

Republic of Turkey
Council of State
Thirteenth Court Circuit
No: 2009/5805

Plaintiff requesting Stay of Execution: British American Tobacco
Defender: TAPDK (Tobacco and Alcohol Markets Regulatory Authority)

Summary: The plaintiff requests the cancellation and stay of execution of Paragraph 10 of amended Article 7 of By-Law Regarding Principles and Procedures for Methods of Production, Labeling and Inspection of Tobacco Products in View of Protection against Their Harms, as well as of Article 3 of TAPDK Decree dated 13 May 2009 and numbered 4721, which is based on the above paragraph.

ON BEHALF OF THE TURKISH NATION

The court made the following observations: Article 1 of Law Regarding the Prevention of Hazards of Tobacco Products No. 4207 provides that the objective of the Law is to take the necessary measures to protect persons against the hazards of tobacco products and against advertisement, promotions and sponsorship campaigns instigating addiction to these products. Article 2 makes provisions about how the use of tobacco products are to be banned. Article 3 makes provisions regarding the other protective measures. With regard to the warnings that are required to be put on tobacco product packages, Paragraph 3 of Article 4 provides that "Warnings or messages written in Turkish and framed with a special border stating the harms of tobacco products shall be put on the two widest surfaces of tobacco and tobacco product packets, which are produced in Turkey or are imported, covering not less than forty percent of the area of one of these surfaces and not less than thirty percent of the area of the other surface. These warnings are required to be put in the same manner on tobacco product boxes which contain more than one packet. Warning messages may be in the form of pictures, illustrations, and graphics. Tobacco and tobacco products which do not carry the warning messages cannot be imported and placed on the market." Paragraph (5), on the other hand, provides that "Issues pertaining to the legal warning messages mentioned in this Law, pictures, illustration or graphic messages shall be set out in a By-Law. This By-Law shall be published by TAPDK on the basis of the consenting view received from the Ministry of Health."

Article 2 of Law No. 4733 Regarding the Organization and Duties of TAPDK provides that TAPDK is founded as a public organization with administrative and financial autonomy in order to carry out the duties and make use of the authorities set out in this Law and in other laws. Subparagraph (a) of Paragraph 1 of Article 3 provides that TAPDK is authorized to make regulations regarding the duties assigned in this Law. Subparagraph (d) provides that notwithstanding the provisions of Law Regarding the Prevention of the Hazards of Tobacco Products, TAPDK is authorized to make regulations and to issue relevant decrees which shall prevent all types of public, societal or medical hazards. Subparagraph (e) provides that

TAPDK is authorized to make industrial regulations related to the implementation of this Law.

Article 4 titled "Definitions" of the By-Law Regarding Principles and Procedures for Methods of Production, Labeling and Inspection of Tobacco Products in View of Protection against Their Harms which was published in the Official Gazette numbered 27085 on 25 November 2008 and which was prepared parallel to the Directive No. 2001/37/EC of the European Union on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, provides: "Combined warning: shall mean the text of the additional warnings contained in the appendix of this By-Law, and the warnings composed of the text, photographs, illustrations and pictures contained in the source list. Source list: shall mean the list under which "combined warnings" are stored electronically by TAPDK. Paragraph 2 of Article 7 of the By-Law provides, that each unit packet of tobacco products, except for tobacco for oral use and other smokeless tobacco products, must carry on of the following general warnings: "Cigarettes/smoking kills," or "Cigarettes/smoking seriously harms you and others around you.", and one of the combined warnings. Paragraph 3 provides that the general warnings mentioned above shall be placed on the most visible wider surface of each unit packet of tobacco products and the additional warnings shall be placed on the other most visible wider surface of the same unit packets, that companies shall determine the sequence and duration of rotational use of general and additional warnings for each brand and inform TAPDK about this, that TAPDK may change the sequence and duration of use when deemed necessary, that these warnings shall be put on each individual unit packet of tobacco products excluding the transparent packaging wrap, and that TAPDK shall determine the positioning of these warnings on the surface of packets. Paragraph 5, which was amended in the By-Law published in the Official Gazette No. 27181 on 5 April 2009, provides that The general warning pursuant to Paragraph 2 of this Article and the warning for smokeless tobacco products mentioned under Paragraph 4 shall be required to cover not less than thirty percent (30 %) of the area of the wider outer surface of the unit tobacco product packet, and the combined warning to be printed pursuant to Paragraph 2 shall cover not less than forty percent (40 %) of the area of the other wider outer surface of the same tobacco product. It is required that the areas are calculated in the same manner for unit packets placed on the market which have more than two wider outer surfaces, or which may appear to have more than two wider outer surfaces, or the area of the most visible wider surface of which can be increased." Paragraph 10, on the other, which is under dispute, provides that the principles and procedures for the implementation of combined warnings shall be determined by TAPDK by way of obtaining the consenting view of the Ministry of Health.

A combined analysis of the above regulations indicates that TAPDK is authorized without question to make industrial regulations regarding the tobacco products market and to make regulations regarding the warnings and messages to be put on tobacco product packets pursuant to the Law. Given that, the rule brought forward by the disputed Paragraph 10 of By-Law 7 which stipulates that TAPDK shall determine the procedures and principles regarding the implementation of combined warnings based on its authorization, is found to be in conformity with the law.

With regard to Article 3 of the Decree of TAPDK dated 13 May 2009 and numbered 4721, which is requested to be cancelled:

It is understood that The Decree of TAPDK was issued based on Paragraph 10 of Article 7 of the By Law, in order to determine the procedures and principles regarding the implementation of combined warnings.

Article 3 of the Decree of TAPDK, which is requested to be cancelled, provides that “combined warnings shall be placed on the most visible wider front surface of unit packages of all tobacco products, except the smokeless tobacco products permitted to be placed on the market, to cover the top section of the surface starting from the line of lid opening or from the end line of the banderol.

Combined warnings shall be framed with a black border not less than 3mm and not more than 4 mm in width, interfering in no way with the text and/or pictorial components included in the warnings.

The surface area of combined warnings, including their black border, must cover not less than sixty five percent (65 %) of the total area of the surface they are placed on.

The most visible wider front surface shall signify, in the case of hard box packets, the side of the packet, from where it gets opened, and in the case of soft packets, any one of the most visible surfaces.

The most visible wider front surface for different packaging types, on which combined warnings are to be applied, shall be determined by TAPDK in the process of reviewing applications.

Combined warnings shall be positioned parallel to the upper edge of the surface on which they are applied and in the same direction as the other information contained on that surface.

Combined warnings must be irremovably and indelible printed. However, in the case of tobacco products other than cigarettes, they can be in the form of stickers, provided that such stickers are irremovable.

Combined warnings shall appear on the most visible wider front surface of tobacco products on a rotational basis.

Companies shall be required to plan and implement their manufacturing and importation programs in a way to ensure that each combined warning appears by 5 % to 9 % of the time during a period of 14 months and separately on each of the different types of products.

The principles and procedures set out in this Decree for unit packets of tobacco products shall also apply to product groupings.”

As it has been indicated above, Article 7 of the By-Law provides the rules for on which surface of unit tobacco product packets “the general and combined warnings” are to be placed, and authorizes TAPDK to determine the positioning of these warnings on the surface of the packets. As it is understood that Paragraph 1 of Article 3 of the Decree of TAPDK specifies the positioning of warnings on the surface of packets based on the aforesaid authorization, the said Paragraph is found to be in conformity with the law.

The rule introduced in Paragraph 2 of Article 3 of the Decree of TAPDK regarding the frame of “combined warnings” is also found in compliance with the law, given that Paragraph 3 of Article 4 of the Law provides that warnings are to be put in special frames.

With regard to the rule introduced in Paragraph 3 of the same Article providing that the surface area of combined warnings, including their black border, must cover not less than sixty five percent (65 %) of the total area of the surface they are placed on:

Paragraph 3 of Article 4 of Law No. 4207 provides that warnings or messages written in Turkish and framed with a special border stating the harms of tobacco products shall be put on the two widest surfaces of tobacco and tobacco product packets, which are produced in Turkey or are imported, covering not less than forty percent of the area of one of these surfaces and not less than thirty percent of the area of the other surface. Paragraph 2 of Article 7 of the By-Law provides that each unit packet of tobacco products, except for tobacco for oral use and other smokeless tobacco products, must carry on of the following general warnings: "Cigarettes/smoking kills," or "Cigarettes/smoking seriously harms you and others around you.", and one of the combined warnings. Paragraph 5 of the same Article provides that The general warning pursuant to Paragraph 2 of this Article and the warning for smokeless tobacco products mentioned under Paragraph 4 shall be required to cover not less than thirty percent (30 %) of the area of the wider outer surface of the unit tobacco product packet, and the combined warning to be printed pursuant to Paragraph 2 shall cover not less than forty percent (40 %) of the area of the other wider outer surface of the same tobacco product.

As it can be seen from the regulations mentioned above, with regard to the minimum space for warnings which need to be put on packets of tobacco products produced in Turkey or imported, a lower limit has been set and no limit has been set for the upper limit. However, regulations provide that combined warnings shall cover not less than forty percent of the outer surface remaining from the outer surface covered by the general warning. In this regard, the rule introduced in Paragraph 3 of the Article 3 of the Decree of TAPDK providing that the surface area of combined warnings, including their black border, must cover not less than sixty five percent (65 %) of the total area of the surface they are placed on, is found to be in contradiction of the Law No. 4207 as it obliterates the lower limit set out in the Law and in the By-Law.

The other paragraphs of Article 3 of the Decree of TAPDK do not contain any provisions which are found to be in contradiction of the law.

For the reasons explained above, the court has decided unanimously to reject the request of stay of execution of Paragraph 10 of Article 7 of the By-Law Regarding Principles and

Procedures for Methods of Production, Labeling and Inspection of Tobacco Products in View of Protection against Their Harms, as well as the request of stay of execution of the paragraphs of Article 3 of the Decree of TAPDK dated 13 May 2009 and numbered 4721, with the exception of Paragraph 3, and the court has decided by majority vote for stay of execution of Paragraph 3 of Article 3 of the aforesaid Decree of TAPDK.

Chairperson	Member	Member	Member	Member
Faruk	Turan	Zümrüt	H. Neşe	Gürsel
ÖZTÜRK	KARAKAYA	ÖDEN	SARI	MEKİK
			(X)	(X)

(X) Discordance votes: Given that the conditions mentioned in Article 27 of Administrative Adjudication Law No. 2577 have not come concomitantly into existence, we are not consenting to the ruling for the stay of execution of Paragraph 3 of Article 3 of the Decree of TAPDK dated 13 May 2009 and numbered 4721, as we are of the opinion that the request for stay of execution should be rejected.

Member	Member
H. Neşe	Gürsel
SARI	MEKİK