

# client alert

INTELLECTUAL PROPERTY | TURKEY |

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## CONSTITUTIONAL COURT STRIKES DOWN ARTICLE 14 OF TRADEMARK DECREE-LAW ON NON-USE: CONSEQUENCES

In a decision numbered 2016/189 K. published in the Official Gazette dated 6 January 2017, the Constitutional Court cancelled Article 14 of the Decree-Law No. 556 on the Protection of Trademarks.

According to Article 14, if, within a period of five years following the registration, the trademark has not been put to use without a justifiable/legitimate reason or if the use has been suspended for an uninterrupted period of five years, the trademark shall be cancelled on grounds of non-use.

Within the decision, the Constitutional Court has stated that trademark rights are property rights, and according to Article 91/1 of the Turkish Constitution, the Council of Ministers is entitled to issue decrees having the force of law. However, such Decree-Laws cannot regulate fundamental rights such as property rights, among others, except during martial law and states of emergency. Therefore, since the Decree-Law No. 556 limits trademark rights, which are considered as individual property rights, Article 14, which was challenged before the Constitutional Court, was considered to be contrary to Article 91/1 of the Turkish Constitution.

The Constitutional Court therefore cancelled Article 14 of the Decree-Law based on Article 91 of Turkish Constitution, and did not conduct further examination on the subject matter.

Previously, the Constitutional Court had struck down Article 42 sub-clause 1/c of the same Decree-Law, which had regulated invalidity based on non-use, on grounds of the same Article 91/1 of the Turkish Constitution.

Even as Article 153 of the Turkish Constitution decrees that cancellation decisions are not retroactive, we believe this decision will likely impact pending cancellation actions based on non-use. However, the Turkish Parliament has recently accepted the new Industrial Property Law No. 6769, and the subject Law came into force with its publication in the Official Gazette dated 10 January 2017. According to Article 9 of the new Industrial Property Law, trademarks that have not been used genuinely without a justifiable reason within a period of five years following their registration shall be cancelled. It is there possible that judges of IP Courts may apply the related Article of the new Law while ruling on ongoing cancellation actions on grounds of non-use.

Alternatively, the Courts may also refer to Article 19 of the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS) which covers Turkey as a member state. According to

the subject Article, if use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are provided by the trademark owner.

The Turkish Constitution ensures that international agreements duly put into effect have the force of law. Where a conflict arises 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. Judges may therefore rule on pending cancellation actions by referring to the relevant TRIPS provision as well.

As indicated above, the new Industrial Property Law came into effect as of the publication date of 10 January 2017. The legal gap created by the Constitutional Court with respect to non-use actions will most probably be filled by the new Law. In any case, we believe that decisions provided as a result of current pending actions on grounds of non-use will clarify the position of the Turkish courts on this issue.

In the meantime, we will keep you informed of full developments regarding the newly published Industrial Property Law No. 6769.

*In compliance with Turkish bar regulations, opinions relating to Turkish law matters which are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.*

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