Patent and Trademark Office almost loses authority to revoke trademarks – before it even gets a chance to use it

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- **Within the context of the entry into force of Article 26 of the Industrial Property Code, there have been heated discussions as to whether the administrative revocation of trademarks is constitutional**
- **An IP court applied to the Constitutional Court to annul the office's authority to revoke trademarks before the office was able to use such authority**
- **The Constitutional Court rejected the application due to the court's lack of jurisdiction and did not examine the merits**

Background

Along with the entry into force of the Industrial Property Code No 6769 on 10 January 2017, a fundamental change was brought about in terms of the abolition of trademark rights. Article 26 of the code determines that trademarks shall be revoked by the Turkish Patent and Trademark Office upon the request of interested persons, contrary to the (abolished) Decree Law No 556 on the Protection of Trademarks, which stated that a trademark may be revoked by the IP courts if the relevant conditions are met (see here).

The entry into force of Article 26 was postponed for seven years to give the office time to prepare to undertake such authority. During this period, the authority to revoke trademarks lay with the IP courts. As of 10 January 2024, the office took over the authority to revoke trademarks; however, as the relevant secondary regulation had not been published yet, the office accepted revocation requests only as "preliminary applications".

As 10 January 2024 approached, discussions got heated as to whether the administrative revocation of trademarks is constitutional As background information to these discussions, the Constitutional Court, upon the Istanbul Second IP Court's application, decided to annul Article 14 of the (abolished) Decree Law on the revocation of trademarks, by stating that:

- trademarks are property rights; and

- property rights can be limited only by law and cannot be limited by a Decree Law (see Article 35 of the **Constitution**).

Similarly, with regard to the Industrial Property Code, the issue of whether preventing the filing of a lawsuit was against the Constitution was subject to discussions. This time, before the office was able to use its authority to revoke trademarks, the Ankara Fourth IP Court applied to the Constitutional Court for the annulment of such authority, claiming that it violated the right to property, the right to legal remedies (see Article 36 of the Constitution), the right to equality before the law (see Article 10) and the binding force and supremacy of the Constitution (see Article 11).

Constitutional Court decision

In a decision dated 5 September 2024 (Merits No 2024/155, Decision No 2024/153), but released only recently, the Constitutional Court stated as follows:

- For a court to apply to the Constitutional Court, it must have a case that has been filed in accordance with the procedure anc falls within the jurisdiction of the court, and the rule requested to be annulled must be applied in that case.
- The case under consideration was a trademark revocation action filed as a counteraction to a trademark infringement case. Under Article 26/1 of the Industrial Property Code, the revocation request should have been filed before the office. In this respect, the trademark revocation action did not fall within the jurisdiction of the Ankara Fourth IP Court.

As a result, the Constitutional Court rejected the application for constitutionality review due to the court's lack of jurisdiction and dic not examine the merits – namely, whether the authority granted to the office for the revocation of trademarks is against the Constitution or not.

Dissenting opinion

The Constitutional Court's decision was not unanimous, with the dissenting opinion stating as follows:

- There are two prerequisites for courts to object to the constitutionality of a provision: (i) the existence of a pending case; and (ii) the provision must be the rule to be applied.
- There was no doubt that the provision requested to be annulled was the rule to be applied. Even if the court accepted the court action or decided that it had no jurisdiction, the court would use the relevant provision in a positive or negative sense. This made the provision a rule to be applied to the case concerned in every sense.
- As the authority to revoke the trademarks was transferred to the office as of 10 January 2024, the court, by claiming that this provision is unconstitutional, asked for its amendment.
- A case is deemed to have been filed on the date on which the petition is registered, and there was no doubt that there was a case filed in the present case. Moreover, this case was not filed as an independent case, but was put forward as a counteraction to a previously filed case and was directly related to the merits of the case.
- If the court's application were to be accepted and the provision annulled, the court would continue to hear the case, since the revocation authority granted to the office would be annulled.

Comment

The dissenting opinion is arguably correct as the main purpose of the Ankara Fourth IP Court was to annul the office's authority to revoke trademarks and retake such authority – and also to better understand and assess whether an IP court can still hear revocation requests filed as a counteraction, despite Article 26. The court's application sought to clear the way for the litigious examination of the revocation of trademarks, and the refusal of its application due to a lack of jurisdiction obstructs any possible application to review the constitutionality of the provision.

As mentioned in the dissenting opinion, even if the court rejected the revocation action due to a lack of jurisdiction, the provision applied would still be Article 26, and the case to be rejected is a pending/ongoing case. Indeed, the court's conclusion of a lack of jurisdiction also arises from Article 26.

On the other hand, based on the majority opinion, the only way for the IP courts to apply to the Constitutional Court for the annulment of the authority given to the office is to have at hand a cancellation action filed against the office's final decision in a revocation request. In such case, the IP court will have jurisdiction to hear the case and will be able to apply to the Constitutional Court. However, as there is uncertainty as to when the secondary regulation will be published and when the office will start examining revocation requests on the merits, such an opportunity may still be a long way off.

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