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TURKEY: "ZERO" IS DESCRIPTIVE FOR BEVERAGES - COURT OF APPEALS

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With its recent decision dated March 9 2017 and numbered 2016/14857 E, 2017/1442 K, the Turkish Court of Appeals (CoA), by reversing its previous decision in the same dispute, held that the trade marks Uludağ Zero and Panda Zero cannot be considered confusingly similar on the basis of the commonness of the term "zero" since this term is descriptive for beverages.

The decision concerns a cancellation action filed by the plaintiff against the decision given by the Turkish Patent and Trade Mark Office, regarding the refusal of the plaintiff's trade mark application Uludağ Zero, covering beverages in class 32, on the ground of likelihood of confusion with the defendant's trade mark Panda Zero, which also covers beverages in class 32.

The case was first evaluated by the first instance IP Court and the Court held that the term "zero", which is the focus point of the dispute, evokes "sugar free, fat free, zero calorie" in the Turkish consumers' minds due to the effect of recent intensive advertising campaigns for beverages.

On that basis, the Court held that the term "zero" is a descriptive term for beverages in class 32, in that it indicates that the relevant product does not include sugar. Therefore, the Court concluded that the main elements of the trade marks in dispute are "Uludağ" and "Panda" and there is no likelihood of confusion between them.

Upon the defendant's appeal, the CoA evaluated the matter and held that the term "zero" is one of the main elements of the trade marks and by considering that beverages are fast moving consumer goods purchased without much thought, concluded that the trade marks are confusingly similar, on the basis that they include the common term "zero" as a predominant and attention-grabbing element. Accordingly, the CoA overruled the first instance IP Court's decision. However, the IP Court resisted this decision.

Upon the defendant's second appeal, the case returned to the CoA, but this time the CoA reversed its own previous decision and held that the term "zero" is a descriptive term for the dispute. Accordingly, the CoA decided that the initial decision of the first instance IP Court, concluding that the trade marks are not confusingly similar, is appropriate.

With this recent decision, the CoA confirmed that the non-Turkish term "zero" is descriptive for beverages and would be perceived by the Turkish consumers as an indication that the relevant product does not include sugar. Arguably, the most remarkable aspect of the CoA's decision is that it puts forward that non-Turkish terms can be perceived as descriptive by Turkish consumers, provided that these terms are advertised in Turkey intensively for the relevant product and therefore become widely known by Turkish consumers. In this respect, the decision sets a precedent for future disputes where the subject of the dispute focuses on a common non-Turkish term in the trade marks, which can be regarded as descriptive or having a low degree of distinctiveness, despite being non-Turkish.