

TIME LIMITATIONS CONCERNING PORTFOLIO COMPENSATION

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Portfolio compensation (compensation for clientele), a right granted to the weaker side of agency or similar contractual relationships upon termination, is controversial and vague in Turkish law in many aspects.¹ One of these is how and until when to exercise the right to claim portfolio compensation.

There are two main provisions in relation with this issue:

- i. Turkish Code of Obligations (“TCO”) Art 147 provides for a statute of limitation (*Verjährung*) of five years for the claims arising out of certain contracts including agencies,
- ii. Turkish Commercial Code (“TCC”) Art 122 requires the claims for portfolio compensation to be asserted in one year following the termination.

Art 122 of the TCC, which was enacted in 2012, does not correspond to any provision of the former law and therefore stands as a significant novelty in Turkish practice. Hence, whether Art 122 TCC overrules Art 147 TCO and, if it does, whether this claim needs to be asserted before the courts, are not crystal clear yet. Interestingly, it was the lawmaker’s intention to allow this controversy. It stated in the preamble to Art 122 TCC that, all discussions among the scholars and the courts are welcome to find out the best solution for the sake of fairness. That being said, the lawmaker also pointed to the German practice as an example to follow.

Turkish courts, however, have diverged from majority of the scholar opinions and the German practice. 11th Civil Division of Court of Cassation, in its decision of 2017, considered a portfolio compensation claim admissible, by observing the fact that “*the termination letter was notified on 28.09.2012 and the lawsuit was filed within the one-year prescription as of 27.09.2013*”.² The 11th Division still sticks with this approach and dismissed a portfolio compensation request in its decision of 2021, based on the fact that the claimant failed to file the lawsuit within the prescription period.³ 19th Division of Court of Cassation has also abided by this approach and gone one step

¹ Please also see Baysal / Demir / Önder: “Widespread and Yet Controversial: Distributorship and Its Termination”, Mondaq, 16.03.2022.

² 11th Civil Division, 2015/13042 E., 2017/1342 K, 07.03.2017.

³ 11th Civil Division, 2020/2621 E., 2021/2021 K, 04.03.2021.

further by preventing the claimant from increasing the quantum after the lapse of the prescription period, despite the fact that the lawsuit was filed *in due time*.⁴

These court decisions, which have formed a consistent but unexplained practice, make it clear that Art 122 TCC is an imperative provision that overrides Art 147 TCO and forces the claimant to file a lawsuit within one year following the termination. This one-year period is regarded as a prescription period and therefore it is not possible to interrupt and/or suspend this period unlike with the case of statute of limitation.⁵

German practice also regards this one-year period as a prescription period. However, it gets apart from Turkish courts' practice in one, but critical, aspect. German practice allows the claimant to exercise the right to portfolio compensation without the need to resort court proceedings. Accordingly, it is sufficient for the claimant to notify the respondents within one-year period. This notification would constitute a precondition of a compensation lawsuit to be filed in the future, within the regular statute of limitation.

In view of the German practice, Turkish courts can be criticized only for forcing the claimant to resort to courts to exercise the right to portfolio compensation. Indeed, Turkish law would expressly and specifically set it forth if a right subject to prescription period (i.e. formative right⁶) has to be asserted before the courts. Other than these, Turkish law does not possess an overarching principle requiring formative rights to be exercised only by way of a court action.⁷ To the contrary, Turkish law of obligations provides that:

- A party who laboured under a fundamental error when entering into a contract can exercise its right to avoid the contract or
- A purchaser can exercise its rights arising out of delivery of defective goods

by simply communicating its intention in this respect, with the counterparty. It is also unanimously accepted among the scholars that right to set-off, that TCC does not clarify how to exercise, can be validly exercised by notifying the counterparty in this respect, without filing a court action.⁸ The claimants in these occasions would resort to the

⁴ 19th Civil Division, 2016/14866 E., 2017/2604 K. 30.03.2017 (The court's conclusion could have been avoided by presenting portfolio compensation as an unquantified debt. Yet, whether the courts would always allow the claimants to pursue an unquantified claim in such cases is another discussion topic in Turkish practice. For a recent example where the court admitted portfolio compensation as an unquantified debt, please see 11th Civil Division, 2019/2876 E. 2020/3326 K. 30.06.2020: "... *portfolio compensation was unquantifiable and therefore the interest should run for the entire claim as of date of this lawsuit.* ...)

⁵ Besides, the lapse of prescription period extinguishes the right to portfolio compensations whereas lapse of statute of limitation would only grant the debtor a defence not to perform an existing obligation.

⁶ **Fikret Eren**, Eren Borçlar Hukuku Şerhi (Eren Law of Obligations Commentary), 2022, p. 2627: "Statute of limitation is only for right to a receivable. Prescription periods on the other hand governs the formative rights..."

⁷ Rights that are subject to prescription periods and need to be exercised before the courts are mostly derived from areas of law concerning public order such as family law and law of enforcement and insolvency.

⁸ **Fikret Eren**, Eren Borçlar Hukuku Şerhi (Eren Law of Obligations Commentary), 2022, p. 2619.

court - within the statute of limitation - only to enforce a validly executed right against the counterparty.

Prominent scholars in Turkish practice find no justifying reason to deviate from this principle.⁹ Art 122 TCC, just like the examples above, requires the claimant to only “assert” the right within one year and contains no indication that such assertion can be made only before the courts. Given that the preamble to Art 122 TCC already refers to the German practice, forcing the claimant to file a court action would give rise to an inconsistent construction of the said provision. For the sake of consistency, it should be deemed sufficient if the claimant (agent, distributor, exclusive reseller etc.)

- communicates its intention to pursue portfolio compensation with the counterparty within one year of prescription period and
- files a lawsuit within the statute of limitation (as per Art 146 or 147 TCO) against the counterparty who fails to fulfil this intention.¹⁰

Having said this, Turkish courts currently do not lend support to this opinion. Therefore, claimants are advised to file a court action within the prescription period of one year if they do not want to risk a smooth procedure to attain their rights.

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⁹ Arslan Kaya, Türk Ticaret Kanunu Sempozyumu (Turkish Commercial Code Symposium), 2018, p. 31.

¹⁰ Ülgen / Helvacı / Kendigelen / Kaya / Nomer Ertan, Ticari İşletme Hukuku (Law of Commercial Enterprise), 2015, p. 823