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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Extraterritorial Implications of Turkish Legislation

Türk Mevzuatının Ülkeaşıcı Etkileri

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Abstract

Prescriptive jurisdiction of states is based on principles such as territoriality, nationality, passive nationality, universality, and protection. Although jurisdiction to prescribe is limited to the territory of the relevant State, geographic scope of application of any legislation can be determined in an extraterritorial manner. Regardless of the intense discussions on this issue, extraterritorial prescriptive jurisdiction is not considered a violation of international law. Decision of the Permanent Court of International Justice which was rendered in the SS Lotus case was accepted as the basis for objective territoriality principle and effect doctrine. In other words, States can exercise prescriptive jurisdiction for acts and conducts committed abroad that have an impact on their countries. Principle of objective nationality and effect doctrine are not the only basis for the application of legislation of a state to the conducts taking place abroad or persons living in another country. A state can also exercise extraterritorial prescriptive jurisdiction relying on the principle of passive nationality, protection principle or another basis. In Turkish law, geographic scope of application of an act and other legislation are rarely determined expressly on an extraterritorial basis. The extraterritoriality of any rule is defined by interpretation taking into account the purpose of the relevant rule. Extraterritorial application or implication of Turkish law can be seen in various areas such as legislation on anti-trust, personal data protection, anti-corruption, and securities. In addition to legislations regarding these issues, other legislations that have extraterritorial scope of application in Turkish law are discussed in this study.

Keywords

Principles of Jurisdiction, prescriptive jurisdiction of States, extraterritoriality, effects doctrine, SS Lotus

Öz

Devletlerin kural koyma yetkisi, ülkesellik, kişisellik, pasif vatandaşlık, evrensel yetki ve ülke güvenliği gibi ilkelere dayanmaktadır. Kural koyma yetkisi devletin ülkesi ile sınırlı olsa da bir kanun veya kuralın uygulama alanı ülke aşıcı bir şekilde belirlenebilir. Bu konudaki yoğun tartışmalara rağmen, bir devletin kendi kanunlarının uygulama alanını kendi ülkesi dışında etkili olacak şekilde belirlemesi milletlerarası hukukun ihlali olarak değerlendirilmemektedir. Uluslararası Daimî Adalet Divanının Bozkurt-Lotus davasında vermiş olduğu karar objektif ülkesellik ve bunun ekonomi hukuku alanındaki yansıması olan etki doktrininin dayanağı olarak kabul edilmektedir. Devletler ülkeleri üzerinde etkisi olan eylem ve işlemlere kendi kanunlarını ve diğer düzenlemelerini ülke aşıcı şekilde uygulayabilir. Objektif ülkesellik ilkesi, dolayısıyla etki kriteri bir devletin kendi kanunlarını ve diğer düzenlemelerini yurt dışında bulunan kişi ve orada gerçekleşen olaylara uygulamasının tek dayanağı değildir. Devletler bazen pasif vatandaşlık ilkesine, bazen ülke güvenliği ilkesine veya diğer ilkelere dayanarak ülkeaşıcı bir şekilde kural koyma yetkisini kullanabilir. Türk hukukunda, kanunların ya da diğer mevzuatın uygulama alanının ülke aşıcı olarak açık bir şekilde belirlendiği durumlara nadiren rastlanmaktadır. Bir düzenlemenin uygulama alanının ülke aşıcı olup olmadığı, kuralın amacı göz önüne alınarak yorum yoluyla tespit edilmektedir. Ülkeaşıcılık rekabet, kişisel verilerin korunması, yolsuzlukla mücadele ve sermaye piyasası gibi pek çok alanda ortaya çıkabilir. Türk hukukunda ülke aşıcı etkileri olan kanun ve diğer düzenlemelerden bazıları bu çalışmada ele alınmıştır.

Anahtar Kelimeler

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Extraterritorial Implications of Turkish Legislation

Introduction

This paper aims to provide a comprehensive description of the law and practice in Turkey regarding the extraterritorial reach of legislation. It covers only legislative (prescriptive) jurisdiction.Thus, issues related to the enforcement of Turkish statutes and regulations are excluded. To that end, we will first lay out the fundamental principles that the explanations of this article will be based on when exploring the extraterritoriality of Turkish legislation. Thereafter, a look into the distinction between the broad and narrow sense of extraterritoriality will be laid out. Third, this paper will provide a brief historical overview of how extraterritoriality came about in Turkey, followed by the basis of its application in Turkish law. The remainder of the paper will explore the applications of extraterritoriality as we see under Turkish law in various fields of law and ultimately conclude with remarks on the necessity to ensure international cooperation if extraterritoriality is to reach its desired level of application.

Prescriptive jurisdiction, which is the power to enact legal norms as an aspect of state sovereignty[1], is based on the principle of territoriality and nationality (personal jurisdiction) as generally accepted in international law. In addition to territoriality and nationality principles, passive personality, security, and universality principles can be also employed as a basis for exercising jurisdiction; all of the above may lead to the extraterritorial application of Turkish legislation.

Pursuant to the territoriality principle, acts carried out within the territory of Turkey fall under Turkey's jurisdiction. This principle is commonly accepted when exercising jurisdiction to prescribe in criminal matters[2]. Turkey also exercises its territorial jurisdiction over an act when at least one of its constituent elements occurred within its territory, i.e. an act initiated in one state other than Turkey (subjective territoriality[3]), but completed, or caused the effects thereof in Turkey (objective territoriality[4]).

Personal jurisdiction based on the principles of nationality allows a state to enact legislation over its nationals, wherever they may be[5]. This is also called the active nationality principle.

1 Antonio Cassese, *International Law* (2nd edn, Oxford 2005) 49.

2 Hüseyin Pazarcı, *Uluslararası Hukuk* (18th edn, Turhan 2019) 177.

3 Subjective territorial jurisdiction is defined as *"exercise of prescriptive jurisdiction by a State in circumstances where it applies its law to an incident which is initiated within its territory but completed outside its territory".* Christopher Staker, 'Jurisdiction' in Malcom D. Evans (ed), *International Law* (4th edn, Oxford 2014) 317.

4 Objective territorial jurisdiction is defined as *"exercise of prescriptive jurisdiction by a State in circumstances where it applies its law to an incident that is completed within its territory, even though it was initiated outside its territory"*: Staker (n 3) 317.

5 Wade Mansell and Karen Openshaw, *International Law-A critical Introduction* (2nd edn, Hart 2019) 43.

The passive personality principle permits states to claim jurisdiction over a foreign national for offenses committed abroad that affect its own nationals[6].

Prescriptive jurisdiction that is based on the principles of security or protection permits a state to exercise prescriptive jurisdiction over any act or conduct violating national security or other important state interests[7]. Counterfeiting of a State's currency is one of the well-known examples of protective principle[8].

These principles are usually based on a connection with the asserting State, such as nationality, the protective or security principle.

Universal jurisdiction is based on the nature of the crime committed by the alleged perpetrator. Any state should have the authority to hold them accountable, regardless of where the crime was committed or the nationality of the perpetrator or the victim[9]. The universality principle, unlike other principles mentioned above, does not require particular nexus with a State for exercising jurisdiction[10]. This jurisdiction is exercised when the perpetrator is present within the state's territory. In this case, a state is allowed to exercise jurisdiction in extraterritorial basis due to a specific set of very serious crimes, such as crimes against humanity, war crimes, genocide, and torture.

The extraterritorial application of any law may occur as a result of exercising one of the above-mentioned principles of jurisdiction.

I. Broad or Narrow Sense of Extraterritoriality

Extraterritorial application of any legislation in a broad sense is a very common phenomenon once the effects of the legislation transcend the boundaries of Turkey. Therefore, extraterritoriality may appear in any case in which Turkish law is applicable to transactions, situations or relations that are in contact with a foreign legal order, irrespective of personal or territorial nature of connecting factor used in a choice of law rule[11]. Each legislation, then, can be considered as extraterritorial in the broad sense whenever it is applicable, by way of choice of law rules, to a situation that has certain foreign elements. However, in the event that a Turkish choice of law rule that uses the territorial connecting factor indicates that the law of 'the country where the effects occur' is governing law, Turkish law may apply extraterritorially, providing that Turkey is the country affected. Accordingly, if choice of law rules with territorial connecting factor results in the application of law of the forum, such legislation will not be considered extraterritorial in the broad sense.

6 R Y Jennings, 'Extraterritorial Jurisdiction and United States Antitrust Law' (1957) 33 Brit YB Int'l L 148,161.

7 Mansell and Openshaw (n 5) 44.

8 Staker (n 3) 321.

9 Yusuf Aksar, *Teoride ve Uygulamada Uluslararası Hukuk* (2nd edn, Seçkin 2013) 283.

10 Sinan Kocaoğlu, 'Evrensel Yetki' (2005) 60 TBB Dergisi 189, 193.

11 Alan V Lowe, 'The problems of extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 International and Comparative Law Quarterly 724, 726.

In this study, we will focus on the extraterritorial application of Turkish statutes and regulations in the narrow sense (i.e. situations where the scope of the application of substantive Turkish legislation prescribed is based on the principles of jurisdiction as outlined above). States, in principle, are not allowed to assert jurisdiction over conducts that are executed outside its territory, without having any connection thereto. With the exception of exercising universal jurisdiction, international law generally requires a state to demonstrate certain connection to its territory, nationality, or national security interests for its legislation to apply extraterritorially. Therefore, extraterritoriality, in the narrow sense, does not constitute a violation of international law, even if it causes severe problems for both individuals and other states involved. These problems merely indicate that when defining the scope of any legislation, a weak connection is used with the state in question.

In order for some legislations to achieve their purpose and to be efficient, especially in the area of economic legislation and regulations, their extraterritorial application may sometimes be inevitable. The core issue, then, is whether the scope of the application of these regulations is defined in an excessive or restrictive manner. A restrictive geographic scope of application of an economic or any other legislation indicates that a state only applies that legislation in cases where there is close contact with its own legal order, whereas an excessive geographic scope of a legislation entails the application of that legislation even in cases where connection with the state's own legal order is very weak. This study covers the extraterritorial application of Turkish legislation irrespective of their excessive or restrictive scope of application.

II. Historical Background of Extraterritoriality in Turkey

Becoming popular only in the 1980s, when Turkey adopted the open-door policy and enacted liberal economic regulation, the extraterritorial reach or application of Turkish statutes or legislation had been already acknowledged in the field of criminal law, and in some protective economic regulation after the establishment of the Republic of Turkey in 1923. Legislation regarding antitrust matters attracted scholars' attention in the 1990s, while anti-corruption, environment, and protection of personal data have recently garnered attention due to their extraterritorial effects over foreign conduct or persons.

It should be noted that the geographic scope of most statutes and legislations are not clearly defined in Turkish law. Therefore, each provision in question has to be construed individually as to ascertain its scope of application, as well as its extraterritorial application or implications.

Extraterritoriality does not only occur in the field of substantive law, such as legislation concerning competition, banking and securities, anti-corruption and protection of personal data, but in the field of procedural law regarding discovery of documents that prove alleged breach of regulation on economics. However, this is irrelevant for Turkish law which does not contain rules that lead to the extraterritorial

application of procedural rules like discovery -in particular those applied by American courts- in disputes related to economic issues.

III. The Basis of Extraterritorial Application of Turkish Law

A. *S.S Lotus Case*

Public international law scholars acknowledge the decision of the Permanent Court of International Justice (PCIJ) in *S.S. Lotus* case[12] as the basis for the objective territoriality principle and *effect doctrine* in Turkey[13]. *Lotus* is known as a leading case addressing a sovereign state's jurisdiction in general. In this case, A French mail steamer collided with a Turkish collier Boz-Kourt on the high seas, and eight Turkish nationals who were on board perished. When the French ship entered the Istanbul port, the Turkish police arrested the French watch officer and charged him with manslaughter.

The PCIJ sustained Turkey's assertion of jurisdiction and held that a state may exercise prescriptive jurisdiction unless a rule of international law prohibits that state from exercising jurisdiction. The PCIJ's holding reveals that exercise of jurisdiction over objective effects emanating from conduct occurring outside a state's territory is not contrary to international law[14]. Being a court decision concerning criminal law does not diminish the value of the *Lotus* decision as a source of the effect doctrine. As a matter of fact, if the effect doctrine is accepted in the field of criminal law, it is hard to explain why it cannot be accepted in other fields of law, such as antitrust, anti-corruption, and protection of personal data.

B. Effect Doctrine

In Turkish law, direct extraterritoriality[15] is mostly based on the principle of objective territoriality, which is known as the *effect doctrine*[16] in the field of economic legislation. In other words, one can assume that the extraterritorial application exists

12 *SS Lotus* PCIJ (ser. A) no 10 (7 September 1927) 19.

13 Aksar (n 9) 280.

14 *"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable": SS Lotus* PCIJ (ser. A) no 10 (7 September 1927) 19.

15 The term of direct extraterritorial jurisdiction is borrowed from the report by Jennifer A Zerk, A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the UNSG's Special Representative on Business and Human Rights, June 2010, Working Paper No 59. <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf> accessed 23 October 2021.

16 Effects doctrine was first introduced to competition law in the opinion of Judge Learned Hand in *Alcoa* case, *US v Aluminium Co of* America, the USA asserted jurisdiction over the conduct of a non-US company whose activities were indented to affect imports to or exports from the USA. 148 F.2d 416 (1945). Judge Learned Hand's opinion became the foundation for the application of the "effects" doctrine in the competition law: Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws', Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws' (1982) 14/1/3) U Miami Inter-Am L Rev 23, 27 (available at: http://repository.law.miami.edu/umialr/vol14/iss1/3).

inherently in all cases, provided that the effects of any conduct or acts taken abroad occur in Turkey. It would then be reasonable to argue that a close relationship exists between the issue of extraterritorial application and the effect doctrine with regard to regulation on economics in particular. For example, one of the reasons for applying Turkish competition rules can be the anti-competitive actions committed in the territory of another state that produces adverse effects in the good or service markets of Turkey.

The main issue that should be discussed here is not the mere effect that triggers the extraterritorial application of a particular legislation, but the qualities that this effect should have. For example, the fact that the extraterritorial application of a particular provision of law may rely on any indirect influence on the Turkish market would be controversial in terms of international law. However, even an indirect effect over the country itself does not require us to conclude that extraterritorial jurisdiction is absolutely contrary to international law. The PCIJ in the *Lotus* Case does not prohibit a State from extending its own law to the individuals, goods, and actions outside of its territory, but rather grants a broad freedom to States in this regard.[17]

In many regulations in the field of economic law, the Turkish legislator took the advantage of that freedom granted to States by international law and employed the effect test in determining the geographic scope of the relevant legislation.

C. Misunderstanding of the Intervention of Public Order in Cases With A Foreign Element

In some incidents, public order has been employed as a basis for extraterritorial application in Turkish law, which reveals that Turkish courts frequently misunderstand the nature of public order in private international law. Indeed, the occurrence of extraterritorial effect or application of any regulation cannot be anticipated where the geographic scope of legislation is not designated explicitly or implicitly on an extraterritorial basis. However, in such cases, the practice of Turkish courts calls for the extraterritorial application of certain mandatory rules of Turkish law. In particular, in the case where foreign law is applicable in accordance with the Turkish choice of law rules, Turkish courts apply certain provisions of the Turkish Labor Act[18] on the grounds of public order simply because the person who was employed in a foreign country is a Turkish national.[19] It should be noted that Turkish court practice with regard to the foregoing would be acceptable if the scope of application of Turkish Labor Act was based on the principle of passive personality.

17 *SS Lotus* PCIJ (ser. A) no 10 (7 September 1927) 19.

18 İş Kanunu, Kanun Numarası: 4857, Kabul Tarihi: 22.5.2003, RG 22.05.2003/25134.

19 The Turkish Supreme Court has held that *"In Turkish labor law, the provisions regarding the jurisdiction of labor court and employment security are mandatory in nature and they are accepted in the sphere of public policy… therefore Turkish law should be applicable* (Turkish Supreme Court, 9th Civil Chamber, 31301/30289, 25.10.2010).

IV. Extraterritorial Application of Turkish Law in Different Fields

A. Legislations Having Rules Regarding the Geographic Scope of Application

1. Competition Law

a. Jurisdiction based on the 'effects' doctrine

Act No 4054 on the Protection of Competition[20] is one of the few examples that clearly defines the scope of its geographic application. The primary reason behind adopting Act No 4054 in the 1990s was the new economic model introduced in Turkey in the 1980s as well as Article 167 of the Turkish Constitution[21] that places a duty and responsibility on the State to prevent monopolization and cartel formation in markets. The customs union between the European Union (EU) and Turkey[22] also played an important role in the enactment process of Act No 4054[23].

The purpose of the Act No 4054 as explained in its Article 1 is to prohibit agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end. In order for realizing foregoing purpose, Article 2 of this Act employs the 'effect' test to ascertain Act No 4054's scope of application[24]. As previously stated, objective territoriality came to be known as the 'effects doctrine' with regard to application of competition law. Article 2 of the Act envisages that:

> *"(T)his Act covers all agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the borders of the Republic of Turkey; abuse of dominance by dominant undertakings in the market; any kind of legal transactions and behavior having the nature of mergers and acquisitions which may significantly decrease competition; and transactions concerning the measures, observations, regulations and supervisions aimed at the protection of competition".*

The expression "*affecting markets for goods and services within the borders of the Republic of Turkey"* in this provision is the obvious embodiment of the effect principle, which derives from the objective territorial jurisdiction. As a matter of fact, this article was considered as a unilateral choice of law rule that leads to the application of Turkish

20 Rekabetin Korunması Hakkında Kanun, Kanun Numarası: 4054, Kabul Tarihi:7.12.1995, RG 13.12.1994/22140.

21 As per Article 167, *"The State shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets. In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by Law to introduce or lift additional financial impositions on imports, exports and other foreign transactions in addition to tax and similar impositions".*

22 It was put into effect on January 1, 1996.

23 Act No 4054 is based mostly on Articles 81 and 82 of the Treaty of Rome.

24 Kemal Erol, *Rekabet Kurallarının Ülke Dışı Uygulanması* (Rekabet Kurumu 2000) 161.

law when Turkish market was affected by anticompetitive conducts and transactions, given the fact that any bilateral conflict of law rule in Turkish Private International Act (PILA)[25] did not exist at that time[26].

Although Act No 4054 was modeled on the principles of EU competition law, Article 58(2) of the Act was inspired by American antitrust law that faced harsh criticism over the past 100 years[27] – namely Section 4 of the Clayton Act, stipulating treble damages. Article 58 (2) provides that:

> "*If the damage arises from an agreement or decision or gross negligence of the parties, the judge may, upon the request of the injured, award compensation by three-fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage".*

Fortunately, Article 58 of Act No 4054 has not encountered a similar reaction by other states since it did not have the opportunity to be applied in disputes containing a foreign element.

b. Applying Act No 4054 by way of choice of law rules in situations presenting foreign elements: the test of direct effects

It should be noted that when the effects of an agreement, decision or practice which prevent, distort or restrict competition occur in a country other than Turkey, Turkish choice of law rules provides the application of the law of the affected country. Law No 5718 on Private International Law and Procedural Law (PILA)[28], in Article 38, provides the application of the law of the state whose market is *directly affected* with regard to the claims resulting from the prevention of competition[29]. As such, Act No 4054 will be applicable by way of choice of law rules when the Turkish market is directly affected by an act or conduct carried out in Turkey or in a foreign country. This also constitutes the extraterritorial application of Turkish law.

25 Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, Kanun Numarası: 2675, Kabul Tarihi: 20.5. 1982, RG 22.5.1982/17701.

26 Bilgin Tiryakioğlu, *Rekabet Hukukundan Doğan Kanunlar İhtilafı* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1997) 153.

27 See also Leon B. Greenfield and David F. Olsky, 'Treble Damages: To What Purpose and to What Effect?' British Institute of International and Comparative Law Conference on International Cartels – Comparative Perspectives on Practice, Procedure and Substance (2 February 2007) 1, 2-3. (Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjvuZWv5J30AhWl8rsIHXT4CJMQFnoECAgQAQ&url=https%3A%2F%2Fwww.wilmerhale.com%2F-%2Fmedia%2Ffiles%2Fwilmerhale_shared_content%2Ffiles%2Feditorial%2Fpublication%2Ftreble-damages-article_-biicl-conference.pdf&usg=AOvVaw0DMd0AptZeqpEIzZkdB5ff>) Accessed 23 October 2021.

28 Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, Kanun Numarası: 5718, Kabul Tarihi: 27.11.2007, RG 12.12.2007/26728.

29 However, this provision does not contain any rule regarding to the applicable law in cases where the effects of the acts permeate over different countries: Bilgin Tiryakioğlu, 'Private International Law Aspects of Competition Law and Unfair Competition Matters under Turkish Law' in Paul Beaumont and Burcu Yüksel (eds), *Turkish and EU Private International Law-A Comparison* (XII Levha 2014) 254.

c. Responding to extraterritorial practices of other states

Article 38(2) of the PILA is the single example of Turkish law that can be considered as a response to extraterritorial practices of other states. Under Article 38(2), if the amount of compensation provided by applicable foreign law is more than the one stipulated by Turkish law, that exceeding amount cannot be ruled by a Turkish court. This article obviously seems to prevent the application of the law of a state whose market is directly affected if it stipulates compensation that is more than what Turkish law provides for. In the Turkish law context, this provision is confusing, simply because on the one hand, Act No 4054 provides triple damages, while on the other hand, Turkish PILA tries to stop triple damages stipulated by rules of foreign competition law[30]. PILA Article 38(2) could have been considered an efficient rule if triple damages had not been stipulated in Turkish law.

2. Anti-corruption regulations

a. Impact of international conventions on the domestic regulations

International Conventions to which Turkey is a party to regarding anti-corruption establish the basis for domestic law since the most important obligation envisaged in those conventions is to regulate the act of corruption as a typical crime in its domestic law[31]. Turkey ratified the United Nations Convention against Corruption, Council of Europe Criminal Law Convention on Corruption (Strasbourg, 27.1.1999), and the Council of Europe *Civil Law Convention on Corruption*, (4 November 1999), as well as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[32]. The last one has a significant impact on Turkish Penal Code. For anti-corruption regulations to be efficient, they must have a scope of application on an extraterritorial basis, as well as require cooperation between states in combating corruption.

b. Application of Turkish Penal Code

As a result of above-mentioned international conventions, the Turkish Penal Code (Law No 5237)[33] has provisions which make the act of corruption as a typical crime.

30 Bilgin Tiryakioğlu, 'Genel Olarak Haksız Fiillere, Haksız Rekabete ve Rekabetin Engellenmesine Uygulanacak Hukuk', in *Avrupa'da Devletler Özel Hukuku ve Yeni Türk Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanunun Akitler ve Ticaret Hukukuna İlişkin Hükümleri* (Legal 2010) 218.

31 Deniz Kızılsümer Özer, *Uluslararası Sözleşmeler Çerçevesinde Yolsuzlukla Mücadele* (12th edn, Yetkin 2016) 43.

32 The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 (including OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions) (signed 17 December 1997; ratified 26 July 2000). The abolished Turkish Penal Code Law No 765 was amended in 2003 and complied with the OECD Convention. In this context, the criminal responsibility of foreign public officials is regulated as a typical crime in the abolished Turkish Penal Code, which previously did not have a provision on the processing of bribery outside Turkey: Okan Demirkan, Bülent Pınar and Gözde Kabadayı, 'Turkey' in Mark F Mendelsohn (ed), *The Anti-Bribery and Anti-Corruption Review* (4th edn, Law Business Research 2015) 244. <https://www.kolcuoglu.av.tr/Uploads/Publication/the-anti-bribery-and-anti-corruption-review-turkey-chapter.pdf> Accessed 23 October 2021.

33 Türk Ceza Kanunu, Kanun Numarası: 5237, Kabul Tarihi: 26.09.2004, RG 12.10.2004/25611.

Article 8 of the Penal Code defines its geographic scope, which is based on the territoriality principle, as the title of the article suggests. Pursuant to Article 8 *"Turkish law shall apply to all criminal offences committed in Turkey. Where a criminal act is partially, or fully, committed in Turkey, or the result of a criminal act occurs in Turkey the offence shall be presumed to have been committed in Turkey*". We can conclude that the Turkish Penal Code may be applicable on an extraterritorial basis since the foregoing provision covers acts that are partially committed in Turkey.

Article 252 of the Turkish Penal Code regarding bribery was amended in 2012[34] in line with the OECD Convention[35]. In this context, the scope of the bribery crimes has been expanded, and bribery outside Turkey, which was not previously covered by the law, has been regulated as a typical crime. This provision reads as follows:

"Where the offence of bribery that falls within the scope of paragraph 9 is committed, although by an alien abroad, with regard to a dispute to which;

a) Turkey,

b) a public institution in Turkey,

c) a private law legal person established according to Turkish laws,

d) a Turkish citizen,

is a party, or to perform or not to perform a transaction concerning these institutions or persons, ex officio investigation and prosecution are initiated against the persons who receive, request, accept the offer or promise of a bribe, mediate these, obtain an undue advantage for himself in connection with bribery relationship, if they are present in Turkey".

As understood from the wording of this provision, the jurisdiction is based on the objective territoriality since the crime is committed abroad. Accordingly, this article is applicable on an extraterritorial basis, whereas the majority of the provisions in the Turkish Penal Code are territorial in nature.

B. Statutes or Regulations that are Silent as to their Geographic Scope

1. In the field of unfair competition

a. Absence of any rule regarding geographic scope

Provisions concerning unfair competition are mainly included in the Turkish Commercial Code No 6102 (TCC)[36]. The purpose of unfair competition provisions,

34 Yargı Hizmetlerinin Etkinleştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılması ve Basın Yayın Yoluyla İşlenen Suçlara İlişkin Dava ve Cezaların Ertelenmesi Hakkında Kanun, Kanun Numarası 6352, Kabul Tarihi: 2.7.2012, RG 5.7.2012/28344 (Article 87).

35 Ministry of Justice, General Directorate of International Law and External Relations: Prevention of Bribery Given to Foreign Public Officials in International Trade Transactions and Turkey's Compliance, Ankara 2013, 5.

36 Türk Ticaret Kanunu, Kanun Numarası: 6102, Kabul Tarihi: 13.1.2011, RG 14.2.2011/27846. Unfair competition has been set forth in TCC between its Articles 54 and 63.

as stipulated in Art 54 of the TCC, is *"to establish a fair and uncorrupted competition in favor of all participants"*. Neither the TCC in general nor its articles on unfair competition are meant to have a scope of application on an extraterritorial basis. Accordingly, provisions regarding unfair competition cover individuals and companies located in Turkey.

b. Applying unfair competition rules by way of choice of law rules in situations with foreign elements

Turkish choice of law rules regarding unfair competition may lead to extraterritorial application since Art 37 of PILA employs the *effect doctrine* in determining the applicable law to unfair competition. Art 37(1) stipulates the application of the law of state the market of which is *directly affected* with regard to claims resulting from unfair competition. Therefore, Turkish substantive rules on unfair competition included in the TCC will apply in the event that the Turkish market is *directly affected* by those acts which constitute unfair competition.

c. Response to acts on unfair competition that distort the Turkish market

In addition to provisions in the TCC, Turkey has unfair competition provisions with regard to antidumping under Law No 3577 on the Prevention of Unfair Competition in Imports[37]. This law was enacted in accordance with Art 167 (2) of the Turkish Constitution and the GATT Subvention Code, to which Turkey is a party, and sets forth rules and principles with regard to procedures to be applied and measures to be taken for purposes of protecting a domestic industry against damages caused by unfair competition in imports. Although there is no rule which defines the geographic scope of the Law No 3577, its provisions inherently have extraterritorial implications since they are applicable to foreign undertakings and companies as a response to their conducts that distort competition in the Turkish domestic market.

2. Securities

a. Absence of any Rule regarding scope of application

Securities is a field of law in Turkey that is regulated by an extensive range of statutes and regulations, and it is constantly changing. The Capital Market Law (No 6362)[38] is the primary legislation with regard to securities the purpose of which is to regulate and supervise capital markets to ensure the functioning and development of capital markets in a secure, transparent, efficient, stable, fair and competitive environment, and to protect the rights and interests of investors. Law

37 İthalatta Haksız Rekabetin Önlenmesi Hakkında Kanun, Kanun Numarası: 3577, Kabul Tarihi: 14.6.1989, RG 1.07.1989/2021.

38 Sermaye Piyasası Kanunu, Kanun Numarası: 6362, Kabul Tarihi: 6.12.2012, RG 30.12.2012/28513.

No 6362 does not have a provision which expressly defines its geographic scope of application. This does not mean that the application of Law No 6362 is only limited to Turkish territory. As a matter of fact, the purpose of the legislation on securities can sometimes be realized by extraterritorial application of certain provisions, especially when the effects of conducts taken place abroad occur in Turkey or are aimed at Turkish nationals. For this reason, it is necessary to construe each provision individually in order to determine whether it requires an extraterritorial application or not. The following are a few examples that help to understand the extraterritorial nature of provisions regarding securities.

b. Individual examples of extraterritoriality regarding security regulation

aa. Insider trading

Art 106 of Law No 6362, which prohibits insider trading and imposes sanctions, does not expressly mention whether the actions concerning insider trading were committed in Turkey or not. On the contrary, in order for the provision to achieve its purpose, it is supposed to have extraterritorial implications if the actions regarding insider trading were carried out abroad have effects in the Turkish capital market. The nationality of the offender does not have any role as long as the effects of the conducts occur in Turkey[39]. Art 106(1) provides that:

> *"The persons mentioned below who place purchase or sale orders for capital market instruments or change the orders they have place or cancel them, and thus provide a benefit for themselves or someone else based on information directly or indirectly concerning capital market instruments or issuers which can affect the prices of related capital market instruments, their values or the decisions of investors and which have not yet been declared to the public, shall be sentenced to imprisonment from (Amended phrase under Article 37 of Law No. 7222 dated 20.02.2020) three years up to five years or be punished with judicial fine:*
>
> *a) Managers of issuers or those of their subsidiaries or their controlling corporations,*
>
> *b) Persons who possess this information by holding a share in issuers' or in their subsidiaries or their controlling corporations,*
>
> *c) Persons who possess this information due to performing their jobs, professions and tasks,*
>
> *ç) Persons who obtained this information by committing crimes,*
>
> *d) Persons who know that the information they possess is of the nature mentioned in this paragraph or that should know it in case when demonstrated. However, if a judicial fine has been imposed due to this crime, the fine to be imposed shall not be less than twice the benefit obtained."*

39 Although there is no regulation regarding the scope of Article 106(1), this kind of violation is also regulated in Turkish Penal Code. Therefore, it should be evaluated within the scope of the Turkish Penal Code which also gives rise to extraterritorial application. See also: Sanlı Baş, *İçeriden Öğrenenlerin Ticareti Konusundaki Düzenlemelerin Ülke Dışı Uygulanabilirliği* (Sermaye Piyasası Kurulu 1999) 23-24.

bb. Crowdfunding

Article 13 of Communiqué on Share-Based Crowdfunding (*Paya Dayalı Kitle Fonlaması Tebliği)*[40] is another example of extraterritorial implications by way of interpretation with regard to the purpose of the provision. This Communiqué is applicable to foreign companies located abroad as the title of the article suggests (ie "activities of platforms located abroad"). Article 13 reads as follows:

> *"(1) Provided that promotion, advertising and marketing activities have not been carried out for residents in Turkey, crowdfunding transactions that Turkish residents participate in through platforms located abroad, accounts opened abroad for this purpose, cash and other assets sent to such accounts and the transactions they carry out through these accounts are not covered by this Communiqué.*
>
> *(2) Within the scope of application of the first paragraph, in the event that the platforms located abroad set up a place of business in Turkey, create a Turkish website, and carry on promotional and marketing activities directly and/or through persons or institutions based in Turkey in relation to the crowdfunding activities will be accepted activities are directed towards the residents of Turkey and the provisions of this Communiqué shall be applied"*

From the wording of Article 13(2) of this Communiqué, one can easily conclude that the passive personality principle is accepted since it requires that *activities are directed towards the residents of Turkey* even if they are committed abroad.

cc. Confidentiality obligations

Although Law No 6362 is silent as to its geographic scope, Article 87 regarding trade repositories also has extraterritorial implications. It reads as follows:

> *"(1) With the purpose of monitoring systemic risk and maintaining financial stability, in what regards capital market transactions, the Board may request from those executing these transactions that information regarding these transactions be notified under the form and content it shall determine directly to itself or to a trade repository that it would authorise. In the context of this Article, those who are obliged to make a notification may not refrain from providing requested information by relying on the secrecy and confidentiality provisions in their special legislation.*
>
> *(2) In the event that the notification is made to a trade repository authorised by the Board, obligations of the related trade repository, the form and media in which information shall be kept as well as principles and procedures concerning activities in relation to their duties under this Article shall be determined with a regulation to be published by the Board.*
>
> *(3) Sharing of information kept at trade repositories with third persons, including public legal entities, shall be subject to the approval of the Board. The legislation concerning the usage of personal data shall be complied with in the implementation of this paragraph.*
>
> *(4) In order to increase efficiency in data storage, the Board may require persons executing financial transactions in Turkey to obtain an identifier code or number from an institution to*

40 Kitle Fonlaması Tebliği, Tebliğ Numarası: III-35/A.2, RG. 27.10.2021/31641. It was issued in alignment with The Capital Market Law (No 6362).

be determined by the Board. The principles and procedures regarding the implementation of this paragraph shall be determined by the Board."

dd. Foreign Capital Market Instruments, Depositary Receipts and Foreign Investment Funds

Communiqué No VII-128.4, on Foreign Capital Market Instruments, Depositary Receipts and Foreign Investment Funds[41] ,is also silent as to its geographic scope; however, from Article 2 of this Communiqué, which defines its subject matter scope, we can conclude that it has extraterritorial implications. Pursuant to the provision;

"[T]he transactions mentioned below in relation to sales of foreign capital market instruments and depositary receipts and foreign investment funds units through or without public offering in Turkey are subject to the provisions of this Communiqué, and filing an application with the Board is mandatory to execute these transactions".

Accordingly, when public offering or sale is made in Turkey regarding foreign capital market instruments, the provisions of this Communiqué are applicable.

ee. Independent auditing

Similarly, Article 15 of the Communiqué, which relates to independent auditing, may have extraterritorial implications since it includes foreign companies irrespective of the country of their location, which can be Turkey or not. The provision stipulates that:

"Financial statements of foreign corporations are, in terms of independent audit obligation, subject to the same principles applied to financial statements of corporations which are similar and/or capital market instruments of which are listed and traded in the same market / platform of stock exchange. Independent auditing of financial statements is required to be conducted in accordance with the principles determined by the Board or the International Audit Standards published by the International Federation of Accountants (IFAC). This must be clearly stated in the independent audit opinion…"

Article 16 (1) of Communiqué (No VII-128.4), which provides for compliance with other capital market regulations, includes a choice of law rule: the applicable law to financial and administrative rights associated with foreign capital market instruments and use of them is the law of the home country of foreign corporation. This provision reads as follows:

"Financial and administrative rights associated with foreign capital market instruments and use of them are subject to the pertinent laws of the home country of foreign corporations. Prospectus shall provide information about laws and regulations of that country pertaining to these rights and about how these rights will be exercised within the frame of CRA[42] *regulations"*

41 Yabancı Sermaye Piyasası Araçları ve Depo Sertifikaları ile Yabancı Yatırım Fonu Payları Tebliği, Tebliğ No: VII-128.4, RG 23.10.2013/28800.

42 Central Registry Agency Incorporation.

However, foreign corporations may be subjected to Turkish law for situations referred to in Article 16(3) under which foreign corporations are exempt from regulations of the Capital Markets Board pertaining to profit distribution and corporate governance (unless deemed necessary by the Capital Markets Board). It is redundant to say that Turkish law will be extraterritorially applicable if the Board were to deem it necessary for corporations to be subjected to Turkish regulation. Another occasion for extraterritorial application under this article is the provision that envisages the implementation of more favourable and advantageous law to investors in terms of conditions leading to mandatory take-over bid. Turkish law will be applicable in the event that is more favourable, leading to the extraterritorial application of Art. 16(3), which provides as follows:

> *"Foreign corporations are exempt from regulations of the Board pertaining to profit distribution and corporate governance, unless deemed necessary by the Board. Furthermore, as for regulations pertaining to mandatory take-over bid, the laws of the country which are more favourable and advantageous for investors in terms of conditions leading to mandatory take-over bid shall be applied"*

3. Banking Legislation

a. Geographic scope

Banking legislation may have extraterritorial implications as well since rules regarding financial institutions and transactions may naturally exceed the territory of the country. The primary Turkish legislation in this field is Law No 5411[43] on Banking and its geographic scope is not defined explicitly. As a matter of fact, Article 2, under the title of *scope,* simply gives a list of banks and institutions including *the branches in Turkey of such institutions established abroad*[44]. Therefore, one can easily come to the conclusion that certain provisions of the Banking Law may have extraterritorial implications due to Turkey's personal jurisdiction over Turkish branches of foreign banks established abroad.

b. Examples of Certain Provisions of Law No 5411 having extraterritorial implications

Article 6 is applicable to banks incorporated abroad when they open branches and representative offices in Turkey, while Article 9 sets forth requirements for the opening of a branch in Turkey by banks headquartered abroad.

Article 12(3) regulates revocation or restriction of operating permission of any bank established abroad having its branch in Turkey.

43 Bankacılık Kanunu, Kanun Numarası: 5411, Kabul Tarihi: 19.10.2015, RG 1.11.2005/25983(mükerrer).

44 *"Deposit banks, participation banks, development and investment banks, the branches in Turkey of such institutions established abroad, financial holding companies, Banks Association of Turkey, Participation Banks Association of Turkey, Banking Regulation and Supervision Agency, Savings Deposit Insurance Fund and their activities shall be subject to the provisions of this Law".*

Article 23(2) provides requirements with regard to the board of directors for Turkish branches of foreign banks[45].

Article 14, under the title of 'cross-border activities', is the example of extraterritorial application for another reason since it is based on Turkey's personal jurisdiction over Turkish banks having branches or representative offices abroad. It provides that:

> *"Banks established in Turkey may open branches or representative offices abroad including off-shore banking regions on the condition to set up undertakings or participate in existing undertakings comply with the corporate governance and protective provisions set forth herein and to comply with the principles to be established by the Board[46]".*

4. Data Protection

a. The historical background

The first steps of the advanced legal structure of Turkey regarding data protection were taken in 2004 and evolved with national and international legislation over the years. The first step was the provision that was added to the Turkish Penal Code in 2004[47] about data protection even though it was related to the criminal law aspects of data violation. The second step was taken on September 2010, and a provision on the protection of personal data was included in Article 20 of the Turkish Constitution[48]. The third step was becoming a party to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in 2016[49]. The fourth and most notable step was in 2016 when a comprehensive law was enacted regarding the protection of personal information that also regulates data processing activities of entities and individuals in Turkey: Law No 6698 (the Turkish Personal Data Protection Law-PDPL) [50]. Shortly after the enactment of PDPL, Turkey became a party to the Additional Protocol to the Convention for the Protection of Individuals with

45 Article 23(2): *"An at least three -member board of managers, including the manager of the main branch and having the authority and responsibility of a board of directors, shall be formed at the main branch offices in Turkey of a bank established abroad and operating in Turkey through branches".*

46 Banking Regulation and Supervision Board.

47 In Turkish Penal Code, the recording of personal data (Art 135), unlawful disclosure or capture of data (Art 136), the acts of not destroying the data (Art 138) are regulated as crimes. In addition, Article 140 of the Code stipulates that security measures will be applied against legal entities in relation to these crimes.

48 An additional clause has been added to Article 20 of the Constitution with Article 2 of Law No 5982 in May 7, 2010: *"Everyone has the right to claim the protection of personal data about themselves. This right includes being informed about the personal data about the person himself, accessing this data, requesting that it be corrected or deleted, and finding out if it has been used for its purposes. Personal data may only be processed where stipulated in the law or with the express consent of the person".*

49 Council of Europe Convention No 108, RG 17.03.2016/29656. According to Article 4, Contracting States shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter.

50 Kişisel Verilerin Korunması Kanunu, Kanun Numarası: 6698, Kabul Tarihi: 24.03.2016, RG 7.4.2016/29677. It came into force on April 7, 2016.

regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows[51].

It can be concluded that Article 20 of the Turkish Constitution, PDPL and Council of Europe Convention No 108 (with Additional Protocol No181) constitute the three legal pillars of Turkish law with regard to personal data protection.

b. Geographic Scope

Although PDPL was based on EU's General Data Protection Regulation (GDPR)[52], the obligation to appoint representatives and register for non-resident data controllers in Turkey has been imposed by the Regulation on Data Controllers' Registry[53].

The PDPL is silent as to its geographic scope, therefore one has to construe the provisions individually to find out if it is applicable on a territorial basis or not. As it is shown below, certain provisions of the PDPL have extraterritorial implications. One of the reasons for extraterritorial implications in the field of data protection in Turkey is the principle of *data adequacy,* which refers to when the country to which the data will be transferred must bring protection equivalent to that provided by the rules on the protection of data in the source country. The PDPL, as stipulated in GDPR, adopts the principle of *data adequacy* and imposes restrictions regarding the transfer of personal data abroad. Under Article 9 (1) PDPL, personal data cannot be transferred abroad without the explicit consent of the data subject. However, it is possible to transfer personal data abroad without explicit consent of the data subject under certain conditions set forth by Article 9(2)[54] of the PDPL. Two of the conditions envisaged in this article have extraterritorial implications.

The first condition is regarding the sufficient protection that will be provided in the foreign country where the data is to be transferred to. The second one is regarding a requirement providing a guarantee by the controllers in Turkey and in the related foreign country for a sufficient protection in writing. The reason for extraterritorial implications here derives from the principle of passive personality. Under this principle,

51 Council of Europe Additional Protocol No 181 of 5 May 2016. The purpose of the Protocol is to increase the protection of personal data and privacy by improving the original Convention of 1981 in two areas. Firstly, it provides for the setting up of national supervisory authorities responsible for ensuring compliance with laws or regulations adopted in pursuance of the convention, concerning personal data protection and transborder data flows. The second improvement concerns transborder data flows to third countries. Data may only be transferred if the recipient State or international organization is able to afford an adequate level of protection.

52 European Parliament and the Council Regulation (EU) 2016/679 of the of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJL 119/1.

53 Veri Sorumluları Sicili Hakkında Yönetmelik, RG 30.12.2017/30286.

54 Article 9 (2) stipulates that personal data may be transferred abroad without explicit consent of the data subject provided that one of the conditions set forth in the second paragraph of Article 5, and the third paragraph of Article 6 exist and that; (a) sufficient protection is provided in the foreign country where the data is to be transferred to, (b) the controllers in Turkey and in the related foreign country guarantee a sufficient protection in writing, and the Board has authorized such transfer, where sufficient protection is not provided.

a state has prescriptive jurisdiction over anyone, anywhere, who injures its nationals or residents. The PDPL, with the above-mentioned provisions, placed all the personal data processing activities involving natural persons situated in Turkey into its jurisdiction.

Additionally, Article 17 of the PDPL stipulates that Turkish Penal Code provisions shall be applied regarding the unlawful processing of personal data. According to it;

(1) "Articles 135-140 of Turkish Penal Code No 5237 of 26/9/2004 shall apply in terms of the crimes concerning personal data.

(2) Those who fail to erase or anonymize personal data in breach of Article 7 herein shall be punished under Article 138 of the Law No 5237".

As can be understood from the reference to the Turkish Penal Code, this article shall be applicable on an extraterritorial basis since the effects of the actions occur in Turkey.

Article 18 of the PDPL provides an administrative fine for the violations which are considered misdemeanors. This article will be applicable irrespective of the nationality and location of the wrongdoer; therefore, it may have extraterritorial effects. Under Article 18(1):

"(1) For the purposes of this Law;

a) those who fail to comply with obligation to inform provided for in Article 10 herein shall be required to pay an administrative fine of 5.000 to 100.000 TL,

b) those who fail to comply with obligations related to data security provided for in Article 12 herein shall be required to pay an administrative fine of 15.000 to 1.000.000 TL,

c) those who fail to comply with the decisions issued by the Board under Article 15 herein shall be required to pay an administrative fine of 25.000 to 1.000.000 TL,

ç) those who fail to meet the obligations for enrolling in the Registry of Data Controllers and making a notification as provided for in Article 16 herein shall be required to pay an administrative fine of 20.000 to 1.000.000 TL".

Under Article 18(2), which may also cause its extraterritorial application, an administrative fine is applicable for both natural persons and legal persons, without mentioning their nationality or location. This article reads as follows:

(2) The administrative fines listed in this article shall be applicable to natural persons and private law legal persons who are controllers".

c. Extraterritorial application of PDPL in practice: PDP Board Decision regarding practice of WhatsApp LLC

The Personal Data Protection Board (PDP Board) has recently imposed an administrative fine on WhatsApp LLC (as data controller) for not taking the necessary technical and administrative measures to prevent the unlawful processing of personal

data[55], i.e. a violation of Articles 4, 9 and 12(1) of PDPL, which constitutes the extraterritorial application of the PDPL.

By taking into account the following findings, the PDP Board decided that the practice of the data controller constitutes a violation of Article 4 of the PDPL for two grounds:

First of all, the data controller breached the principle of 'compliance with the law and the rules of good faith' per Article 4 of the PDPL. According to the Board, statements regarding the 'transfer' contained in the Terms of Service and Privacy Policy of the data controller were presented in a closed-door manner, and the persons concerned were forced to give their consent to the contract as a whole. Hence, the explicit consent of concerned persons was tried to be eliminated, and the use of the WhatsApp application was subjected to the transfer of data by WhatsApp LLC. The interests and reasonable expectations of the persons concerned were not considered by the data controller.

Second, the data controller practice constituted a violation of Article 4 of the PDPL since the data requested was not proportionate and limited with the information for the purpose for which they were processed, and it was not clearly revealed for what purpose it was transferred.

The Board decided that WhatsApp also violated Article 9 of the PDPL since, on the personal data obtained by the data controller from the relevant persons in Turkey, all kinds of processing activities, which s/he engaged in after obtaining this data, means 'the transfer of personal data abroad' as long as the servers are not in Turkey. Therefore, it is imperative for such transfer to be carried out in accordance with Article 9 of the PDPL. However, neither explicit consent was obtained nor a written guarantee for sufficient protection was requested to transfer activities by the data controller in accordance with Article 9. In accordance with Article 18(1)(b) of the PDPL, the Board decided to impose an administrative fine of TL 1,950,000 on the data controller who was found not to have taken all the necessary technical and administrative measures to ensure the appropriate level of security in order to prevent the unlawful processing of personal data contained in paragraph 12 (1) of the PDPL.

As the PDP Board's decision demonstrates, various provisions of the PDPL have extraterritorial implications although there is no express provision regarding the scope of its application.

5. Labor Law

In principle, regulations regarding employment contracts are not meant to have extraterritorial implications in Turkish law. Rules regarding employment contract with a foreign element can be applied only if Turkish choice of law rules envisage

55 PDP Board's Decision of 03.09.2021, No 2021/891.

the application of Turkish law to labour relationship even if the employee works in a foreign country (Article 27 of the PILA).

However, Turkish legislation regarding labour law that complies with conventions of the international labour organization (ILO), to which Turkey is a party, may have extraterritorial scope of application. One of the examples is found in the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour of 1999 (No 182) (Convention).[56] Under Article 1, each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. This provision clearly imposes an obligation to make necessary arrangements against this problem without being limited to the territory of a state[57]. Article 15 of the Recommendation No 190, which supplements the ILO Convention[58] No 182 is the express example of extraterritorial application:

> *"[O]ther measures aimed at the prohibition and elimination of the worst forms of child labour might include providing for the prosecution in their own country of the Member's nationals who commit offences under its national provisions for the prohibition and immediate elimination of the worst forms of child labour even when these offences are committed in another country".*

Article 8 of Convention No 182 provides that Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes, and universal education. This approach is an indication of awareness of the international aspect of the problem (child pornography, child trafficking, child sex tourism), and determination for solving the problem completely by taking the necessary measures[59]. By ratifying this convention, Turkey made it part of its domestic law. Hence, the provisions of the Convention which have extraterritorial effects have become part of Turkish law as well.

6. Environmental law

Article 56 (2) of the Turkish Constitution provides that "*It is the duty of the State and citizens to improve the environment, protect environmental health and prevent environmental pollution".* Environmental law is based on the international treaties

56 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour of 1999 (No 182), <https://www.ilo.org/ankara/conventions-ratified-by-turkey/WCMS_377311/lang--tr/index.htm> Accessed 26 October 2021.

57 OHCHR Working Paper 1, Cross-border regulation and cooperation in relation to business and human rights issues: a survey of key provisions and state practice under selected ILO instruments, 2015, 5. <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf> Accessed 26 October 2021.

58 Recommendation concerning the prohibition and immediate action for elimination of the worst forms of child labour R190: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312528> Accessed 26 October 2021.

59 OHCHR Working Paper 1, 6.

which Turkey is a party to as well as national regulations. The majority of hazardous activities on the environment are of cross-border nature (that is, not limited to a country in which the hazard occurs). Therefore, provisions regarding protection of the environment may also have a cross border effect in order to realize their purpose. However, one vital issue to bear in mind in the first place is the cooperation at the international levels for the protection of the environment. As a matter of fact, protection of the environment would have to be accomplished by means other than individual state responsibility. An international cooperative approach is accepted as the key for protecting the environment.

The Turkish Environmental Act (Law No 2872)[60] is based on the territoriality principle although it does not have any provision that indicates its geographic scope. Due to the cross-border nature of acts that harm the environment, the basis of the extraterritorial application in Turkish Law is the objective territoriality principle. For example, under Article 23 of the Regulation on Water Pollution Control[61], the prohibition imposed regarding unauthorized discharge and waste dumps directly into Turkey's territorial waters include indirect external effects on waters, which are the right of economic use of the country. Since the indirect effects of polluting acts and conducts taking place outside the territory of Turkey are covered by this provision, we can conclude that it has extraterritorial implications.

Turkey is a party to the International Convention for the Prevention of Pollution from Ships (MARPOL)[62], which is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes[63]. According to Article 4(4):

> *"[T]he penalties specified under the law of a Party pursuant to the present article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur".*

The provision clearly states that parties must regulate their domestic legislation regarding issues covered by this Convention in an "extraterritorial" manner.

Conclusion

It is a rarity to encounter an explicit regulation in Turkish law on which Turkish legislation is applied extraterritorially or has extraterritorial effects. Therefore, we have endeavored to determine the existence of the extraterritoriality application or its

60 RG 11.8.1983/18132.

61 RG 31.12.2004/25687.

62 MARPOL - International Convention for the Prevention of Pollution from Ships Amended by Resolution MEPC.111(50) Amended by Resolution MEPC.115(51) Amended by Resolution MEPC.116(51), <http://www.mar.ist.utl.pt/mventura/Projecto-Navios-I/IMO-Conventions%20%28copies%29/MARPOL.pdf> Accessed 23 October 2021.

63 RG 24.06.1990/20558.

effect in this paper by considering the purpose and function of Turkish legal provisions and by interpreting them.

We are not asserting that this paper contains an exhaustive list of all of the provisions in Turkish law that has an extraterritorial effect, but aims to outline the extraterritorial effect and extraterritorial application of such rules in fields where such may be encountered more frequently, such as in competition, security, banking, data protection, and environmental law. It is noteworthy to mention that extraterritorial application of legal provisions will be more relevant than ever, especially considering how the internet is an integral part of our lives and acts harming the environment, in particular, has regional and even global effects. All of these areas are open to international cooperation, but time will tell whether such a cooperation may be established and -when it is established- whether or not this will hinder a state's ability to extraterritorially determine the sphere of application of its national laws.

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