

# Non-Competition Agreements in Line with the New Code of Obligations

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Upon the enactment of the New Code of Obligations numbered 6098 on 1 July 2012 (the “New Code of Obligations”), the Turkish Code of Obligations numbered 818 (the “Law numbered 818”) will be abolished. The New Code of Obligations explicitly regulates areas which were deemed ambiguous under the Law numbered 818.

As per the New Code of Obligations, parties of an employment contract may draw up a non-competition agreement and decide that the employee shall not perform any work competing

up in writing by the parties. Since the employee incurs the obligation of not competing, his signature alone will be sufficient for the validity of the agreement. It should be noted that the written form is a condition for the validity. It should be noted that the non-competition agreement may only be valid if the employee is employed within a position whereby he has the opportunity to acquire valuable knowledge or trade secrets, such as, customer portfolio or production secrets and the employee uses such information that causes the employer material damage.

The subject of the non-competition agreement shall be drafted as i) not to perform any work in competition with his employer on behalf of himself; ii) not to work in a rival company; iii) not to be a shareholder in a rival company; or iv) not to be engaged with a rival company under any position other than shareholder. In the event the employee acts in breach of the non-competition agreement during his employment such acts would constitute a violation of the employment contract. However, it constitutes a violation of non-competition obligation if such acts have been carried out following the termination of the employment contract.

It should be further noted that there should be a causal link between the employee’s knowledge and the damage caused. If the damage is caused due to the employee’s personal talent and ability rather than due to knowing trade secrets, then such non-competition agreement shall not be binding. For instance, in free lance work such as lawyers or doctors relations with the customers are based on the personal talent therefore, non-competition clauses shall not be valid for such employees. Please note that the notion “trade” regulated under the New Code of Obligations

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with his employer on behalf of himself or work at a rival company or be associated with another rival company as a shareholder or under any other position. The employee shall have the legal capacity to execute the non-competition agreement. If the employee is not of legal age, then the regulation on non-competition obligation is invalid. Furthermore, non-competition agreements shall be executed in writing. Although if there is no employment contract executed in writing, the non-competition agreement shall be drawn

shall be interpreted in a broad manner. Any kind of feature which there is benefit not to be known by the others shall be deemed as a trade secret. For example, the customer list, composition of a product, confidential agreements, the organization chart of the workplace which is not known by anyone, the code system, communication file or cost price of a product may all be accepted as trade secret.

Non-competition agreements should not obstruct economical development of the employee against justice and equity, and endanger the employee's future career. In case the non-competition restriction is not limited in terms of area, time and subject matter of works, it shall be deemed to be agreement inequitable. Therefore, such regulation shall only be binding as long as non-competition obligation of the employee is restricted. However, the restriction in terms of area, time and subject matter of works must also

since such regulation is not restricted in terms of area and subject matter of works, and also dangers the economic future of the employee.

Differently from the Law numbered 818, the New Code of Obligation regulates that the non-competition obligation cannot exceed two years unless there are special cases or conditions. Under the Law numbered 818, the duration for non-competition obligation had been defined as "appropriate period of time as the case may be" and the judges were not authorized to restrict such period. However the New Code of Obligations authorizes the judge to make restrictions in terms of scope and term of the non-competition obligation.

The employer may claim compensation from his employee in case he acts contrary against his non-competition obligation. Such right only exists provided that the employee can prove that he is not at fault. The right to claim compensation of the employer arises from the law. In such case, the employee shall be obliged to compensate all damages of the employer. If a penalty clause is regulated under the non-competition agreement and there is no other regulation contrary to such penalty clause, then the employee shall pay that penalty to the employer for the damages arisen. Please note that the liability of penalty payment does not arise from the law but arises from the contract executed by the parties. However, it should be noted that the employee may further be liable to compensate the amount of damages exceeding the penalty amount decided under the non-competition agreement.

Finally, it is regulated under the New Code of Obligations that in addition to claiming the penalty and damages, the employer may request the employee to cease acting in breach of his non-competition obligation. However in order for the employer to make such claims, this right must be explicitly reserved under the non-competition agreement in writing and the importance of the interests which have been violated or threatened and the acts of the employee justifies such request.

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be reasonable and proportionate with the specific case and conditions. The reasonableness shall be evaluated considering the employer's interest and the future of the employee.

As per the provisions of the New Code of Obligations, a non-competition agreement which regulates a very heavy liability regarding the employee will be evaluated freely by the judge and revised in line with equity and justice in favor of the employee. Accordingly, the judge may decide either to restrict the obligation of the employee or completely remove such obligation considering that there is no possibility for the employee to know the customers or trade secrets. For instance a non-competition agreements regulating that the employee cannot work in any bank have been deemed invalid by the Court of Appeals

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