of priority an exception of principle of territoriality⁷¹. Said articles of the Decree-Law should be interpreted in accordance with Articles 4 and 11 of the PC that govern the right of priority.

As the PC uses the term “person” in defining the right holders without making a restriction for foreigners⁷², it is possible for the citizens of Turkey to enjoy this privilege and have a right of priority on the basis of an overseas application at the TPI.

The PC clearly states that right of priority gives priority to the right holder and it should be exercised and claimed by him⁷³.

Fees charged by the TPI in the Trademark Regulation that an applicant has to pay in order to obtain a certificate to claim right

⁷¹ PASLI, p. 267 et seq.

⁷² For the view that in Paris Convention system, “person” term in here should be interpreted with PC art. 2 and 3, see Geoffrey H. C. BODENHAUSEN, *Guide to the Application of the Paris Convention For The Protection Of Industrial Property, As Revised at Stockholm in 1967, BIRPI 1969, WIPO Reprinted 1991, 2004, 2007*, p. 35; Martin PFLÜGER/Tihani PRÜFER-KRAUSE, *Paris Convention: Article 4, 4bis, 4ter, 5, 5bis, 5ter, Squater*, in *Concise International and European IP Law, TRIPS, Paris Convention, European Enforcement and Transfer of Technology*, ed. by Thomas Cottier/Pierre Veron, second ed., Wolters Kluwer, AH Alphen aan den Rijn 2011, p. 214. Bodenhausen points out in national regulations provision might be enlarged as right holder, BODENHAUSEN, p. 35-36.

⁷³ See TEKİNALP, p. 389; Uğur ÇOLAK, *Marka Hukuku, On İki Levha Yayınları*, İstanbul 2014, p. 94. For the necessity of the right to be asserted see Court of First Instance (Fourth Chamber), *Signal Communications Ltd vs OHIM*, 15.11.2011, Case T-128/99, N. 42 (online) <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-128/99>.

of priority in another country do not comply with the Convention and are subject to repayment⁷⁴.

Article 4(A)(1) of the PC recognises the person who has duly filed an application for the first time or “his successor in title” as a right holder. However, the Decree-Law only specifies the applicant. In our law, right of priority should also be exercised by successors as permitted by the Convention⁷⁵.

Right of priority exists if an overseas application as a source of right has been “duly” filed and classified as a “first application” in accordance with the Convention⁷⁶. The first application is the priority filing outside Turkey within the Paris Union⁷⁷. Each new filing in union members does not create a new right of priority⁷⁸. With respect to first filing, exceptional cases as stipulated in Article 4(C)(4) of the PC have directly effect on our law⁷⁹. Likewise, whether an application has been “duly” made or not should be determined in accordance with the PC, as there is no specific provision exists in the Decree-Law. Accordingly, a right of priority can be claimed, if the formal requirement is fulfilled, there is no need to ascertain substantial requirements, or grounds of refusal in the country where the application is filed⁸⁰.

When an application that is the source of right ceases to exist prior to the second application enjoying the right of priority, its effect on the existence of a right of priority should be determined by considering Article 4(C)(4) of the PC. If an application is re-

⁷⁴ See PASLI, p. 274/n. 134.

⁷⁵ PASLI, p. 276.

⁷⁶ PASLI, p. 279.

⁷⁷ Overseas means a member country of the Paris Union within the meaning of DLPT art. 25/1, however according to the last paragraph of the provision it is possible for a country outside the union to be the place of overseas application that is the source of the right.

⁷⁸ PASLI, p. 284; YASAMAN/YUSUFOĞLU, C II, p. 793; WIPO, Introduction to Intellectual Property, Theory and Practice, Kluwer Law International, London-The Hague-Boston, 1997, p. 363.

⁷⁹ YASAMAN/YUSUFOĞLU, C. II, p. 794.

⁸⁰ See BODENHAUSEN, p. 40; WIPO, Introduction, p. 363; PFLÜGER/PRÜFER-KRUSE, p. 217.

fused *prima facie* due to existence of absolute reasons of refusal, the right of priority in Article 4 of the PC will be affected and cease to exist; however, if an application is refused after the notification irrespective of whether upon an objection or not, since the application has been made and become public, right of priority may be exercised within legally prescribed period of time. What is important here is that whether an application becomes public or not⁸¹.

Facts that fall within the scope of influence of the right of priority application in the PC are not limited to ‘application’ or ‘registration’ as in the Decree-Law, but also cover “any acts”. Thus, an application based on right of priority in Turkey does not only provide priority/precedence over prior application and registration filed on behalf of a third party -within legally prescribed period of time- but also over the use of the respective sign/trademark in the country⁸². In this case, effect of the advantage provided by the right of priority at the time of registration is compounded with the direct enforcement of Article 4(B) of the PC and protects the trademark against objections under Article 8 of the DLPT⁸³.

Meaning and consequence of the provision, which states that a registered trademark which fall within the scope of right of priority “shall not prevent registration”, are different from the “invalidation” in Articles 42 et seq. of the DLPT.

The provision of Article 25(2) of the DLPT, which implies that as if the date of application is not important when a registration made on behalf of a third party within right of priority period, and brings such registrations under the invalidating effect of right of priority, should be interpreted/rendered in compliance with especially last sentence of Article 4(B) of the PC. That way, while the PC, on the one hand, widens the effect of right of priority as superiority against the use for the purpose of Turkish

⁸¹ PASLI, p. 285.

⁸² PASLI, p. 288.

⁸³ See PFLÜGER/PRÜFER-KRUSE, p. 217.

law, on the other hand, it has restrictive effect in relation to the superiority of right against the registration⁸⁴.

- *Telle quelle* principle⁸⁵ (protection of trademark ‘as is’) that takes its source from the PC (Article 6*quinquies*) does not exist in our domestic law. Therefore, the PC, which provides a complementary source for constructing and implementing the provisions of the Decree-Law with respect to right of priority, has a direct effect on our law with regard to *telle quelle* rule⁸⁶. The regulatory effect of the Convention also complies with the said effect⁸⁷. With the contribution of the DLPT, the said Article 6*quinquies* of the PC is enforceable in connection with the special applications of foreign registered trademarks based on overseas registration.

For the purpose of the *telle quelle* rule, a trademark that satisfies the respective requirements in the PC and therefore, is registered within the Paris Union is protected in Turkey as is in other countries, in other words, as a rule, a registration application for the trademark may not be refused in Turkey. An application may be refused only on the basis of reasons set out in the Convention. Therefore, this rule in fact entails a separate/independent procedure at the TPI. In the event of a *telle quelle* application in our country of a trademark registered within the Paris Union, registration will not be consummated in accordance with Articles 7 and 8 of the DLPT, but rather under Article 6*quinquies* (B) of the PC⁸⁸.

⁸⁴ See BODENHAUSEN, p. 41-42; PFLÜGER/PRÜFER-KRAUSE, p. 218; PASLI, p. 290-291.

⁸⁵ This rule is internationally gained recognition by the term “*telle quelle* (as is)” in original French text of Article 6*quinquies* of PC. BODENHAUSEN, p. 109/n. 2. This provision means protection of trademark abroad with registration, as it was registered before without any change or alteration. BODENHAUSEN, p. 107, 110; PFLÜGER p. 258.

⁸⁶ PASLI, p. 291.

⁸⁷ PASLI, p. 298.

⁸⁸ For these reasons being *numerus clausus* depends on accepting expanding interpretation pertaining to the discussion regarding the meaning of *telle quelle* rule. PFLÜGER, p. 261; PASLI, p. 311.

- As distinct from treaty norms that introduces special rules such as right of priority or *telle quelle* rule, which eliminate registration obstacles or facilitates the registration process, some treaties approach from the opposite angle, and prevent the registration of certain types of signs as a trademark and ban the member states to provide trademark/registration protection to these types of signs. However, the prohibition in fact aims at protecting foreign right holders inside the country in compliance with the rationale of international treaties, and preventing the seizure of trademarks used by their right holders-by means of territoriality- by local powers inside other countries⁸⁹. On the other hand, rules and regulations contained in the PC and TRIPs governing emblems, hallmarks, representative trademarks, well-known marks, geographical indications etc. prevent the registration thereof as a trademark without prior consent of their holders and without taking advantage of shield of territoriality rule.

With reference to Article 6^{ter} of the PC in the DLPT under absolute grounds for refusal, the DLPT forbids the registration or use of special signs such as emblems, hallmarks, abbreviations, etc. which fall within the scope of the article⁹⁰. The requirement of the Convention regarding the prevention of use of signs may also be satisfied with the unfair competition rules in addition to special protection regulations such as Flag Law⁹¹.

⁸⁹ PASLI, p. 342.

⁹⁰ The provision in PC was included with La Haye Revision 1925. 1958 Lisbon Revision is important for abolishing well-known rule regarding the signs included. BODENHAUSEN, p. 94-95, 101-102; PFLÜGER, p. 250. TEKİNALP states that this prohibition brought by related PC provision is mirrored by DLPT art. 71/-(g) in Turkish law. TEKİNALP, p. 410.

⁹¹ It must be noted that within the meaning of TCC art. 56/2-3 this case can be filed by public authority as well as consumers, professional/economic societies and NGOs. Within the scope of DLPT, only registered marks can be protected with infringement provisions, since unregistered marks are not included in DLPT, and they are usually even not “marks”, unfair competition rules might be protection mechanism for the purpose of PC. Of course, for example when flag is subject, specific protection provisions will prevail. PC already points out the necessity for prohibition of use but leaves parties free on finding the proper tool in their national laws.

The representative mark does not only represent a registration obstacle in our law but also entitles the proprietor of a trademark to demand the transfer of the trademark and oppose the use of the trademark by third parties as stipulated in Article 6^{septies} of the PC. In interpreting of and defining the terms used in Article 8(2) of the DLPT in which the representative trademark poses relative grounds for refusal, the Convention presents a valuable guidance⁹². It is not the wording of the provisions of the Decree-Law governing the representative trademark that makes them exception to the territoriality principle and thus protects the trademark registered in another country, but it is the effect of the Convention.

The term “proprietor” whose objection leads to the rejection of the trademark application as used in the Decree-Law is not a person only recognised by the TPI as a registered owner of the trademark, but also is a registered owner in any member state of the Paris Union pursuant to Article 6^{septies} (1) of the PC.

As no reference is made to the registration requirement in neither DLPT nor the PC, even though it is possible to be a registered right holder, it is not necessary for prior/real right of ownership to be based on registration. The place where the ownership right in the trademark being represented arises is, as a rule, a member state of Paris Union other than Turkey -with the effect of the Convention- although there is no clarity in Article 8(2) of the DLPT⁹³.

Even though it is possible to maintain from the wording of provision in the DLPT that the place where the agent or representative is authorised to act should be in Turkey, the provision in the PC clearly provides that in the event of an application in one or several countries within the Paris Union by an agent or representative, the proprietor shall be entitled to oppose the registration made in any country within the Paris Union and even in another

⁹² PASLI, p. 359-360.

⁹³ PASLI, p. 360-362.

country which is not a party to the Paris Union⁹⁴. Therefore, with respect to a trademark for which registration application is made, enforcement of Article 8(2) of the DLPT does not rely on whether the trademark was previously used by its proprietor or its agent or representative in Turkey⁹⁵.

The “right of objection” included in Article 11 of the DLPT should not be limited to the claims of a formal proprietor i.e. agent or representative against the real proprietor of a trademark⁹⁶. Under Article 6*septies* (2) of the PC, it is possible for the overseas real proprietor to prevent the agent or representative to make any disposition effecting the trademark as well as to use the trademark -even it is registered- with a lawsuit he/she files.

In addition to emblems, hallmarks, representative trademarks and well-known marks, another factor that represents a hindrance to trademark registration in international treaties is geographical indication. No person shall be allowed to exploit geographical indications as a main/substantive element of a trademark⁹⁷. In our law, geographical indications are governed by Article 7 of the DLPT as well as Article 18 of the Decree-Law on Geographical Indications (“DLGI”). The result that may be deduced from the wording of Article 18(1) of the DLGI is that no matter whether a geographical indication is used to create confusion or not, uses as a substantive or auxiliary element associated

⁹⁴ See PASLI, p. 371/n. 333.

⁹⁵ PASLI, p. 371.

⁹⁶ However, without any doubt, when formal right holder representative files an unfair use or unfair competition case against represented real right holder, case will be rejected despite the apparent right provided by registry, since real right holder will be valued. In other words, right of objection can overcome “prima facie” right holder effect of registry. See PASLI, Fikri Mülkiyet Hukukunda Hükümsüzlüğün Sonuçları, FMHD, 2006/3, p. 172-173.

⁹⁷ See Zekeriyya ARI, “Coğrafi İşaret Kavramı ve Coğrafi İşaretlerin Tescili”, Prof. Dr. Ömer TEOMAN’a 55. Yaş Günü Armağanı, C. I, Beta Yayınları, İstanbul 2003, p. 55 and authors there inn. 30; Felix ADDOR/Alexandra GRAZIOLI, TRIPS Agreement: Section 3: Geographical Indications, in Concise International and European Law, TRIPS, Paris Convention,, European Enforcement and Transfer of Technology, ed. by. Thomas Cottier/Pierre Veron, second ed., Wolters Kluwer, AH Alphen aan den Rijn 2011, p. 63.

with a product will hinder the registration and invalidation of the trademark. However, Article 22(3) of the TRIPs provides to the contrary. The said provision of the DLGI should be interpreted in accordance with Article 22(3) of the TRIPs, and this is a direct effect of the TRIPs on our law⁹⁸. Accordingly, the word ‘or’ in Article 18(1) of the DLGI should be read as ‘and’ and the use of geographical indication as an auxiliary element of a trademark should be allowed⁹⁹, unless such use in the trademark is of a nature capable of misleading the public¹⁰⁰; and more importantly, any use that does not fall within the scope of Article 15(2) of the DLGI should be allowed.

With respect to right of prevention of a registration, due to the wording of Article 18(1) of the DLGI, a mere application for geographical indication should not be deemed adequate, and pursuant to Article 22(3) of the TRIPs, as a requirement, registration of geographical indication should have been previously obtained.

Under Article 23 and 24 of the TRIPs, even though a previous geographical indication may prevent registration of a trademark, as a rule, a previous trademark does not prevent the registration of a geographical indication. As long as the trademark proprietor acts in good faith¹⁰¹, both intellectual property categories can survive. At this point, for the purpose of survival of a registration that relies on good faith, Article 24(5) and (7) of the TRIPs provide a guidance to determine in which circumstances, “bad

⁹⁸ PASLI, p. 396.

⁹⁹ For specific extended protections over exceptional indications see Burçak YILDIZ, “Ticaretle Bağlantılı Fikri Mülkiyet Hakları Sözleşmesi’nde (TRIPs’de) Coğrafi İşaretlere İlişkin Düzenlemeler”, FMR, 2008/8-3, p. 80/n. 107; 94.

¹⁰⁰ TRIPs art. 22/3 includes usage of indications as auxiliary element of trademarks, however only this inclusion does not suffice for implementation of provision also mislead of public is required. In case of trademark consists of geographical indication it will not be registrable anyway due to being devoid of distinctiveness. However if indication is auxiliary element and other elements are distinctive and there is no misleading regarding geographical source of the goods, registration and usage of such trademark cannot be prevented.

¹⁰¹ See ADDOR/GRAZIOLI, p. 74.

faith” may prejudice eligibility for or the validity of the registration of a trademark¹⁰².

3. Types of Trademarks

- The term “collective mark” contained in Article 7*bis* of the PC encompasses both common mark and warranty mark¹⁰³. Provision of the Convention obligates member states to provide protection to such foreign marks. Wording of the said article reveals that member states including Turkey have agreed and undertaken to provide protection. Therefore, even though the provision was not written as a statute norm¹⁰⁴, Articles 54 et seq. of the DLPT should be interpreted in accordance with the law of nations commitment. In this case, a foreign collective mark, which has not been previously registered or used in Turkey, is recognised as a source of entitlement and protected in favour of its holder¹⁰⁵.

With respect to collective marks, PC provides protection to collective marks that belongs to associations, even if such associations do not possess an industrial or commercial establishment. Therefore, the term “enterprise” in Articles 54 et seq. of the DLPT should be ignored, and collective mark application should not be refused and/or deprived of protection merely for this reason, even if the applicant does not possess an industrial or commercial establishment¹⁰⁶.

Even if an entity, which as a holder of a collective mark or warranty mark files an application for registration or protection without registration, does not exist in Turkey, its organisational structure is not subject to Turkish law, it does not engage in any

¹⁰² See PASLI, p. 400 et seq.

¹⁰³ See WATAL, p. 244. For opposing view CHOW/LEE, p. 627. Bodenhausen includes warranty mark but had no assertion on common mark. BODENHAUSEN, p. 130.

¹⁰⁴ Bodenhausen accepts this provision as directly enforceable. BODENHAUSEN, p. 129-130.

¹⁰⁵ PASLI, p. 418-419.

¹⁰⁶ PASLI, p. 422.

activity whether commercial or non-commercial or it does not have a branch, liaison office or representative office in Turkey, it should not be deprived of registration or protection¹⁰⁷. The PC does not provide restriction regarding the entitlement in terms of legal personality, principle of territoriality, citizenship or domestic operations, and does not even seek for overseas industrial or commercial establishment requirement. Therefore, the collective mark and registration and protection eligibility granted to collective marks in Turkey should be considered from such a wide angle¹⁰⁸.

- Effect of PC and TRIPs on the Turkish law through the term of well-known trademark encompasses three types of effect of treaties on the domestic law: firstly, there is a direct reference to the PC; secondly, rules and regulations are formulated in accordance with the PC and the TRIPs; and thirdly, due to lack of adaptation, sometimes international treaties are directly enforced within the country.

Well-known mark is a term created by international trademark law and constitutes an exception for certain basic principles of intellectual property law. Well-known mark is defined and governed in Article 6*bis* of the PC. In Turkey, Article 7 of the DLPT regulates well-known mark in the sense of the Convention through reference. Article 8 of the DLPT, which refers to reputation of trademark, provides a widened/enhanced protection with addition of extra terms taken from a regulation that corresponds to Article 16(3) of the TRIPs. As for adaptation, well-known mark in Article 7(1)(1) of the DLPT corresponds to Article 6*bis* of the PC, and well-known mark having reputation in 8(4) of the DLPT corresponds to 16(3) of the TRIPs. Therefore, the relation between Article 6*bis* of the PC and Article 16 of the TRIPs and the reference in both articles to the “characteristics” of the trademark applies for the relation between Articles 7 and 8 of the DLPT¹⁰⁹.

¹⁰⁷ PASLI, p. 423.

¹⁰⁸ PASLI, p. 425.

¹⁰⁹ PASLI, p. 433.

Both international treaties complement each other in terms of well-known mark¹¹⁰. Since the TRIPs completes the gap in the Convention, and in certain cases, it amends the latter, it will not be reasonable to consider these two treaties separately or independent from each other from the perspective of well-known mark. The PC and the TRIPs have introduced or formed a common definition of well-known mark and protection system¹¹¹. Therefore, from the viewpoint of Turkish law, contrary to what is widely known, there is no more than one degree of being well-known as it is used in Turkish law or definition of well-known mark. That is to say, under Articles 7 and 8 of the DLPT, a trademark is whether well-known or not. Whether a trademark is a well-known mark or not under Turkish law should be determined in accordance with the rules contained in Article 6*bis* of the PC and Article 16(2) of the TRIPs and the WIPO criteria that embody these rules.

Different legal outcomes of both treaties with regard to the wider protection is related to the articulation of different terms to the same “concept”, i.e. well-known mark, as stated in the treaty, rather than the difference in the concept¹¹².

If a trademark used or registered within a member state of the Paris Union is a “well-known” mark, it is recognised as “existing” and “superior” against registration applications by third parties in another member state even it is not used or registered in the former member state¹¹³, or in other words, it has not become a

¹¹⁰ CORREA, p. 188.

¹¹¹ PASLI, p. 434.

¹¹² PASLI, p. 434.

¹¹³ Bodenhausen states countries can lay down territorial usage as a condition. See BODENHAUSEN, p. 91; SIMON, p. 56. Compare; Annette KUR, “TRIPS and Trademark Law”, IIC Studies Series, From GATT to TRIPs-The Agreement on Trade-Related Aspects of Intellectual Property Rights, ed. by F. K. Beier/G. Schricker, Weinheim, New York, 1996, p. 105; GERVAIS, p. 332-333; CORREA, p. 190. We do not agree with this comment from the perspective of wording and purpose of PC art. 6*bis*. Moreover there is no specific regulation regarding this in Turkey. Besides since there is no point in PC related to acquired recognition with promotion as in TRIPS, we can conclude that no need for national usage for recognition is introduced clearly by TRIPS for the first time.

subject of a claim in the country of protection in the context of principle of territoriality, as long as it is well known in that country as being already the mark of a person entitled to the benefits of this Convention, and thus, as an exception of the principle of territoriality, unless otherwise consented by its real holder, the registration of a trademark, which constitutes reproduction or imitation liable to create confusion therewith, will be refused, and even if the registration has completed, it will be cancelled¹¹⁴.

The original text of the provision in the Convention clearly states that in addition to the entitlement to prohibit and cancel the registration, the right that a proprietor has also affects any use that creates confusion with the well-known trademark by third parties, and such use may be banned by the proprietor¹¹⁵. Therefore, for instance, even if a reproduction, imitation or translation of a mark considered to be well known in another country, which is liable to create confusion, is used by third parties without an application for registration in Turkey, this will be considered an infringement and such use may be prohibited by the owner of the well-known mark with the help of the Convention under the provisions of unfair competition. In other words, exception to principle of territoriality is not only related to registrations/applications for registration but also related to illegitimate use of well-known marks¹¹⁶.

See WATAL, p. 255; CORREA, p. 189-190. Considering this, it would be erring with the order brought by PC art. 6bis and TRIPS art. 16/2 to claim that national usage is condition or can be by national regulation.

¹¹⁴ It must be noted that the moment that well-known mark protection begins is the moment that marks are well-known in country of protection. If application for registration in Turkey is before than becoming well-known, it is not possible to overcome territoriality and enjoy well-known mark protection. In this case at the moment of application overseas mark is an existing right however being well-known, in order to overcome territoriality, occurs afterwards. This finding is also valid for third party uses before being well-known.

¹¹⁵ The requirement of prohibition of such uses along with registration was added in PC provision with Lisbon Revision 1958.

¹¹⁶ PASLI, p. 462.

Existence of well-known mark is not sufficient to enjoy the widened protection under Article 16(3) of the TRIPs that covers different goods¹¹⁷. The said mark should also be registered. However, registration under Article 8(4) of the DLPT should not be limited to the TPI registration, registration within the Paris Union should be adequate¹¹⁸.

It is not correct to interpret Article 6*bis* of the PC, which is recognised as an absolute grounds for refusal in Article 7 of the Decree-Law, separately from Article 16(3) of the TRIPs, and to reach a conclusion that protection should be granted only to similar or identical goods as in the original text of the Convention with respect to trademarks not registered in Turkey¹¹⁹. The said provision has been amended, improved and widened with Article 16(3) of the TRIPs. The provision of the Convention may not be interpreted as if Article 16(3) of the TRIPs does not exist. In this case, if a trademark is a “well-known mark”, the area of protection that falls within the scope of reference to the PC should also be interpreted in a manner that encompasses the protection for different products or services granted under Article 16(3) of the TRIPs. In other words, when the TPI receives an application that may create confusion with a well-known mark, the TPI should consider *ex-officio* the existence of well-known mark issue and refuse the application, even if the application is related to the same or different goods or services¹²⁰.

If a uniform definition of “well-known mark” is adopted and categorisation thereof is avoided, it will lead to a simplified the form of protection. The same subject is regulated in the

¹¹⁷ See Kemal ŞENOCAK, “Toplumda Tanınmışlık Düzeyine Erişmiş Markaların Farklı Mal veya Hizmetlere İlişkin Korunması (556 Sayılı KHK md. 8/IV)”, *Batider*, 2009, XXV/2, p. 135, 147-148.

¹¹⁸ In order to enjoy widened protection, without any doubt, only application will not suffice.

¹¹⁹ Compare, for division between PC and TRIPs with not clear expressions, PFLÜGER, p. 247.

¹²⁰ PASLI, p. 471-472.

Decree-Law as absolute as well as relative grounds for refusal¹²¹. The complex scenery created thereby can be amended with the rules and regulations of the international treaties. Accordingly, if a trademark is a well-known mark and is registered in a member state of the Paris Union, it will be protected under Article 16(3) of the TRIPs for different goods as absolute grounds for refusal; and if the trademark is also registered in Turkey, it may enjoy additional terms that provides protection on the basis of different goods pursuant to Article 8(4) of the DLPT, in other words, even if it does not fulfil the requirements stipulated in Article 16(3) of the TRIPs, it can enjoy protection under Article 8(4) of the DLPT, even with respect to such use that does not create confusion. Yet, this will constitute a relative ground for refusal¹²². That is to say, in order to enjoy widened protection, in addition to those stipulated in Article 16(3) of the TRIPs, upon occurrence of an alternative event stated in Article 8(4) of the DLPT -provided that the well-known trademark is registered in Turkey- refusal of an application for registration by a third party will be possible upon challenge of the owner of the trademark¹²³. If the third party's trademark is registered, it will be possible to cancel the registration by both regulations.

Protection against unfair competition that may arise in the event of use of trademark in connection with different goods may be granted in accordance with Article 16(3) of the TRIPs¹²⁴.

The regulation in the PC confirms the Supreme Court's precedents that incorporate the period within which the prohibition of use of a well-known mark may be claimed into other grounds for nullity. However, while the Supreme Court applies the 5-year period for well-known marks under Article 42(1)(a) of the DLPT to other grounds for nullity, it should also not fix any time limit

¹²¹ PASLI, p. 473.

¹²² In another words, it will be possible with the objection of trademark owner to reject registry due to DLPT art. 8/4 along with the PC art. 16/3, and to make an examination under mentioned DLPT provision.

¹²³ PASLI, p. 481.

¹²⁴ PASLI, p. 473.

for requesting the cancellation, prohibition, or use of marks registered or used in bad faith by third parties, since the source of these two regulations is the PC. Moreover, the rule that sets no time limit in Article 6*bis* (3) of the PC is not exclusive to nullity case. Therefore, time limits under Article 70 of the DLPT and Article 60 of the Turkish Code of Commerce in connection with infringement or unfair competition cases aiming at prohibiting the unlawful use of trademark will not apply, if the third party acts in bad faith¹²⁵.

4. Scope of Right in Mark

- Irrespective of whether a right arises as a result of registration or use, negative and positive aspects of rights that the right holder possesses are similar in nature¹²⁶. However, the difference is that in addition to ownership created through registration, tools that enable the holder to exercise its rights differ¹²⁷.

With respect to scope of right, the most prominent difference between the wordings of Article 16(1) of the TRIPs and Article 9 of the DLPT is that while the TRIPs states that owner of a registered trademark may prevent its use in the ordinary course of commerce, the DLPT does not provide any restriction regarding use of a trademark by third parties¹²⁸.

Article 16 of the TRIPs directly affects Article 9 of the DLPT in a complementary and interpretative way. Accordingly, it is accepted that the requirement, which demands that use of a trademark must be of commercial nature, leads to a right in the trademark insofar as such commercial use, as a rule, may result in a likelihood of confusion¹²⁹.

¹²⁵ PASLI, p. 482-485.

¹²⁶ Compare GERVAIS, p. 331. Author states recent/actual usage might determine existence and scope of the right.

¹²⁷ PASLI, p. 492.

¹²⁸ PASLI, p. 501.

¹²⁹ PASLI, p. 517.

If a trademark is a well-known mark, even though prevention of those types of uses that do not result in a likelihood of confusion falls within the scope of negative aspect of the right under Article 9(1)(c) of the DLPT, then the trademark law, which aims at protecting the image of trademark, accepts -with the effect of the TRIPs- those third party uses that in the ordinary course of commerce exploit the trademark in a manner that is detrimental to the reputation thereof, within the scope of the right. On the other hand, it is understood from the TRIPs that any type of commercial use that may result in a likelihood of confusion may infringe the right; therefore, the right conferred encompasses use of any type of sign that may damage the distinctiveness thereof; and infringement of a right is not necessarily subject to existence of use of a sign as a trademark¹³⁰.

The exception in Article 16(1) of the TRIPs, namely, “existing prior rights” procures that in particular, actual use of a trademark by third parties, who have obtained a right on it prior to the registration by means of use of the trademark, does not fall within the scope of right of prevention conferred by the right¹³¹. Thus, in an infringement action filed on the formal ownership grounds by the holder of registration against the real/superior right holder, use by the real right holder will not be deemed to be against law due to the said exception, and this can be used by the right holder as a position to defend his rights in the said legal action.

Even though the TRIPs stays impartial with regard to the issue of exhaustion as set out in Article 6 and does not set forth a definitive rule regarding national, regional or international exhaustion principles that member states may choose¹³², due to reference to

¹³⁰ PASLI, p. 517.

¹³¹ CORREA, p. 187. For, despite being not clear, the statement that provision regulates usage of sign subjected to mark as enterprise/store name except trademark law see Joanna SCHMIDT-SZALEWSKI, “The International Protection of Trademarks After The TRIPs Agreement”, *Duke Journal of Comparative & International Law*, 1998/9-189, p. 208-209.

¹³² See PASLI, p. 527/n. 764.

national treatment and most-favoured-nation treatment in the same article, it can be argued that parallel import from Turkey to Europe, where regional or national exhaustion applies, conforms to law, and exhaustion that goes beyond region should be applied. Therefore, free trade within the European Union can be widened towards the Paris Union.

Fair use exception in Article 17 of the TRIPs is also enforceable for non-registered trademarks¹³³.

5. Requirement or Burden of Use

- Requirement or burden of use of registered trademark is governed in both the Convention and the TRIPs, which is considered as an exceptional circumstance in the international trademark law and in the relation between the PC and the TRIPs. Therefore, the rules and regulations introduced by these two treaties, which correspond to each other with respect to provisions of burden of use, should be regarded as a whole. However, even so the TRIPs agreement adopts a “Paris plus” approach, and generic approach of Article 5(c) of the PC is clarified and exemplified in Article 19 of the TRIPs¹³⁴. The TRIPs introduces a three-year lower-limit to “reasonable period” for use in the PC¹³⁵, underlines the requirement that reasons justifying the non-use should be independent of the will of the owner of trademark, and gives various examples such as “import restrictions”. Therefore, from this perspective, it will be accurate to say that TRIPs does not contradict with the PC, but rather it complements it.

Existence of a reason justifying the non-use is not considered *ex-officio* by the judge taking into consideration the provisions contained in the PC and TRIPs, even though the wording of Article 14 of the DLPT can be interpreted otherwise. The defendant trademark owner should claim it and prove the existence of

¹³³ GERVAIS, p. 338; CORREA, p. 195.

¹³⁴ For the view that TRIPs is more precise/complete at this point than PC see CORREA, p. 197.

¹³⁵ PASLI, p. 543/n. 803-804.

the reason¹³⁶. Even though the DLPT does not provide a definition or example regarding the “valid reason”, second sentence of Article 19(1) of the TRIPs should directly affect to our law and the “valid reason” in Article 14(1) of the DLPT should be interpreted in accordance with the provision of the TRIPs¹³⁷. Therefore, even if the trademark is not used for a period of five years after the registration, if circumstances, which have arisen objectively beyond the control of the owner and cannot be remedied by him, constitute an obstacle for the use of the trademark, such circumstances will be recognised as a “valid reason” that legitimatises the non-use, and the trademark will not be cancelled, notwithstanding its non-use¹³⁸. The source of the restrictive/severe interpretation that requires non-recognition of the subjective circumstances as a “valid reason” despite the absence of the fault on the part of the trademark owner¹³⁹ is the second sentence of Article 19(1) of the TRIPs¹⁴⁰.

Interpretation of the provision contained in the PC suggests that the place of use should be within the borders of Turkey, even though the DLPT remains silent on this matter¹⁴¹.

¹³⁶ See and compare, CORREA, p. 197; TEKINALP, p. 460; KARAN/KILIÇ, p. 315; Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1988, AB-2001-7, WT/DS 176/AB/R, 02.01.2002, p. 56.

¹³⁷ SIMON, p. 60. In EU regulations and German MarkenG § 26/1, “proper reason/berechtigte Gründe” terms are used.

¹³⁸ PASLI, p. 545-546.

¹³⁹ See same approach for bankruptcy KARAN/KILIÇ, p. 315-316; partly overlapping Sabih ARKAN, *Marka Hukuku*, C II, A. Ü. Hukuk Fakültesi Yayınları, Ankara 1998, p. 149/n. 20; for other views see TEKINALP, p. 460/n.3; YASAMAN/YÜKSEL, C I, p. 650/n. 99; YASAMAN/ALTAY, C. II, p. 721 and n. 21 there; Arslan KAYA, *Marka Hukuku*, Arıkan Yayınları, İstanbul 2006, p. 202. For opposing view see Walter R. SCHULEP, *Das Markenrecht als Subjektives Recht*, Verlag für Recht und Gesellschaft, Basel 1964, p. 207.

¹⁴⁰ Supreme Court determines PC and TRIPs do not provide provisions in favour of trademark owner. See 11. Civil Chamber 18.03.2002 1719/2064 at KARAN/KILIÇ, p. 27-28.

¹⁴¹ In doctrine discussion is not related to place of usage. See PFLÜGER/PRÜFER-KRUSE, p. 236.

To accept the use with the consent of the owner in Article 14(2) of the DLPT as a use preventing cancellation, control of the owner over the use by third party is sought under Article 19 of the TRIPs¹⁴².

As provided in Article 5(C)(3) of the PC, co-proprietors, who acquired a trademark by way of inheritance or spin-off, should be allowed to use and register the trademark separately¹⁴³.

6. Legal Proceedings pertaining to Trademark

- With respect to legal proceedings pertaining to trademark, international treaties take the principle of territoriality as a basis and do not introduce an exception to the basic rule contained in Article 6 of the PC. As a result of the principle of territoriality, when a trademark is registered in several countries, it is possible to transfer -and initiate a legal proceeding against- the trademark separately in each country of registration, even if it is composed of the same sign and encompasses the same type of products¹⁴⁴.

Article 21 of the TRIPs denies the principle of affiliation¹⁴⁵ under Article 6*quater* of the PC and recognises the “separation” between the trademark and the entity owning the trademark. Under Turkish law, it is possible to transfer the trademark separately from the entity.

¹⁴² PASLI, p. 554.

¹⁴³ PASLI, p. 556/n. 839.

¹⁴⁴ See ECJ Decision, IHT Internationale Heiztechnik GMBH vs Ideal Standard GMBH, C-9/93, 22.06.1994, N. 26-27 (online), available at: http://www.ippt.eu/files/1994/IPPT19940622_ECJ_Ideal_Standard.pdf. See SCHMIDT-SZALEWSKI, p. 194-195; YASAMAN/ALTAY, C. II, p. 683.

¹⁴⁵ PASLI, p. 573.

The Requests That Maybe Asserted by The Collective Society in The Event of the Withdrawal of the Authorization Certificate in The Field of Turkish Intellectual Law

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Introduction

In the field of Intellectual Law, collective societies are associations that are established to ensure the administration and pursuance of rights of author and related right owners that are entitled by the Law, collection and distribution to the right owner of receivable payments, within the scope of the provisions of article 42 and the rest of the Turkish Intellectual and Artistic Works Code and “Regulation on the Collective Societies and Federations of Owners of Intellectual and Artistic Works and Related Right Owners¹” that is introduced based on “Intellectual and Artistic Works Code”².

The subject of our article consists of the authorization certificate that is conferred to collective society by the member right owners and

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¹ Official Gazette, 01.04.1999, 23653.

² TEKİNALP, Ü.; Fikri Mülkiyet Hukuku, 4. Edition, İstanbul, 2005, p. 277; KARAHAN, S./ SULUK,C./ SARAÇ, T./ NAL, T.; Fikri Mülkiyet Hukukunun Esasları, 4. Edition, Ankara, 2015, p. 146-147; YAVUZ, L./ALICA, T./MERDİVAN, F.; Fikir ve Sanat Eserleri Kanunu Yorumu, Volume 1, Ankara, 2013, p. 42 ff. For German Law see DREYE, G./KOTTHOFF, J./MECKEL, A./ZEISBERG, H.J.; Urheberrecht, Heidelberg, 2008, p. 1368 ff.; LOEWENHEIM, U.; Handbuch des Urheberrecht, München, 2010, p. 787 ff.; SCHRICKER, G./ LOEWENHEIM, U.; Urheberrecht Kommentar, München, 2010, Wahrn G. § 1 ff. For English Law see LADDIE, H. /PRESCOT,P. /VITORIA,M.; The Modern Law of Copyright and Design, 4. Edition, Craydon, 2011, p. 1112 ff.

the financial results of the withdrawal of the rights vested within this scope without any valid ground in respect of the collective societies in the field of Turkish Intellectual Law.

I- Legal Characteristics of The Authorization Certificate Conferred to The Collective Society by Right Owners

Collective Societies obtain authorization certificate from the right owners to be able to pursue the rights of the owner of intellectual property and related right owners granted by the Law and collect the receivable payments, within the scope of article 42 and the rest of Turkish Intellectual and Artistic Works Code , “Regulation on the Collective Societies and Federations of Right Owners Related to Owners of Intellectual and Artistic Works” and “Guideline on the Authorization Certificate Conferred by the Owners of Intellectual and Artistic Works (Regulation)”³.

In articles 3 and 4 of the Regulation on the Authorization Certificate Conferred by the Owners of Intellectual and Artistic Work, the authorization certificates that will be conferred to the collective societies by the members and its content are defined. The provisions are as follows:

Authorization certificate

Article 3 – Real and legal persons which are authors or financial right owners and members of the Collective Societies are obligated to confer an authorization certificate in accordance with the provisions of this regulation. In this case, pursuance of the financial rights of real and legal persons which are authors or financial right owners on the works, collection of royalties and distribution of these payments are conducted by the collective society. The rights vested with the authorization certificate are valid for the works that are specified by the financial right owner in the authorization certificate.

³ TEKİNALP, p. 281.

Collective society is the representative of the members that conferred authorization certificates.

Matters required to be specified in the authorization certificate

Article 4 – Authors or financial right owners are obligated to comply with the matters specified below that will be in the authorization certificated.

- a) Right owner accepts to transfer its financial rights resultant of its authorship or financial right ownership to the collective society for at least five years, that in the event that it does not annul the authorization certificate via a rightful notary one year prior to the expiration of the period in the authorization certificate, the authorization period will be deemed to extended for the same amount of time for once,
- b) To comply with the regulation of the collective society, directive and plan of distribution of royalties,
- c) To pay its share to the collective society,
- d) To individually manifest the transferred right, if there are any,
- e) To deliver a copy to the collective society if the authors or financial right owners executed a private contract regarding the works that are specified in the authorization certificate,
- f) That the collective society is authorized in the matter of pursuance of the subsequent rights,
- g) To deliver a sample of the work that is specified in the authorization certificate for the archive of the collective society,
- h) To specify the author or the financial right owner, information regarding the work that will be transferred to the collective society, its full name and address, name of the work, name of the author, the number of reproduction, if it was published, quality of the work and names and addresses of the other right owners,

if there are any according to these qualifications and the kind of work,

- i) To perform the obligations given by the “Regulation on the Collective Societies and Federations of Owners of Intellectual and Artistic Works” “and the authorization certificate,
- j) That the collective society is authorized to confer a work that it specified in the authorization certificate to any real or legal persons that request to use it in any way, without the permission of the right owner.

Within the scope of these provisions, the following determinations may be made:

Primarily, it is explicitly stated in article 3 of the Regulation that the authorization vested in the collective society is a **representative authority**⁴. Furthermore, the existence of essentially a **mandate agreement** between the parties is clear, given that the Collective Society also incurs a debt against the member.

Again, as it is specified in article 4/a of the Regulation, it is required by the legislations that the member **transfers its financial rights to the collective society for at least five years**. On the other hand, the same provision indicated the “**transfer of financial rights**” as well. In article 8 of the Regulation, it is clearly decided that the member is obligated to sign the authorization certificate that the collective society prepared. In other words, the member does not have the chance to negotiate in many matters.

Consequently, it is seen that the essential relationship between the member and the collective society is a proxy relationship and correspondingly, the member vests the right of representation to the collective society with the “**membership authorization certificate**”. As mentioned above, transfer of financial rights in the authorization certificate

⁴ For detailed information regarding the representation see, OĞUZMAN, M.K./ÖZ, M.T.; Borçlar Hukuku Genel Hükümler, Volume 1, 12. Edition, İstanbul, 2014, p. 225 ff.; TEKİNAY,S.S./AKMAN,S./ BURCUOĞLU,H./ ALTOP,A.; Borçlar Hukuku Genel Hükümler, 7. Edition, İstanbul, 1993, p. 166 ff.

is required by the legislations. However, the provision in question is not right. In respect of such authorization, entitlement of exclusive licence must very well be accepted in my opinion.

II- Requests That Maybe Asserted by The Collective Society in The Event of The Member Withdrawing From The Collective Society Without Any Valid Grounds

What the requests that the collective society may assert in the event that the member withdraws from the collective society without any valid ground, in other words, the withdrawal of the authorization certificate that are conferred to the collective society and the rights that are vested within this scope without any valid ground and the termination of the mandate agreement in this way must be evaluated within the scope of both Intellectual Law and Law of Obligations.

Article 42 of Turkish Code of Obligations regarding the withdrawal of the right of attorney (representation) is as follows: “The person that is being represented may always limit or withdraw the power of attorney that is based on a legal transaction. However, the rights that may arise from the legal relationships between the parties such as service, mandate or partnership agreements are reserved”.

It is seen that the same content is accepted in article 10 of the Regulation on the Collective Societies and Federations of Owners of Intellectual and Artistic Works and Related Right Owners and it is decided that nobody can be forced to continue to be a member in the collective society. Similarly, in the article 17/1 of the abovementioned Regulation it is established that another way for the membership to end is “withdrawal from membership”. On the other hand, in article 17/2, it is stated that in the event of expiration reciprocal obligations of the member and the collective society will continue for one more year. It is determined that from this aspect, article 17/2 of the Regulation does not comply with article 512 of Turkish Code of Obligations which indicates that the appointer

of proxy may always unilaterally terminate the agreement. Indeed, due to the fact that the essential relationship between the member and the collective society is a proxy relationship, provisions regarding this agreement must be examined: Article 512 of Turkish Code of Obligations is as follow: “The appointer of proxy and the proxy may always unilaterally terminate the agreement. However, the party that terminated the agreement in an inappropriate time is obligated to indemnify the loss incurred by the other party that arose from this”. Considering that it is not possible for a Regulation to be inconsistent with a Law due to the fundamental principle of “hierarchy of norms”, we are of the opinion that article 17/2 of the Regulation must be amended and construed within the scope of the Law, until the amendment. Accordingly, it must be accepted that the member always has the right to immediately terminate the agreement, however, in the event that it terminates the agreement in an inappropriate time, the sanction concerning this situation must be imposed.

In that case, the matter of what should be understood from the term “*inappropriate time*” must be examined.

1) Concept of inappropriate time

Inappropriate time may be determined by the evaluation of the situation that the opposite party is left in, in respect of the conducting the activity of operation of business subject to the agreement, by the time the termination of agreement is realized. The evaluation in this sense should not be done completely according to the subjective situation of the opposite party, but it should be done by taking the content of the operation of business subject to the agreement into consideration pursuant to good faith. As it is justifiably accepted in the doctrine, it is not right to determine whether the termination is realized in an inappropriate time based on whether a valid ground exists or not. Similarly, termination of the mandate agreement by way of dismissal without any valid grounds before the period established in the agreement does not result in the conclusion that this right was definitely used in an inappropriate time⁵.

⁵ SARI, S.; Vekalet Sözleşmesinin Tek Taraflı Olarak Sona Erdirilmesi, İstanbul, 2004, p.

Because the acceptance of the opposite will lead to the right of dismissal that may be unilaterally used by the client in article 512/1 of Turkish Code of Obligations losing its meaning⁶.

2) Losses of the collective society required to be indemnified in the event of termination of the agreement by the member in an inappropriate time

In case that the mandate agreement is regarded as terminated in an inappropriate time, the following can be said concerning the extent of the damage that will be indemnified. First of all, it must be stated that, as it is explicitly expressed in article 512 of Turkish Code of Obligations, the damage that the client is obligated to indemnify is the damage that arises from the application of the dismissal right in an inappropriate time. In other words, the damage in question is the damage that arises from the waste of faith (trust) in the continuity of the transaction of business by termination at an unexpected time. Accordingly, the damage that will be indemnified is negative damage⁷.

As is known, negative damage, falls into the opposite of the term positive damage. Positive damage is the damage that the claimant endures due to its interest in the performance of the debt not being realized. Negative damage is the damage that is endured due to the fact that an agreement of which the credibility was trusted does not take effect⁸. Negative damage that can be demanded within the scope of article 512 of Turkish Code of Obligations has an importance in this respect: Herein, not the party that

166 ff.; ZEVKLİLER, A./ GÖKYAYLA, E.; Borçlar Hukuku Özel Borç İlişkileri, 12. Edition, Ankara, 2013, p. 626.

⁶ SARI, p. 135 ff. especially 138; GÜMÜŞ, M.A.; Borçlar Hukuku Özel Hükümler, İstanbul, 2012, p. 191.

⁷ SARI, 138-139; YAVUZ, C./ACAR,F./ÖZEN, B; Borçlar Hukuku Dersleri, Özel Hükümler, 13. Edition, İstanbul, 2014, p. 674; ZEVKLİLER/GÖKYAYLA, s. 627; ERGÜNE, S.; Olumsuz Zarar, İstanbul, 2008, p. 270.

For the opinion that the positive damage may be demanded GÜMÜŞ, p. 191.

⁸ For detailed information regarding the term negative damage and its comparison to positive damage, see ERGÜNE, p. 36 ff.

uses its right to terminate, but the addressee party requests the damages that arise from waste of its trust regarding the termination date of the agreement. On the other hand, within the scope of the termination of agreement, the damages that the terminating party may request provided that the conditions are realized are positive damages. However, in article 512 of Turkish Code of Obligations, the indemnification of the negative damage that the party of which the trust regarding the termination date of the agreement was wasted is the issue⁹. Provision of article 17/2 of the Regulation of Collective Societies must be evaluated and interpreted within this scope. In other words, to claim that the financial obligations of the member would extend for one more year after the termination of the agreement within the scope of this provision would be contrary to the letter and spirit of the Law. A regulation including a provision contrary to the Law is against the “hierarchy of norms” which is one of the basic principles of law, as it was mentioned before.

The law-maker did not allow the indemnification of all of the damages of the party that trusted the validity of the agreement that arise from the termination of agreement. The provision limited the scope of the negative damage to be indemnified by indicating that the reason of the obligation of indemnification is the exercise of the termination right in an inappropriate time. Pursuant thereto, indemnification of the damages that only the realisation moment of the termination caused and not all of the damages that arise from the termination is indicated¹⁰.

Accordingly, the damages that may be requested due to the dismissal in an inappropriate time are as follows:

a) Damages that arise in terms of payment

The proxy incurs the debt to transact business for the benefit of its client with the mandate agreement. In exchange for the business transaction it realized, the proxy will be entitled to the payment in the event that it is set out in the agreement or customary (Article 502/3 of Turkish

⁹ ERGÜNE, p. 270.

¹⁰ SARI, p. 141-142.

Code of Obligations). Collective Societies pursue the rights of the members and take service charges.

In cases that a power of attorney with payment exists, the proxy transacts business to obtain the aforementioned payment. In the event that the power of attorney is terminated by way of dismissal, continuance of agreement by the proxy is prevented, hence, the opportunity of obtainment of payment is abolished and incurrence of loss of earnings is caused. The provision of law that entitles the client to terminate the agreement any time it desires (article 512 of Turkish Code of Obligations) does not protect the performance interest of the proxy with this article. Acceptance of the necessity of payment of the full payment would lead to the entitlement of termination of the client becoming meaningless. Accordingly, the proxy cannot request its damages that arise from the termination of transaction of business by way of dismissal, with the claim that the dismissal was exercised in an inappropriate time. However, it is possible for the proxy to request a certain payment for the preparation it made with the faith for the continuance of the mandate agreement¹¹.

Within the scope of a new mandate agreement, it is normal for a reasonable time to pass to generate any income. In such situations, indemnification for the payment that was lost for the termination of the mandate agreement in an unexpected form and a proper time period that this negativity can be resolved can be in question as a necessity of fairness¹².

The following may be stated concerning the opinion of the Supreme Court regarding the subject:

In the decision of Supreme Court 3rd Civil Chamber dated 29.12.1997 with the file number of 1997/11339 and decision number of 1997/12497¹³ it was rightfully decided that:

¹¹ ZEVKLİLER/GÖKYAYLA, p. 627; SARI, p. 146-147.

¹² SARI, p. 149.

¹³ Kazancı Bilgi İçtihat Bankası www.kazanci.com (26.10.2015).

“In the lawsuit petition, determination of the fact that it was not indebted for 100.000.000 Turkish Liras, in the file with the file number of 1997/487 of the conjoined Second Minor Court the withdrawal of appeal that was made to the case with the file number of 1996/9351 of the Sixth Execution Office for the collection of the debt of 100.000.000 Turkish Liras was requested. The Court proceeded to the dismissal of the lawsuit and acceptance of the conjoined withdrawal of appeal case; the judgment is appealed by the counsel of the plaintiffs.

It was perceived that the request of appeal was in due time, all of the papers in the case were read and it is decreed that:

In cases that the defendant client (the represented) does not give authorization (representation) to the plaintiff attorney (the proxy) it must be accepted that there is an ordinary power of attorney between the parties and the issue must be resolved accordingly. Hence, the provision of the law (article 174/11 of Attorney’s Code) regarding the full payment of the payment in case of unlawful dismissal will not be applied to the matter of dispute.

In principle, in all types of power of attorney, the client (the represented) cannot waive the right to dismiss the proxy at any time and the proxy cannot waive the right to resign at any time (article 396/1 of the Code of Obligations). In the event of exercise of the right of dismissal or resignation, indirect limitation of this right in a way that the payment that was collected in advance cannot be taken back or a penalty clause would be paid with an agreement cannot be valid. In that case, the provision that states “in the event that the client does not give the power of attorney (.....) the full payment specified in the agreement shall be paid” in the article 7 of the agreement between the parties cannot be applied.

Even if the right of dismissal is not based on a valid ground or the resignation is rightful, in principle, the full payment cannot be requested, however, if the proxy transacted business as is due, it can request a partial payment in proportion to the time it devoted. In that case, as dismissal and resignation are only forwardly valid, it must be accepted that the proxy that is dismissed or resigned can demand a partial payment for the expenses and damage it endured that is in exchange for

the business it transacted de facto until that time. Agreements regarding the detainment of the payments that exceed these requests and penalty clauses will not be valid.

Rendering a judgment as a result of a deficient investigation without considering the abovementioned de facto and legal facts was not found acceptable.

What the Court must do is to render a judgment (without any expert examination) toward the protection of justice balance between the parties by evaluating the case according to fairness in the concrete case pursuant to article 4 of the Civil Code. Because a part of the payment must be paid in accordance with fairness if the completion of transaction of business becomes impossible without the fault of the proxy.

Within this scope, it is accepted that rendering of judgment in written form without considering the abovementioned elements is wrong and it is unanimously decided on the date of 29.12.1997 that the judgment is (REVERSED), the appeal fee will be returned to the appellant if requested.”

However, the decision of Supreme Court 13th Civil Chamber dated 07.11.1997 with the file number of 1997/7395 and decision number of 1997/8923¹⁴ is not rightful in terms of its preamble. The decision is as follows:

“Following to the appeal by the counsel of the defendant of the judgment that is rendered in consequence to the proceedings for the reasons written in the verdict, the case was examined and it is decreed that:

The plaintiff stated that it is an attorney, it executed an agreement for a period of three years with the defendant company to carry out its legal consultancy on the date of 07.11.1996, the agreement was wrongfully terminated without a cause by the defendant as of the date of 11.03.1197 and requested the collection from the defendant of service indemnification in the amount of 4.089.000.000 Turkish Liras with interest on the basis of the last paid payment, in exchange for the remaining period of 2 years 7 months 10 days pursuant to article 8 of the agreement.

¹⁴ Kazancı Bilgi İçtihat Bankası www.kazanci.com (26.10.2015).

Defendant argued for the dismissal of the lawsuit.

The Court rendered a judgment for the collection of 4.089.000.000 Turkish Liras, the judgment was appealed by the defendant.

With the agreement executed on the date of 07.11.1996 between the plaintiff attorney and the defendant, it was agreed that the agreement would be valid as of the date of 20.10.1996 for a period of three years, the attorney would carry out the legal consultancy and continuous advocacy of the defendant company without being tied to specific working hours, the attorney would not resign from its duty and the company would not dismiss the attorney without a valid ground pursuant to the article 8, in the event of a wrongful dismissal or termination of the agreement, the total of the claims that arise from this agreement on the basis of the remaining period of the agreement would be paid to the attorney as service indemnification. It is true that the agreement was terminated by the defendant as of the date of 11.03.1997, the termination and dismissal from the power of attorney was wrongful and these matters are undisputed between the parties.

Mandate agreement is an agreement that is based on mutual trust and trust is an essential feature of the agreement. Therefore, each party may always terminate the agreement. For this reason, resignation and dismissal from power of attorney are always lawful in accordance with article 396/1 of the Code of Obligations. In that case, agreements in advance regarding the waiver of the rights of dismissal and resignation or obstruction of the exercise of these rights are invalid. Therefore, the provision of the article 8 of the agreement executed between the parties that is against the abovementioned principals is invalid as well. Nevertheless, the plaintiff is entitled to the full payment as the dismissal was wrongful. However, pursuant to articles 390 and 325 of Code of Obligations, the entities that are saved, or the entities that are earned or intentionally waived from earning from another job due to the fact that the business was not transacted must be reduced from the payment. In that case, when the court must conduct an expert examination and the amount that must be reduced from the payment of the attorney must be determined pursuant to article 325 of Code of Obligations and render a judgment according

to the result, it is against the judicial process and law to render a judgment in written form and it is a cause for reverse of judgment.

With the abovementioned grounds, it is unanimously decided on the date of 07.11.1997 to (REVERSE) the appealed judgment for the benefit of the defendant and the refund of the fee if requested.”

In the case, it is understood that the proxy is an attorney in the mandate agreement. According to article 174 of Attorney’s Code:, “in the event of dismissal of attorney, the complete payment is paid. In so far as the attorney is dismissed due to its fault or negligence, the payment is not required to be paid.” As is seen, this provision is different from article 512 of Turkish Code of Obligations. Article 512 of Turkish Code of Obligations resolves that if the dismissal is exercised in an inappropriate time, indemnification must be paid; however, in article 174 of the Attorney’s Code, if the proxy is not at fault regarding the dismissal, in principal, it will be entitled to the complete payment. It is seen that the Supreme Court missed this point and applied the provisions of Code of Obligations, instead of Attorney’s Code to a mandate agreement where the proxy is an attorney and while the conclusion is right according to the Attorney’s Code, it does not comply with the Code of Obligations that the Supreme Court indicated as justification.

Within this scope, as a conclusion, in the event that the member terminates the agreement even without a valid ground and leaves the membership, a request of payment of the payment until the end of the period that is specified in the authorization certificate or until one year after the termination of the agreement pursuant to article 17/2 of the Regulation of Collective Society must not be possible. Considering that a Regulation being against a Law is not possible in accordance with the basic principal of “hierarchy of norms”, we are of the opinion that the article 17/2 of the Regulation must be amended and until it is amended, it must be interpreted within the scope of the Law. Accordingly, it must be accepted that the member has the right to terminate the agreement at any time, however, in the event that it terminates the agreement in an inappropriate time, sanctions concerning this situation must be implied.

In this case, the collective society must be able to request the payment regarding the business that it transacted and the preparations it made with the faith in the continuance of the agreement.

b) Damages that arise due to the expenses that the collective society made

The client incurs the debt to pay the expenses that the proxy made to carry out the business in due form. Within this scope, the client incurs the debt to pay the expenses that the proxy made before the termination of the agreement, as well as the debt to pay the expenses regarding the preparations that the proxy made to provide convenience for the transaction of business that it has not yet performed¹⁵.

Nevertheless, the request of a significant claim by the collective society in the event of the termination of the membership agreement cannot be expected to come into question. Because it is not a frequently concurred situation for the collective society to make expenses for only one member.

c) Damages of the collective society that arise from missing the other agreement offers

The proxy may have rejected other paying mandate agreements that are offered to it, in consideration with the current mandate agreement, apart from the abovementioned damages. After the termination of the existing mandate agreement in an unexpected time, it will not be possible to consider these offers anymore. The agreement offers that are missed in this way will be fall within the damages of the proxy that must be indemnified¹⁶.

In regard to the collective societies, executing an agreement with a member almost never will cause it to miss an opportunity to execute an

¹⁵ SARI, p. 150; ZEVKLİLER/GÖKYAYLA, p. 627.

¹⁶ SARI, p. 151.

agreement with another person. Therefore, the collective society to make such a request can only come into question in exceptional cases such as a person not wanting to become a member of the collective society just because another person is already a member.

Conclusion

In conclusion, it is determined that the basic relationship between the member and the collective society is a mandate agreement and the member vests the power of attorney in the collective society with the “membership authorization certificate”. As it is stated above, it is required by the legislation to transfer financial rights in the authorization certificate. Nevertheless, the regulation is not right. In terms of such authorization, it must also be accepted exclusive licence in my opinion.

In the event of the member of the collective society withdrawing the authorization it vested in the collective society and terminating the mandate agreement in this way, it must be accepted that the Collective Society may collect its unpaid wages that arose until the termination moment of the agreement and following the termination moment, in principal, it cannot request any payment, however, if the termination was exercised in an inappropriate time, it can request the cost for the preparation that it made with the faith in the continuance of the agreement.

In terms of the collective societies, executing an agreement with a member almost never will cause it to miss an opportunity to execute an agreement with another person. Therefore, the collective society to make such a request can only come into question in exceptional cases such as a person not wanting to become a member of the collective society just because another person is already a member.

Within this scope, in the event that the member terminates the agreement and leaving the membership, even it does not have a valid ground, it must not be possible for the request of payment until the end of the period that is specified in the authorization certificate of the collective society or until one year after the termination of the agreement in the way specified in article 17/2 of the Regulation on the Collective

Societies and Federations of Owners of Intellectual and Artistic Works and Related Right Owners must not be possible.

Considering that a Regulation being against a Law is not possible in accordance with the basic principal of “hierarchy of norms”, in my opinion the article 17/2 of the Regulation must be amended and until it is amended, it must be interpreted within the scope of the Code.

Wesentliche Merkmale der Anwendung des Grundsatzes von Treu und Glauben und des Verbots des Rechtsmissbrauchs im türkischen Recht

*Assoc. Prof. Dr. Mehmet Serkan Ergüne**

I-) Der Grundsatz von Treu und Glauben

Der im römischen Recht als *“bona fides”* bezeichneter Grundsatz von Treu und Glauben, ist eines der gemeinsamen Fundamente der gesamten Rechtsordnung¹. Der im Lauf der Zeit in verschiedenen Rechtsordnungen angewendete Grundsatz von Treu und Glauben, ist auch eines der Grundprinzipien im türkischen Recht. Art. 2/Abs. 1 des TZGB, der den Titel *“Handeln nach Treu und Glauben”* trägt, lautet; *“Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln”*. Der Gesetzgeber, der bestimmt hat, dass sich jeder nach dem Grundsatz von Treu und Glauben verhalten muss, hat sich davor zurückgehalten den Begriff zu definieren, stattdessen hat er die Inhaltsbestimmung des Begriffs der Lehre und der Praxis überlassen. Der Grundsatz von Treu und Glauben, der ein allgemeines und objektives Prinzip ist, wird bei Rechtsverhältnissen, deren Partei Personen sind, als ein ehrliches, anständiges, moralisches und konsequentes Verhalten beschrieben². Der Maßstab für dieses Verhalten sind die in der Bevölkerung

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¹ Für ausführliche Informationen zum Grundsatz von Treu und Glauben siehe, **Heinz Hausheer/Regina E. Aebi-Müller**, Berner Kommentar Band I/1, Art. 1-9 ZGB, Einleitung und Personenrecht, Bern 2012, Art. 2, N. 1ff.; **Şener Akyol**, Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasası, 2. Bası (Der Grundsatz von Treu und Glauben und das Verbot des Rechtsmissbrauchs. 2. Auflage), İstanbul 2006, S. 1 ff.

² **Ergun Özsunay**, Medenî Hukuka Giriş, 5. Bası (Einführung in das Bürgerliche Recht, 5. Auflage), İstanbul 1986, S. 307; **Selahattin Sulhi Tekinay**, Medenî Hukukun Genel Esasları ve Gerçek Kişiler Hukuku, 6. Bası (Allgemeine Grundlagen des Bürgerlichen

allgemein geltenden Sittenregeln, Traditionen und die Praxis sowie die Besonderheiten des Rechtsverhältnisses in dem konkreten Fall.

Das in Artikel 2/Abs. 1 Türkisches Zivilgesetzbuch enthaltene Grundsatz von Treu und Glauben hat ein sehr weites Anwendungsbereich, so wird der Grundsatz von Treu und Glauben nicht nur im Bereich des Zivilrechts angewendet, sondern auch im Verfahrensrecht³ und sogar im Öffentlichen Recht angewendet⁴. Diese in der Lehre hervorgehobene Grundlage ist auch in der Praxis akzeptiert. Nach dem Urteil des Gemeinsamen Zivilsenats des Kassationshofs vom 04.05.2011 und 2011/11-59, 2011/271; *“Der Grundsatz von Treu und Glauben wurde in den Allgemeinen Vorschriften als ein auf allen Gebieten des Rechts vorhandenes Prinzip geregelt”*⁵.

Nach dem Urteil des Gemeinsamen Zivilsenats des Kassationshofs vom 04.05.2005 und 2011/1-298, 2005/308; *“Das in Artikel 2 Zivilgesetzbuchs geregelte Grundsatz von Treu und Glauben ist nicht nur auf konkrete, bestimmte und begrenzte Verhältnisse zwischen Personen, sondern als Regel auf alle Rechtsbeziehungen anzuwenden und ist als Grundprinzip vom Richter bei jedem konkreten Fall zu beachten”*⁶.

Rechts und das Recht der Natürlichen Personen, 6. Auflage), İstanbul 1992, S. 166; **Hüseyin Altaş**, Medeni Hukuk, Başlangıç Hükümleri, (TMK m. 1-7) (Zivilrecht, Einführungsvorschriften, Art. 1-7 TZGB), Ankara 2014, S. 262ff.; **Mustafa Dural/Suat Sarı**, Türk Özel Hukuku, Cilt I, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri, 10. Bası (Türkisches Zivilrecht, Band 1, Grundbegriffe und Einführungsvorschriften des Zivilgesetzes, 10. Auflage), İstanbul 2015, N. 1222; **O. Gökhan Antalya/Murat Topuz**, Medeni Hukuk, 2. Bası (Zivilrecht, 2. Auflage), İstanbul 2015, S. 355ff.; **Seyfullah Edis**, Medeni Hukuka Giriş ve Başlangıç Hükümleri, 6. Bası (Einführung in das Zivilrecht und Einführungsvorschriften, 6. Auflage), Ankara 1997, S. 291; **Ramazan Arslan**, Medeni Usul Hukukunda Dürüstlük Kuralı (Das Gebot von Treu und Glauben im Zivilverfahrensrecht), Ankara 1989, S. 23.

³ Siehe zum Beispiel Art. 29, 124/Abs. 3, 327 der türkischen Zivilprozessordnung.

⁴ **Hausheer/Aebi-Müller**, Art. 2, N. 309ff.; **Max Baumann**, Zürcher Kommentar Band I/1, Art. 1-7 ZGB, Einleitung, Das Personenrecht, 3. Auflage, Zürich 1998, Art. 2-A, N. 28; **Zahit İmre**, Medeni Hukuka Giriş, 3. Bası (Einführung in das Zivilrecht, 3. Auflage), İstanbul 1980, S. 289; **M. Kemal Oğuzman/Nami Barlas**, Medeni Hukuk, 21. Bası (Zivilrecht, 21. Auflage), İstanbul 2015, N. 856ff.; **Arslan**, S. 3ff.; **Edis**, S. 302-404; **Antalya/Topuz**, S. 358.

⁵ Für das Urteil siehe Juristische Datenbank Kazancı.

⁶ Für das Urteil siehe Juristische Datenbank Kazancı.

Nach dem Urteil der 9. Zivilkammer des Kassationshofs vom 01.10.2012 und 2012/27107, 2012/32372; *“Der im Zivilgesetzbuch enthaltene Grundsatz von Treu und Glauben (Art. 2 TZGB) ist ein allgemeiner Grundsatz, der auch im Verfahrensrecht Geltung hat. Es ist undenkbar, dass ein Gericht, das eine öffentliche Institution ist, eine Streitigkeit auf eine ungerechte, betrügerische und gesetzwidrige Weise löst. Der Grundsatz von Treu und Glauben muss auch wegen öffentlichen Interessen berücksichtigt werden. Denn, damit ein Verfahren in einer prozessökonomischen Weise beendet wird, ist nur dann möglich, wenn der Grundsatz von Treu und Glauben auch im Zivilprozessrecht gilt und vom Richter selbst berücksichtigt wird. Der Grundsatz von Treu und Glauben findet bei der Auslegung, Ergänzung, Überdenken und Ändern des Verfahrens Berücksichtigung. Für die Parteien ist die Beachtung des Grundsatzes von Treu und Glauben eine Verpflichtung. Auch der Gebrauch von Verfahrensermächtigungen muss dem Grundsatz von Treu und Glauben entsprechen”*⁷.

Der Grundsatz von Treu und Glauben ist nicht nur ein Grundprinzip, der nur bei dem Gebrauch der Rechte und der Erfüllung von Verpflichtungen angewendet wird; der Grundsatz von Treu und Glauben hat eine darüber hinaus gehende Funktion. Der Grundsatz von Treu und Glauben wird insbesondere

- bei der Auslegung und Ergänzung von Gesetzen;
- zur Vermeidung von Gesetzesumgehungen;
- bei der Entstehung, Auslegung und Ausfüllung der Lücken von Rechtsgeschäften;
- bei der Entstehung von Verbindlichkeiten;
- bei Vertragsanpassungen (Wegfall der Geschäftsgrundlage);
angewendet⁸.

⁷ Für das Urteil siehe Juristische Datenbank Kazancı.

⁸ **Hausheer/Aebi-Müller**, Art. 2, N. 89ff.; **Baumann**, Art. 2-B, N. 59ff.; **Akyol**, S. 26 ff.; **Özsunay**, S. 309ff.; **İmre**, S. 289ff.; **Oğuzman/Barlas**, N. 902ff.; **Rona Serozan**, Medeni Hukuk, 6. Bası (Zivilrecht, 6. Auflage), § 9, N. 9d; **Dural/Sarı**, N. 1223ff.; **Edis**, S. 304ff.; **Tekinay**, S. 167ff.; **Hüseyin Hatemi**, Medeni Hukuk'a Giriş, 6. Bası (Einführung in das Zivilrecht, 6. Auflage), İstanbul 2012, § 14, N. 2ff.; **Altaş**, S. 273ff.; **Bülent**

II-) Das Verbot des Rechtsmissbrauchs und sein Verhältnis mit dem Grundsatz von Treu und Glauben

Der Gesetzgeber, der bestimmt hat, dass jeder verpflichtet ist, sich ehrliche zu verhalten, hat in der Fortsetzung der gleichen Vorschrift das Verbot des Rechtsmissbrauchs geregelt. Art. 2/Abs. 2 TZGB lautet; *“Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz”*. Mit dieser Vorschrift wird betont, dass der Rechtsinhaber beim Gebrauch seines Rechts nicht völlig frei ist und der Gebrauch jeden Rechts allgemein begrenzt wird. Da es dem Gesetzgeber nicht möglich ist, jede Möglichkeit hervorzusehen und eine detaillierte Regelung zu erlassen, wurde in Art. 2/Abs. 2 TZGB eine allgemeine Begrenzung vorgesehen.

Der Gebrauch des Rechts jedes Rechtsinhabers kann mehr oder weniger den Interessen eines anderen entgegenstehen, dies ist eine rechtlich hinzunehmende Situation, dabei kann nicht von einer Rechtswidrigkeit gesprochen werden. Jedoch ist der Gebrauch des Rechts im Widerspruch zum Zweck nicht mit dem Grundsatz von Treu und Glauben vereinbar, hierdurch wird der Rechtsmissbrauch verursacht.

Der Grundsatz von Treu und Glauben nach Art. 2/Abs. 1 Türkisches Zivilgesetzbuch und das Verbot des Rechtsmissbrauchs in Artikel 2/Abs. 2 sind die zwei unterschiedlichen Erscheinungsbilder desselben Verhaltens; sie sind geradezu die zwei Seiten einer Medaille. Obwohl zwischen dem Grundsatz für Treu und Glauben und dem Verbot des Rechtsmissbrauchs zwar ein enges Verhältnis besteht, sind deren Anwendungsbereiche nicht immer die Gleichen. Der Grundsatz von Treu und Glauben aus Art. 2/Abs. 1 TZGB wird - wie oben bereits erwähnt- bei der Auslegung und Ergänzung von Gesetzen und Verträgen, bei der Entstehung von Verbindlichkeiten usw. angewendet. Hingegen wird das

Verbot des Rechtsmissbrauchs in Art. 2/Abs. 2 TZGB für Berichtigung/Korrektur von Gesetzen in konkreten Fällen benützt⁹.

Der Grundsatz von Treu und Glauben und das Verbot des Rechtsmissbrauchs haben den Charakter einer Grundregel, die vermeiden soll, dass Gesetzesvorschriften rigoros angewendet werden und dadurch ein rechtswidriges und ungerechtes Ergebnis verursacht wird. Mit diesem Grundprinzip wird den Juristen die Möglichkeit gegeben, den Gesetzen eine Elastizität zu verleihen, um den verschiedenen Bedürfnissen des Lebens, die man vorher unmöglich vorhersehen kann, entsprechen zu können. Diese Grundlage ist auch in der Praxis akzeptiert. Nach dem Urteil des Gemeinsamen Zivilsenats des Kassationshofs vom 20.10.2010 und 2010/6-404, 2010/533; *“Der auch als objektiver Guter Glaube bezeichneter und den Grundsatz von Treu und Glauben regelnde Artikel 2 des TZGB hat bestimmt, dass bei Gebrauch jeglichen Rechts im Rahmen des Grundsatzes von Treu und Glauben gehandelt werden muss und das missbräuchliche Gebrauchen eines Rechts, um jemanden zu schaden oder ihn in eine Zwangslage zu versetzen, vom Gesetz nicht geschützt wird. Der Zweck des im zweitem Absatz der gleichen Vorschrift geregelten Verbots des Rechtsmissbrauchs ist, dem Richter zu ermöglichen, in besonderen Einzelfällen (in gerechter Weise) ein Urteil zutreffen. Art. 2 des TZGB öffnet einen Anwendungsbereich und eine außerordentliche Möglichkeit in den Fällen, in denen der Gebrauch eines Rechts eine offensichtliche Ungerechtigkeit darstellt, eine Zwangslage besteht, damit tatsächlich Recht zugesprochen und das Individuum geschützt werden kann; es korrigiert eine Ungerechtigkeit und hat die Funktion die Regeln in den Gesetzen zu ergänzen”*¹⁰.

III-) Die Fälle des Rechtsmissbrauchs

Es ist nicht möglich die Fälle des Rechtsmissbrauchs erschöpfend aufzuzählen. Die Lehre und die Praxis haben die Fälle des Rechtsmissbrauchs, entsprechend den Sachverhalten, die in den vergangenen Jahren

⁹ **Baumann**, Art. 2-A, N. 20ff.; **Tekinay**, S. 171; **Dural/Sarı**, N. 1220; **İmre**, S. 306-307; **Serozan**, § 9, N. 10a-b; **Antalya/Topuz**, S. 357ff.; **Altaş**, S. 260-261; 290-291.

¹⁰ Für das Urteil siehe Juristische Datenbank Kazancı.

vorgekommen sind, unter bestimmten Titeln eingestuft. Als Merkmale, die einen Rechtsmissbrauch aufzeigen, werden folgende akzeptiert¹¹:

- Der Gebrauch des Rechts bringt keinen gesetzlichen Vorteil.
- Zwischen dem Vorteil, der durch den Rechtsgebrauch erlangt wird, und dem Schaden, der hierdurch einem anderen hinzugefügt wird, besteht ein krasses Missverhältnis.
- Der Gebrauch eines Rechts, wobei man sich auf ein eigenes sittenwidriges Verhalten stützt.
- Handeln im Widerspruch zum geschaffenen Vertrauen (*venire contra factum prorum nemini licet*).

Das Verbot des Rechtsmissbrauchs hat in den Fällen, in denen die Anwendung von Gesetzesvorschriften ein ungerechtes Ergebnis erzeugen wird, eine korrigierende Funktion (Ermöglicht die Vermeidung von der Gerechtigkeit entgegenstehenden Ergebnissen).

Der spätere Einwand der Unwirksamkeit eines formwidrigen Vertrages, nach dem er angewendet wurde, oder das spätere Beruhen auf die Unwirksamkeit durch die Person, die den Formmangel zu verantworten hat, sind die typischen Erscheinungsformen des rechtsmissbräuchlichen Verhaltens¹². Jedoch wird der Anwendungsbereich des Verbots des Rechtsmissbrauchs, wie in der Lehre hervorgehoben wird, nicht auf die Fälle des Formmangels beschränkt; die Angelegenheit muss in jedem konkreten Fall gesondert beurteilt werden¹³.

Ob ein Rechtsmissbrauch vorliegt, wird unter Berücksichtigung der Besonderheiten des konkreten Falls festgestellt. Um von einem Rechtsmissbrauch zu sprechen, muss auch kein schuldhaftes Handeln vorliegen

¹¹ Hausheer/Aebi-Müller, Art. 2, N. 206ff.; Oğuzman/Barlas, N. 871ff.; Dural/Sarı, N. 1255ff.; Serozan, § 9, N. 11; Özsunay, S. 323ff.; Altaş, S. 298ff.; İmre, S. 313ff.; Edis, S. 332ff.; Akyol, S. 24-25; Hatemi, § 14, N. 10ff.; Antalya/Topuz, S. 401ff.; Köprülü, S. 147; Helvacı/Erlüle, S. 39-40.

¹² Siehe das Urteil der 3. Zivilkammer des Kassationshofs vom 05.12.2014, 2014/9198, 2014/15941; das Urteil der 14. Zivilkammer des Kassationshofs vom 06.04.2015, 2015/4647, 2015/3762 (Juristische Datenbank Kazancı).

¹³ Oğuzman/Barlas, N. 868.

und es muss niemand geschädigt worden sein¹⁴. Es ist notwendig und ausreichend, dass ein Recht zweckentfremdet gebraucht wird.

Es wird akzeptiert, dass der Grundsatz von Treu und Glauben und das Verbot des Rechtsmissbrauchs auf alle Fälle Anwendung finden, in denen ein Vertrag aus irgendeinem Grund unwirksam ist. In den Fällen, in denen ein Vertrag nichtig ist, kann die Unwirksamkeit jederzeit behauptet werden, auch wenn seit dem Vertragsschluss lange Zeit vergangen ist oder die Parteien die aus dem Vertrag entstandenen Pflichten teils oder vollständig erfüllt haben, führt in der Regel nicht zur Heilung des Vertrages. Das es keine absolute Regel gibt, dass jemand beständig zu seinem früheren Verhalten handelt, besteht kein Hindernis, dass eine Partei, die einen Vertrag abschließt, sich auf dessen Unwirksamkeit berufen kann. Die Nichtigkeit eines Vertrages muss auch vom Richter von Amts wegen berücksichtigt werden. Das ist zwar die Regel, doch kann in den Fällen, in denen die Verpflichteten aus einem unwirksamen Vertrag freiwillig erfüllt werden, die nachträgliche Behauptung einer Partei, dass dieser Vertrag unwirksam sei eine Verletzung des Verbots des Rechtsmissbrauchs darstellen¹⁵. Beruft eine der Parteien, die gegenüber der Anwendung des Vertrags geschwiegen hat, dann aber als sie ihre Pflicht erfüllen muss, sich auf die Unwirksamkeit des Vertrages, ist dies eine typische Erscheinungsform des widersprüchlichen Verhaltens zum geschaffenen Vertrauen ist. Es ist sogar nicht einmal eine Bedingung, dass der Vertrag bereits angewendet worden sein muss, um von einem Rechtsmissbrauch zu sprechen. Eine Partei, die bei dem anderen Vertragspartner das Vertrauen erweckt, als werde der Vertrag trotz der Unwirksamkeit erfüllt, und dann aber später die Unwirksamkeit des Vertrages (selbst wenn die Pflichten noch nicht einmal teilweise erfüllt wurden) behauptet, hat

¹⁴ **Özsunay**, S. 321-323; **Dural/Sarı**, N. 1258; **Oğuzman/Barlas**, N. 869-870; 895-896; **Köprülü**, S. 145; **Antalya/Topuz**, S. 393; a.M. **Altaş**, S. 296; **Turgut Akıntürk/Derya Ateş Karaman**, *Medenî Hukuk*, 17. Bası (Zivilrecht, 17. Auflage), İstanbul 2012, S. 96.

¹⁵ **Hausheer/Aebi-Müller**, Art. 2, N. 268ff.; **Baumann**, Art. 2-B, N. 99ff.; **Akyol**, S. 53; **Oğuzman/Barlas**, N. 891ff.; **Selâhattin Sulhi Tekinay/Sermet Akman/Halûk Burcuoğlu/Atillâ Altop**, *Tekinay Borçlar Hukuku Genel Hükümler*, 7. Bası, İstanbul 1993 (Allgemeine Vorschriften des Obligationenrechts, 7. Auflage), S. 104-106; **Altaş**, S. 304; **Antalya/Topuz**, S. 405.

damit das Verbot des Rechtsmissbrauchs verletzt¹⁶. Wie in der Lehre ausgeführt wird, ist es inkonsequent, wenn eine Partei es fortsetzt Vorteile aus einem unwirksamen Vertrag zu ziehen ohne die Unwirksamkeit zu behaupten, dann aber wenn er seine eigene Pflicht erfüllen muss, die Unwirksamkeit des Vertrages behauptet¹⁷.

Diese Grundlage ist auch in der Praxis akzeptiert. Nach dem Urteil der 19. Zivilkammer des Kassationshofs vom 08.05.2008 und 2007/11490, 2008/5010; *“In dem konkreten Fall besteht Streitigkeit darüber, ob der blinde Beklagte für die Schulden, die durch die Kreditkarte entstanden sind, haftet. Der Beklagte hat mit der Begründung den Schulden widersprochen, dass seine Unterschrift auf dem Kreditkartenvertrag gemäß der am Unterzeichnungstag geltenden Vorschrift 14, III Obligationsgesetz unwirksam sei, Kreditkartenschulden, die mit einem rechtlich unwirksamen Vertrag begründet werden, müssten damit ebenfalls als unwirksam angenommen werden... In dem konkreten Fall ist der Beklagte als Anwalt für eine Öffentliche Verwaltung tätig, daher verfügt er aufgrund seiner Bildung und des ausgeübten Berufs mindestens über die Kenntnisse im Hinblick auf den Gebrauch einer Kreditkarte wie die anderen Personen, die im Alltag eine Kreditkarte verwenden. Außer dass er über die Vorstellung und das Wissen bezüglich der für sich selbst getätigten Geschäfte verfügt, hat er einen Beruf ergriffen, bei dem er die Rechtsgeschäfte, bei denen die Öffentliche Verwaltung Partei ist, führt und hierfür die Verantwortung übernimmt. Daher ist der Einwand eines Anwalts, dass er für die aus seinem Gebrauch einer Kreditkarte Schulden nicht verantwortlich sei, ein typischer Beispiel für den Rechtsmissbrauch”*¹⁸.

Nach dem Urteil der 19. Zivilkammer des Kassationshofs vom 22.02.2012 und 2011/10971, 2012/2633; *“In dem konkreten Fall hat der Beklagte, obwohl in unserem Land sogar Vollgeschäftsfähige nicht immer in*

¹⁶ Tekinay/Akman/Burcuoğlu/Altop, S. 107-109; Oğuzman/Barlas, N. 891; Altaş, S. 272-273.

¹⁷ Akyol, S. 66.

¹⁸ Für das Urteil siehe Juristische Datenbank Kazancı.

Siehe auch das Urteil der 13. Zivilkammer des Kassationshofs vom 26.01.2015, 2014/31871, 2015/1258; das Urteil der 13. Zivilkammer des Kassationshofs vom 02.07.2014, 2014/5766, 2014/22574 (Juristische Datenbank Kazancı).

den Genuss einer Kreditkarte kommen, eine Kreditkarte benutzt und Vorteile daraus erlangt. Der Beklagte hat sich bis zur Zahlungsaufforderung der klagende Bank sich wie ein Geschäftsfähiger verhalten und erst dann durch Berufung auf seine Geschäftsunfähigkeit sich der Erfüllung seiner Pflicht entzogen, dies ist ein typisches Beispiel für den Rechtsmissbrauch¹⁹.

Nach dem Urteil des Gemeinsamen Zivilsenats des Kassationshofs vom 08.10.2008 und 2008/13-565, 2008-583; *„Auf den streitgegenständlichen Vertrag findet das Obligationenrecht Anwendung. Wenn der Kläger die bestehenden Regelung lange Zeit nicht beanstandet hat, dann wie im konkreten fall, erst nach seiner Arbeitsbewerbung mit besseren Bedingungen angenommen wurde, dieses Recht einwendet, ist dies mit dem Grundsatz von Treu und Glauben des Artikel 2 TZGB nicht vereinbar und wird vom Gesetz nicht geschützt“*²⁰.

IV-)Die Sanktion der Verletzung des Grundsatzes von Treu und Glauben und des Verbots des Rechtsmissbrauchs

Art. 2 TZGB ist eine zwingende und nicht vertraglich abdingbare Rechtsnorm²¹. Die Sanktion für den Rechtsmissbrauch ist, wie in Art. 2/Abs. 2 TZGB erklärt wird, dass es durch die Rechtsordnung nicht geschützt wird. Das bedeutet, dass die mit dem Rechtsmissbrauch behaupteten Ansprüche und Verteidigungen nicht berücksichtigt werden²². Beispielsweise werden die Ansprüche eines Eigentümers, der von

¹⁹ Für das Urteil siehe Juristische Datenbank Kazancı.

Siehe auch das Urteil der 13. Zivilkammer des Kassationshofs vom 22.10.2014, 2013/31194, 2014/32615; das Urteil der 13. Zivilkammer des Kassationshofs vom 25.02.2014, 2013/18747, 2014/4964; das Urteil der 19. Zivilkammer des Kassationshofs vom 10.11.2014, 2014/13384, 2014/16008 (Juristische Datenbank Kazancı).

²⁰ Für das Urteil siehe Juristische Datenbank Kazancı.

²¹ **Akyol**, S. 7ff.; **Antalya/Topuz**, S. 368; **Altaş**, S. 266; das Urteil der 1. Zivilkammer des Kassationshofs vom 06.11.2014, 2014/16698, 2014/17011; das Urteil der 14. Zivilkammer des Kassationshofs vom 23.02.2005, 2005/373, 2005/1151 (Juristische Datenbank Kazancı); a.M. **Oğuzman/Barlas**, N. 966.

²² **Akyol**, S. 107; 120-121; **Serozan**, § 9, N. 12a; **Dural/Sarı**, N. 1268; **Oğuzman/Barlas**, N. 897; **Helvacı/Erlüle**, S. 40; **Altaş**, S. 306; **Edis**, S. 331; **Özsunay**, S. 328-329;

seinem Recht nur Gebrauch macht, um den Nachbarn zu schaden, oder die Unwirksamkeitseinwände einer Person, die bewusst die aus irgendeinem Grund unwirksamen Vertrag entstanden Pflichten erfüllt hat, werden vom Richter nicht berücksichtigt. In diesem Zusammenhang muss daraufhingewiesen werden, dass es möglich ist, einer Person, die durch den Rechtsmissbrauch geschädigt wurde, ein Klagerecht einzuräumen²³.

Es sollte hier angemerkt werden, dass Art. 2 TZGB nicht auf negative Funktion beschränkt bleibt. Mit Hilfe des Art. 2 TZGB kommt auch ein Anspruch auf Erfüllung in Betracht²⁴.

Die Verletzung des Grundsatzes von Treu und Glauben und des Verbots des Rechtsmissbrauchs, ist vom Richter von Amts wegen zu berücksichtigen²⁵. Falls sich aus der Akte ergibt, dass eine der Parteien sich im Widerspruch zum Grundsatz von Treu und Glauben oder dem Verbot des Rechtsmissbrauchs verhalten hat, so muss der Richter die Ansprüche und die Einwände dieser Person zurückweisen.

V-) Ergebnis

Der Grundsatz von Treu und Glauben aus Art. 2/Abs. 1 TZGB ist eines der Grundprinzipien im türkischen Recht und hat ein sehr weites Anwendungsbereich. Der Grundsatz von Treu und Glauben ist nicht nur ein Grundprinzip, der nur bei dem Gebrauch der Rechte und der

Arslan, S. 34-35.

²³ Hausheer/Aebi-Müller, Art. 2, N. 204; Serozan, § 9, N. 12a; Akyol, S. 108; 121ff.; Edis, S. 331; Köprülü, S. 153-154; İmre, S. 326; Oğuzman/Barlas, N. 898; Antalya/Topuz, S. 396-397; Altaş, S. 308-309; Dural/Sarı, N. 1269; Helvacı/Erlüle, S. 40; Özsunay, S. 327-328; Arslan, S. 35.

²⁴ Serozan, § 9, N. 10c; Akyol, S. 77-78; Altaş, S. 272-273; siehe dazu auch das Urteil der Vereinigten Großen Senate des Kassationshofs zur Vereinheitlichung der Rechtsprechung vom 30.09.1988, 1987/2, 1988/2 (Juristische Datenbank Kazancı).

²⁵ Hausheer/Aebi-Müller, Art. 2, N. 203; İmre, S. 301; 327; Oğuzman/Barlas, N. 899; 965; Akyol, S. 10-11; Dural/Sarı, N. 1272; Antalya/Topuz, S. 368-369; Altaş, S. 267-268; Edis, S. 293; Arslan, S. 27; siehe auch das Urteil des Gemeinsamen Zivilsenats des Kassationshofs vom 20.10.2010, 2010/6-404, 2010/533; das Urteil der 1. Zivilkammer des Kassationshofs vom 02.07.2015, 2014/8145, 2015/9655 (Juristische Datenbank Kazancı).

Erfüllung von Verpflichtungen angewendet wird; der Grundsatz von Treu und Glauben hat eine darüber hinaus gehende Funktion. Er wird bei der Auslegung und Ergänzung von Gesetzen; zur Vermeidung von Gesetzesumgehungen; bei der Entstehung, Auslegung und Ausfüllung der Lücken von Rechtsgeschäften; bei der Entstehung von Verbindlichkeiten; bei Vertragsanpassungen angewendet.

Der Gesetzgeber, der bestimmt hat, dass jeder verpflichtet ist, sich ehrliche zu verhalten, hat in der Fortsetzung der gleichen Vorschrift das Verbot des Rechtsmissbrauchs geregelt (Art. 2/Abs. 2 TZGB). Das Verbot des Rechtsmissbrauchs hat in den Fällen, in denen die Anwendung von Gesetzesvorschriften ein ungerechtes Ergebnis erzeugen wird, eine korrigierende Funktion.

Art. 2 TZGB gibt den Juristen die Möglichkeit, den Gesetzen eine Elastizität zu verleihen, um den verschiedenen Bedürfnissen des Lebens, die man vorher unmöglich vorhersehen kann, entsprechen zu können.

Ob ein Rechtsmissbrauch vorliegt, wird unter Berücksichtigung der Besonderheiten des konkreten Falls festgestellt. Es wird akzeptiert, dass der Grundsatz von Treu und Glauben und das Verbot des Rechtsmissbrauchs auf alle Fälle Anwendung finden, in denen ein Vertrag aus irgendeinem Grund unwirksam ist oder ein Recht zweckentfremdet gebraucht wird.

Die mit dem Rechtsmissbrauch behaupteten Ansprüche und Verteidigungen können nicht berücksichtigt werden. Die Verletzung des Grundsatzes von Treu und Glauben und des Verbots des Rechtsmissbrauchs, ist vom Richter von Amts wegen zu berücksichtigen.

