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Confidentiality Q&A: Turkey

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Turkey specific information concerning the key legal and commercial considerations in relation to confidentiality.

This Q&A provides jurisdiction-specific commentary on *Practice note, Confidentiality: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

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Confidentiality

1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction for a general commercial purpose?

Confidentiality agreements are commonly used in commercial transactions where trade secrets, personal or sensitive information are exchanged (particularly in mergers and acquisitions). They are used regardless of the parties' jurisdiction.

2. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally-imposed obligations of confidence, or would they replace them?

Contractual obligations set out in a confidentiality agreement governed by Turkish law would be additional to the mandatory provisions of Turkish laws. Confidentiality obligations are not governed by a specific piece of legislation in Turkey; instead, they are regulated in various Turkish codes and regulations. The provisions under Turkish Penal Code and the penal provisions provided under the Turkish Commercial Code are mandatory provisions, which cannot be superseded by contractual obligations. However, provisions in the Turkish Code of Obligations regarding compensation for monetary and moral damages can be superseded by contractual agreement.

Under the Commercial Code, a person who analyses documents and books disclosed to them by virtue of office, cannot disclose business and trade secrets they obtained or learned from the disclosed information. If they do so, they will be liable for monetary and moral damages.

Under the Penal Code, during or on the expiry of the term of office, any public officer disclosing, publicising or facilitating access to confidential documents, decisions and orders and other notifications delivered to them by virtue of office is subject to imprisonment.

The Penal Code further provides that any person disclosing business secrets, banking secrets, information relating to customers, information relating to scientific research or discoveries or industrial practices, which they hold by virtue of office, is subject to imprisonment and a punitive fine. (A punitive fine, compared to the administrative fine, has serious consequences and if a person does not pay the imposed punitive fine, such punitive fine is converted to imprisonment.)

The Law on Protection of Personal Data (the LPPD) imposes obligations on individuals and legal entities regarding the processing of "personal data" and establishes an organisation to enforce the provisions of the law. The LPPD provides for imprisonment and administrative fines for non-compliance with its provisions.

Confidentiality agreements in Turkey follow international standards and practices, and the *Standard document, Confidentiality agreement (commercial): Cross-border: clause 3* includes confidentiality provisions of the type which we typically see in the market.

3. What is the definition of confidential information in your jurisdiction? What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of Confidential Information contained in a confidentiality agreement governed by the law of your jurisdiction?

There is no specific definition of "confidential information" under Turkish law. The definition varies depending on the type of information disclosed.

That said, personal data is defined as "any information relating to an identified or identifiable individual" under Article 3(ç) of the LPPD. Article 6 of the LPPD provides a higher protection for sensitive personal data, which is defined as "data relating to race, ethnic

origin, political opinions, philosophical beliefs, religion, sect or other beliefs, appearance and dressing, membership of association, foundation or trade-union, health, sexual life, criminal conviction and security measures, and biometrics and genetics".

Article 5 of the LPPD states that personal data cannot be processed without the explicit consent of the data subject, except in the following cases:

- Where data processing is expressly required by law.
- Where data processing is necessary to protect the life or physical integrity of the data subject or another person when the related data subject(s) is/are physically incapable of giving consent or such consent is deemed legally invalid.
- Where data processing is directly related and necessary to establish and perform a contract to which the data subject is a party.
- Where data processing is necessary for the data controller's compliance with a legal obligation.
- Where the data has been disclosed to the public by the data subject.
- Where data processing is required to establish, use or protect a right.
- Where data processing is compulsory for legitimate interests of the data controller, provided that fundamental rights and freedoms of the data subject are not harmed.

The protection provided under the LPPD only covers personal data relating to individuals, and not legal entities.

Standard document, Confidentiality agreement (commercial): Cross-border: clause 2.2 is a typical provision included in Turkish law-governed confidentiality agreements to define information which does not fall within the scope of the "Confidential Information" definition.

4. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?

There is no distinction in terms of treatment of physically or electronically retained data. The LPPD applies to data processed both by physical methods and electronic methods, and the law does not differentiate between them.

However, data processed electronically is subject to various additional safety measures aimed at ensuring the security of data obtained in the course of electronic communication:

- The Regulation on Processing of Personal Data and Security of Confidentiality in Electronic Communication Sector.
- The Regulation on Service Provider and Intermediary Service Provider in Electronic Commerce.
- The Regulation on Commercial Communication and Commercial Electronic Communication.
- The Regulation on Security of Network and Data in Electronic Communication.

These Regulations impose obligations on data processors, among other things, to:

- Take necessary administrative and technical safety measures for the security of communication lines.
- Provide access only to authorised persons.
- Obtain consent for certain data processing activities.
- Notify the data subjects of any breach of security.
- Retain data obtained through electronic communication only for limited purposes and period and destroy data when the purposes of process no longer exist.

5. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?

As mentioned, there is no specific definition for confidential information under Turkish law, and therefore no general principle for the classification of findings, date or analysis derived from confidential information (see *Question 3*). However, the parties can contractually agree to include findings, data or analysis derived from confidential information in the definition of "confidential information". In this sense, *Standard document, Confidentiality agreement (commercial): Cross-border: clause 2.1(d)* is a typical provision included in Turkish law-governed confidentiality agreements.

In terms of personal data, if derived information falls within the scope of the definition of personal data under the LPPD, then the derived data is subject to LPPD protection as well. However, if derived data is obtained through anonymisation of personal data, then it does not qualify as "personal data" and does not benefit from the protection provided in the LPPD.

6. Is it possible to extend the parties' obligations in the agreement so as to capture information that was disclosed prior to the confidentiality agreement being entered into and signed? Is an undertaking by a recipient not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable in your jurisdiction?

Yes. Under Turkish law, the parties are free to enter into a contract for lawful and legitimate purposes, as long as it does not conflict with public order or morals. One or all parties' jurisdiction being outside of Turkey does not alter this analysis. *Standard document,*

Confidentiality agreement (commercial): Cross-border: clauses 2.1(a), 2.1(b) and *3.1(a)* of are typical examples used in Turkish law-governed confidentiality agreements.

7. Is it necessary for "consideration" (that is, value of some kind) to be given by a discloser for a confidentiality agreement to be binding on a recipient under the law of your jurisdiction? If so, does agreement by the discloser that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?

Under Turkish law, no value of any kind need be given by a disclosing party in order for the confidentiality agreement to be binding. *Standard document, Confidentiality agreement (commercial): Cross border: clause 3.1* is a typical provision included in Turkish law-governed confidentiality agreements.

8. What are the remedies available in your jurisdiction for a breach, or an anticipated breach, of (i) obligations set out in a confidentiality agreement, or (ii) confidentiality obligations imposed by the general law of your jurisdiction?

Possible remedies under the general provisions of the Code of Obligations include:

- Specific performance and compensation due to the delay in performance of the relevant obligation.
- Compensation for non-performance, instead of an order for specific performance.
- Rescission or termination of the contract.

The non-breaching party is free to choose which remedy to request. It may be argued that specific performance of an obligation is always preferable to other alternatives. However, specific performance may not always be possible. As for confidentiality agreements in particular, specific performance may be problematic, as once a party has unlawfully disclosed confidential information to third parties, it is very difficult to take it back and control the actions of those third parties.

According to Article 118 of the Turkish Code of Obligations, in order to request compensation due to the counterparty's breach, the claimant must prove that the counterparty has breached the contract with fault, and must prove its positive damages (that is, damages that arise due to non-performance of the obligation) arising from this specific breach.

In practice, it is not very easy to prove damages and establish casual connection between the breach of a confidentiality obligation and the claimant's damages. Including a penalty or specific indemnity in case of breach is recommended, as under Turkish law penalty clauses relieve the claimant from an obligation to prove damages (see *Question 9* for further detail on penalties).

A preliminary injunction as set out under Articles 389 to 399 of the Turkish Civil Procedural Law may be an additional remedy. For a preliminary injunction to be granted, there must be a concern that an inconvenience or a serious detriment would occur as a result of a delay or a change in the current situation, which would make the exercise of a right difficult or impossible. The court may grant any type of injunction that would remove the inconvenience or prevent the damage/threat, such as doing or undoing a specific action.

In addition to the above, under Article 25(2)(e) of the Turkish Labour Law, if an employee discloses the employer's trade secrets, then the employer has the right to terminate the employment contract.

There are also consequences under criminal law (imprisonment and/or fines) for disclosure of confidential agreement by persons owing certain types of duty of confidentiality (see *Question 2*).

9. Is it common in your jurisdiction for an indemnity to be requested by the disclosing party from the recipient for any loss or damage arising from the misuse or unauthorised disclosure of the confidential information disclosed?

Yes, an indemnity for breach of confidentiality obligations can be incorporated in the confidentiality agreements. Generally, courts do not interfere with the penalty amount determined under the contracts, when both parties are contracting in the course of business. However, according to Article 22 of the Commercial Code, if an excessive amount limiting the economic freedom of the counterparty is determined as a penalty or indemnity, the court may reduce the excess amount.

10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?

There is no specific provision in Turkish law imposing a limit on the time during which the confidential obligations apply. As per the principle of freedom of contract, the parties can enter into confidentiality agreements without a specific time period. However, *Standard document, Confidentiality agreement (commercial): Cross-border: clause 10.2* is a typical provision used under Turkish law-governed confidentiality agreements as in line with market practice.

In the case of a breach of the confidentiality agreement, the following limitation periods shall apply to bringing claims against the breaching party. If the confidentiality agreement does not specify a period for the incurred obligations, then according to Article 72 of the Code of Obligations, notwithstanding any provision to the contrary in the law, all receivables/agreements are subject to the ten-year statute of limitations. However, if the breach of such obligation constitutes

a tort, then claims arising out of such an act shall be subject to the two-year statute of limitations from the date of discovery (with a back-stop date of the ten-year statute of limitations from the date of tort). On the other hand, if breach of such obligation constitutes a crime, then the statute of limitation determined for the relevant crime shall apply.

11. Is a clause requiring the return or destruction of the confidential information, on the request of the disclosing party, permitted in your jurisdiction?

Yes, the parties can agree to the return or destruction of the confidential information upon termination or expiry of the relevant agreement.

According to Article 7 of the LPPD, even where confidential information is processed in accordance with the LPPD and other relevant legal provisions, once the reasons that allow for processing of the confidential information are passed, the recipient party must return or destroy the confidential information upon request by the disclosing party.

*Standard document, Confidentiality agreement (commercial): Cross-border: clause 6*is a typical provision included in Turkish law-governed confidentiality agreements.

12. In your jurisdiction, who would be the typical list of permitted representatives of the recipient in a confidentiality agreement who could receive the confidential information?

The parties to a confidentiality agreement may list all third parties (typically directors, officers, partners, board members, employees, providers of debt or equity finance or advisers) permitted to receive confidential information. If no third parties are listed, then only the authorised representatives of the parties shall be authorised to receive the confidential information.

Standard document, Confidentiality agreement (commercial): Cross-border: clause 4.2 may be amended to narrow the scope of the Representatives to a need-to-know basis.

13. Where the information is particularly sensitive, would it be possible in your jurisdiction for the disclosing party to require that the recipient enters into a separate undertaking with each of its representatives?

Yes, this is often seen in competitive M&A transactions (for example, separate undertakings may be entered into with financial and legal advisers before the due diligence process commences).

14. What would be the typical list of situations under the law of your jurisdiction in which a party might be compelled to disclose confidential information supplied by the other party (and which should therefore form express exceptions to an undertaking to keep them confidential)?

In the following cases, the parties would be compelled to disclose the confidential information to third parties:

- Upon the order of a court, or on request by a competent regulatory, judicial, governmental or similar authority.
- Where a disclosure obligation arises from applicable laws.

The procedure set out under *Standard document, Confidentiality agreement (commercial): Cross-border: clause 5.2* would be applicable under Turkish laws and is typical in a confidentiality agreement governed by Turkish law.

15. Might any additional undertakings be considered in certain scenarios, for example, undertakings not to entice away officers or employees or not to solicit customers of the disclosing party?

Standard document, Confidentiality agreement (commercial) does not include any non-solicitation provisions. Additional undertakings with respect to non-solicitation of employees and customers can be incorporated in the confidentiality agreements and it is usual market practice to include them.

Accordingly, a typical confidentiality agreement may include provisions stating that the receiving party or its representatives will not:

- Directly or indirectly initiate or accept or engage in or have any contact of any kind with the staff or employees of the disclosing party and/or its representatives nor offer employment to any member of such staff or such employee.
- Directly or indirectly endeavour to entice customers or suppliers away from the disclosing party.

16. Could a third party, for example, members of a party's group enforce a confidentiality agreement, without being a party to the agreement?

Privity of contract is accepted in Turkish law; a contract cannot impose an obligation on a third party, regardless of the laws under which the parties are incorporated. A third party (for example, members of a party's group) cannot enforce a confidentiality agreement without being a party to the agreement.

In order for the third party to enforce such rights, the relevant party to the contract should assign such rights or the contract to the third party with an assignment protocol, if this is not contractually prohibited.

17. Could a party to the confidentiality agreement enforce any of its provisions against a third party under the laws of your jurisdiction. For example, against a permitted representative of the recipient, without that representative being a party to the agreement?

A party can only enforce the provisions of a confidentiality agreement against another party to the contract. A contract cannot impose obligations on third parties (see *Question 16*).

However, the parties can agree to disclosure of confidential information to permitted representatives of the recipients, by inserting such a provision in the confidentiality agreement.

18. What are the formal requirements for executing a valid confidentiality agreement in your jurisdiction?

The elements of the contract must fulfil several requirements:

- The parties to the contract should have legal capacity to execute the contract. (*Article 8, Turkish Civil Law*).
- The parties to the contract should exchange their mutual valid consent on material elements of the contract, orally or in writing (*Article 1, Code of Obligations*).
- The subject of the contract should be compliant with mandatory provisions of law, public order, public ethics and personal rights; and should be realisable (*Article 27, Code of Obligations*).

There are no mandatory form requirements (for example, notarisation, witnesses) for confidentiality agreements under Turkish law; therefore, parties are free to execute the contract in any form. However, for evidentiary purposes, it should be in written form.

An individual representative of a legal entity should submit a document evidencing authority to act on behalf of the legal entity (for example, signature circular or power of attorney), to verify the authority of the person signing the confidentiality agreement on behalf of a legal entity.

Contracts concluded by and between Turkish parties, must be in Turkish language, otherwise they are deemed invalid. Thus, a confidentiality agreement executed by Turkish parties must be in the Turkish language (*Article 1, Law on Obligation to Use Turkish Language in Commercial Organisations*). This requirement does not apply if one of the parties is a foreign individual or a foreign legal entity.

19. Does the law of your jurisdiction dictate which governing law and jurisdiction will apply to this agreement?

Freedom of contract is one of the most fundamental principles of Turkish law. Within the framework of this principle, the parties' objectives will determine their mutual rights and obligations. The parties are free to choose a foreign law to govern their agreement; this is expressly provided for in the International Private and Procedure Law (the IPPL), particularly where there is a foreign element to the contract, such as one of the parties.

Contractual relationships are subject to the law selected by the parties. Article 24 of the IPPL provides that the agreement between the parties regarding choice of law must be clear, in order to be valid. In this sense, *Standard document, Confidentiality agreement (commercial): Cross-border: clause 12.10* should be drafted in a specific manner (that is "courts of London" instead of "courts of England").

Accordingly, even if a Turkish court hears a dispute concerning a contract that is subject to a foreign law, the Turkish court must assess the parties' submissions in accordance with the foreign law chosen. It cannot adjudicate the dispute based on Turkish law, because that would violate the parties' express will (as reflected in the contract, in writing) to apply the chosen foreign law.

Although the IPPL permits a foreign law to govern an agreement, there are some instances where the foreign law selected by the parties cannot apply. One instance is provided under Article 5 of the IPPL, for issues concerning matters of "Turkish public policy", the relevant Turkish law provision must also be considered and the relevant contractual provision must comply with the related Turkish law principles (for example, family law principles).

Under Article 47 of the IPPL, to the extent that the dispute in question concerns a matter falling outside the exclusive jurisdiction of Turkish courts, parties are free to choose a foreign state's court as the competent court to resolve their contractual disputes. This foreign court selection must be in writing and clearly drafted in order to be valid.

20. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of any subsequent transaction documents?

In Turkish Law, there is no restriction on the parties' choice of law in respect of subsequent transaction

documents, other than as set out in *Question 19*. Parties may include a provision restricting the parties' choice of law in respect of a subsequent transaction documents.

21. Are there any clauses in the confidentiality agreement that would not be legally enforceable or not standard practice in your jurisdiction?

No, *Standard document, Confidentiality agreement (commercial): Cross-border*includes typical provisions and follows the market practice in Turkey.

22. Are there any other clauses that it would be usual to see in a confidentiality agreement and / or that are standard practice in your jurisdiction?

No, *Standard document, Confidentiality agreement (commercial): Cross-border*includes typical provisions and follows the market practice in Turkey.

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