

Litigation - Turkey

Appeal court holds non-compete clause to be unconstitutional

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In a recent decision⁽¹⁾ the Eleventh Chamber of the Court of Appeals held that the post-contractual non-compete clause in a franchise agreement was unconstitutional, and thus invalid, for violating the freedom to work and contract guaranteed under Article 48 of the Constitution.

Background

A sub-franchise contract was executed by and between the franchisor and franchisee on November 13 2007. Article 5.5 of the sub-franchise contract stipulated the franchisee could not:

- perform any work similar to the subject matter of the contract;
- directly or indirectly deal with any business that would compete with the franchisor's business; or
- sell any product of the franchisor's competitors for one year following the expiry or termination of the contract in the territory designated by the contract.

Not long after terminating the contract, the franchisor found out that the franchisee had sold unauthorised products in breach of Article 5.5 of the contract. The franchisor filed a lawsuit before the Intellectual and Industrial Rights Court and requested determination of unfair competition and prevention of the breach.

First instance decision

The franchisee did not respond to the lawsuit and did not attend the hearings. Based on the collected evidence, on April 3 2009 the court accepted the franchisor's claim and held that the franchisee's activities in the territory that breached Article 5.5 of the contract should be prevented for the period between March 20 2008 and March 20 2009. The franchisee appealed.

Appellate review

The Eleventh Chamber of the Court of Appeals overruled the first instance decision, based on the following provisions of Turkish law:

- Article 48 of the Constitution, titled "Freedom to work and contract", which stipulates that everyone shall be free to contract and free to work in any field they wish;
- Article 19(1) of the Code of Obligations, which stipulates that the subject matter of a contract can be freely determined within legal limits; and
- Article 20 of the Code of Obligations, which stipulates that a contract is null and void if the subject matter of a contract is impossible, inappropriate or immoral.

Based on these provisions, the appellate court held that even though the parties of a contract are free to determine the subject matter of a contract, such freedom is not absolute or unlimited. Accordingly, parties cannot contract to violate the freedom to work, which is secured by the Constitution, as was the case in the post-contractual non-compete clause of the contract.

Comment

According to Article 5(b) of Communiqué 2002/2 of the Competition Authority, post-contractual non-compete clauses are valid for one year after the termination or expiry of the contract provided that:

- they relate to goods and services that are in competition with those subject to the contract;
- they are restricted to the facility or territory where the franchisor performed its activities during the contract; and
- they are required for the protection of the know-how that is provided to the franchisee by the contract.

However, the court's decision does not refer to Communiqué 2002/2.

This decision has not yet become established practice of the Court of Appeals. Furthermore, the decision provides no information as to whether Article 5.5 of the sub-franchise contract is contrary to Article 5(b) of the the communiqué. Nevertheless, the decision is significant and the court's future practice should be closely monitored.

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Endnotes

(1) January 19 2012, File 2011/13747, Decision 2012/356 K.