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## **Portfolio Compensation Under Turkish Law**

### **Introduction**

The customer group acquired by the agency or the exclusive seller during their operation under an exclusive distributor agreement or agency contract is called as "The Portfolio" and in case of the termination of such contract, compensation which may be claimed by the agent or the distributor to be undertaken by the counter party of the agreement, the principal, is called "Portfolio Compensation" under Turkish law. Moreover the terms such as "Compensation of Termination" or "Portfolio Rights" are also used in Turkish doctrine.

It is necessary to state that, the reason of this compensation is the fact that despite of the termination of the contract, the former customer earnings, which were created by the distributor or the agent do still continue.

After long endeavors, portfolio compensation was first regulated officially and put into action for such cases in France and in Switzerland in 1950s. Whereas an official regulation does not exist in our country's legislation, Turkish Court of Appeal has ruled for three times about the subject in 1996s and in the decisions portfolio rights has been accepted and the agencies entitled for compensation.<sup>1</sup>

For instance, the 11<sup>th</sup> Chamber of Turkish Court of Appeal, in its cancellation decision dated 20.06.1996, stated that under circumstances where the agency does not have any default in the termination of the agency contract, a fair compensation to be calculated by considering the commissions of the agency from the premiums of long term insurance agreements should be ordered in favor of the agency. Additionally, in the same decision, the Court of Appeal ordered that the provisions of agreements preventing the payment of portfolio compensation shall be invalid. The Court of Appeal in its other decisions given in the same year continued to rule under the same approach creating a precedent regarding the matter.

Such decisions of the Court of Appeal, also the directive of EU providing similar regulations, created an environment under Turkish legal practice that the Draft Code of Commerce has a clear provision regarding this matter headed as "Counterbalancing Demand".

Within the scope of this article, article 134 of Turkish Commercial Code (TCC) and the points it differs from portfolio compensation and the article 122 of Draft Code of Commerce with its reason shall be discussed.

### **Article 134 of Turkish Commercial Code and its Differences from the Portfolio Compensation**

In the section of TCC about the termination of contracts, article 134 provides that, the compensation to the agency is appropriate in a limited number of cases accepted by the law. To our opinion, in respect of the contexts and objective of the agency contract, it is unwise to take the subject into consideration in a limited manner.

As we mentioned above, the portfolio compensation is provided for the agent / distributor as return of their efforts to expand the goodwill of the company, in contrary of the article 134/I-II which states that a compensation can only be determined in the existence of uncompleted transactions and a limited number of cases such as death, bankruptcy, and to be put under restraint. However, this article about the subject accepts compensation for uncompleted transactions without considering the portfolio created.

If we examine the views on the issue, we can conclude two different points in doctrine, one is in favor of providing portfolio compensations to the agent/ distributor by broadly interpreting the article 134 while the others state that this article limits the provision of the compensation to the situations which are clearly stated under the article. The defenders of the second view yet emphasize that although a portfolio compensation is not regulated by law, parties are not prevented to decide for the payment of a compensation at their own will, thus they may insert a relevant provision in their contracts. Yet, it should be underlined that, despite of the fact that theoretically, it is possible to accept the alternative of inserting such a clause in the agreements by relying on contractual liberty, this would not be applicable in all cases due to the huge gaps between the parties regarding the balance of the powers. Think about the case of a multinational insurance company against a relatively small firm trying to be the agent of the insurance company.

### **Article 122 of the Draft Turkish Code of Commerce and the Preamble of the Draft Code**

Such compensation is regulated in the Draft of TCC as called "Counterbalancing Demand".

When we examine the preamble of the draft article, it is seen that the Court of Appeal's precedents and directive of EU are cited. In this respect we can conclude that the newly preparation of this draft does not bring up a new concept, but it lets this important concept to be regulated concretely for the first time. Moreover it is also underlined in the preamble that the Court of Appeal has taken a crucial step to fill the gap and served in favor of the law.

The first paragraph of the draft article 122 reads that in order to be entitled for compensation, the customers which were acquired by the agency should continue their relationship with the company and the company should be in a situation of continuously making income from them. Also the amount of the equalization demand should be calculated fairly.

The second paragraph of the draft article clarifies the determination of this amount. The compensation amount cannot be higher than the average of annual commissions and other payments of the agency under circumstances where the contract is longer than five years. Should the contract have taken less than five years then the average up to the date of termination should be taken into consideration. This regulation is provided to be mandatory and as from the preamble it can be concluded that such determination of the law seeks to set the minimum amount to be determined as compensation.

The third paragraph of the article provides that in case of the termination of the contract due to an unreasonable cause or any mistake of the agency, compensation can not be claimed. On the other hand, irrespective of the provisions of this paragraph, the parties, by relying on the contractual freedom, may always agree on the payment of a compensation even under the cited circumstances.

The fourth paragraph of the article prevents parties to waive their rights. Yet, the parties may still provide a waiver for their compensation rights only if this waiver is given after the execution of the contract between the parties. In fact this situation relies on the general principle of Turkish law which provides that no one can waive its right before the birth of such right. Hence, the practitioners should closely examine that whether the agency acting under his free will while giving its waiver, even this may be given after the execution of the contract.

The fourth paragraph of the article it is also provided that the portfolio compensation should be claimed within the time limit of one year. In the preamble, to permit the practitioners or the doctrine for setting up new approaches to the issue, it is not stated whether this time limit has a foreclosure effect or it is determined as statute of limitations. Undoubtedly this would lead new discussions among the legal practitioners.

Finally the fifth paragraph provides that the provisions of the article shall also be applicable to the exclusive distributor agreements and other continues – type contract relations as long as the situation shall not be against good faith. With this last provision, the Turkish legislator points out its will to not to differentiate an agency contract and an exclusive distributor agreement from the point of compensation of portfolio.

## **Conclusion**

In accordance with the doctrine and the practice, a concrete legal arrangement about portfolio compensation is to be imminent in Turkey. In fact otherwise, it would be pretty unfair to ignore the efforts of the agencies or exclusive sellers in developing the goodwill of the principal. However, it is necessary to note that the above stated provisions, defining the conditions of compensation for portfolio, are parts of a draft code of which enactment is still uncertain.

## **Footnotes**

1. Dated 10.05.1996 and 1996/2189 E. 1996/3335 K.

Dated 20.06.1996 and 1996/2084 E. 1996/4533 K.