

**REQUESTING STAY OF EXECUTION**

**To the Presidency of Istanbul Administrative Court on Duty  
to be forwarded  
TO THE PRESIDENCY OF 11TH DEPARTMENT OF COUNCIL OF STATE**

**PLAINTIFF:** BRITISH AMERICAN TOBACCO

**REPRESENTATIVE:** Att. Gülcan İlkkutlu, Att. Hande Dilmen

**DEFENDANT:** TAPDK (Regulatory Agency for Tobacco and Alcohol Markets)

**SUBJECT OF LAWSUIT:** The abolition of the following:

- 1- Article 3 of TAPDK Decree dated 13 May 2009 and numbered 4721.
- 2- The legal grounds of the above Article, 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, which entered into force on the date of its publication in the Official Gazette dated 5 April 2009.

**DATE OF NOTIFICATION:** TAPDK Decree dated 13 May 2009 and numbered 4721, regarding the implementation 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, which entered into force on the date of its publication in the Official Gazette dated 5 April 2009, was published in the Official Gazette on 3 June 2009.

**EVENTS:** Article 3 of TAPDK Decree dated 13 May 2009 and numbered 4721 which identifies the principles and procedures for the implementation of combined warnings as established by 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 (the By-Law), which entered into force on the date of its publication in the Official Gazette dated 5 April 2009, makes the following provisions: "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." The abovementioned provisions are in contradiction of law, and as such, they constitute the subject matter of this lawsuit.

#### **LEGISLATION PERTAINING TO THE SUBJECT MATTER:**

TAPDK was established based on Article 2 of Law No. 4733 which entered into force on the date of its publication in the Official Gazette dated 9 January 2002. Article 3/d of the same Law stipulates that, "notwithstanding the provisions of the Law Regarding Prevention of Harms of Tobacco Products ("the Law"), making regulations and taking Decrees in order to prevent all types of public, societal or medical harmful effects caused by consumption of tobacco and alcohol" are among TAPDK's duties and authorities.

Paragraph 2 of Article 4, titled "Warnings", of Law No. 4207, providing, "The phrase of "Legal warning: Hazardous to health" shall be put on tobacco and tobacco products packets, which are produced in Turkey or are imported, in a clearly visible and easily readable manner. Tobacco and tobacco products which do not carry this phrase cannot be imported and placed on the market." was amended by Law No. 5727 published in the Official Gazette on 19 November 2008, which revised it under the heading of "Ensuring Control".

In Paragraph 3 of the same Article the following provision was introduced: "**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."

This is followed by the provision of Paragraph 5 of the same Article: "**Issues concerning the legal warnings and pictorial, illustration and graphic messages mentioned in this Law shall be set out in a By-Law.** This By-Law shall be issued by TAPDK, by way of obtaining the consenting view of the Ministry of Health."

The legal warnings and pictorial, illustration and graphic messages mentioned in this Law are identified as follows:

“Warnings for places in which the consumption of tobacco products are prohibited, stating the name of the legislation and the penalty consequences of violation of this legislation (Article 4/1)

“Warnings for places which are reserved for consumption of tobacco, stating the dangers of consuming tobacco (Article 4/1)

“Warnings to be used in places where sales of tobacco products are permitted (Article 4/2)

“Warnings and messages written in Turkish stating the harms of tobacco products to be placed on tobacco product packets which are produced in Turkey or are imported. (Article 4/3)

The Paragraph 5 of Article 7 of the By-Law, which was introduced as an amendment put into force on the date of its publication in the Official Gazette dated 5 April 2009, provides, “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 introduces the following provision: **“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.”**

The principles and procedures for the implementation of combined warnings were then determined by TAPDK in its Decree dated 13 May 2009 and numbered 4721.

## **JUSTIFICATION FOR ARGUMENT OF CONTRADICTION OF LAW AND REQUEST FOR ABOLITION**

### **A – CONTRADICTION OF LAW OF THE PROVISION OF THE BY-LAW**

Paragraph 3, amended Paragraph 2 of Article 7 of the By-Law published in the Official Gazette on 25 November 2008, provides that one of the two general warnings, “Cigarettes/tobacco kill” and “Cigarettes/tobacco seriously harm you and others around you” and one of the combined warnings shall be placed on unit packets of all tobacco product other than smokeless tobacco products permitted to be placed on the market; these general warnings shall be placed on the most visible wider surface of the unit packet of tobacco products, and additional warnings shall be applied to the other most visible wider surface; **the general warning introduced in Paragraph 5 shall cover not less than thirty percent of the area of the wider outer surface of the tobacco product packet and the combined warning shall cover not less than forty percent of the area of the other wider outer surface of the same tobacco product packet.** This is recognized as a provision parallel to the provision of Article 4/3 of Law No. 4207 which stipulates that warnings and messages written in Turkish shall be placed on one of the two wider surfaces of tobacco products covering not less than forty percent of the area, and on the other wider surface covering not less than thirty percent of the area.

The aforementioned provision of the Law differs from the Law in that it introduces the concept of **“combined warning” which does not exist in the Law.**

Article 4 of the By-Law defines the meaning of the combined warning as **a warning which is composed of the text of additional warnings and corresponding texts, photographs, illustrations and pictures contained in the source list contained in the Annex of the By-Law.** Paragraph 10, on the other hand, provides that **“the principles and procedures for the implementation of combined warnings shall be determined by TAPDK by means of obtaining the consenting view of the Ministry of Health.”**

Within the framework of provision of Article 4/3 of Law No. 4207, which stipulates that warnings and messages written in Turkish stating the harms of tobacco products shall be placed on unit packets of tobacco products and warning messages may be in the form of pictures, illustrations and graphics, **it is clear that, as understood clearly from the definition contained in Article 4 of the By-Law, the “combined warnings” are a type of warning which are composed of pictures, illustrations and texts and are based on this Law. In this respect, pursuant to Article 4/5 of Law No. 4207, they can only be put into effect through a By-Law to be issued by TAPDK by means of obtaining the consenting view of the Ministry of Health.**

By-Laws are regulatory administrative pieces of legislation which are put into effect within the framework of Article 124 of the Constitution. Even if they are issued by the same authority and through similar methods, in the hierarchy of norms, it is not possible to equate any lower regulatory piece of legislation to a By-Law. In this respect, **the provision of Paragraph 10, which allows an issue to be regulated by TAPDK and not with a By-Law, is in contradiction of law, given the fact that the Law says that this issue is to be regulated with a By-Law.**

Likewise, the rulings of some of the departments of the Council of State on similar issues have been also based on this principle:

[2 exemplary rulings of the Council of State are provided here to show whenever administrations tried to regulate an issue with a piece of legislation with a lower status than required, the departments of the Council of State ruled that those administrations were in contradiction of the law.]

## **B – THE PRINCIPAL/ESSENTIAL CONTRADICTION OF LAW OF TAPDK DECREE DATED 13 MAY 2009 AND NUMBERED 4721**

### **Legal Grounds**

The Decree of TAPDK dated 13 May 2009 and numbered 4721 is legally defective given that its legal basis, the By-Law, is in contradiction of law, as explained above. But the Decree is legally defective also in essence/principle.

In Law No. 4207, **while lawmakers did not define what the warnings and messages written in Turkish to be placed on tobacco product packets shall be, they made provisions on how they are to be placed on tobacco product packets.** According to this provision, warnings shall be placed on one of the two wider surfaces of packets covering not less than forty percent of the total area, and on the other wider surface covering not less than thirty percent of the total area, inside a special border.

What needs to be emphasized here is what it means “... not less than forty percent of the total area, and on the other wider surface covering not less than thirty percent of the total area”. Two interpretations are possible.

- a- This is a directive to producers about the area coverage of warnings indicating which minimum area coverage producers must use.

- b- This defines the lower limit for the area coverage of warnings, and TAPDK is authorized to define an upper limit to be determined in a piece of legislation. If this interpretation is seen as valid, the Administration must introduce definitely an upper limit to be defined in a By-Law, such as between 30 % and 65 %.

However, it is understood that we do not have here a lower limit, the upper limit of which can be specified by TAPDK, on the contrary, **it is a minimal area definition, with which tobacco product producers must comply when designing their packets, given the provisions “covering not less than forty percent (40 %)” in the By-Law, and “The area covered by combined warnings shall cover not less than sixty five percent (65 %) of the surface area, including the black borders” in the Decree of TAPDK, and “not less than” phrase used in the Law.**

For this reason, **the fact that the Decree of TAPDK dated 13 May 2009 specifies a new minimum area coverage by stating that combined warnings shall cover not less than sixty five percent of the total area of the surface they are placed on, including their black borders, is in contradiction of the Law and of the By-Law,** given that the Law provides that warnings and messages written in Turkish stating the harms of tobacco products are to be placed in special borders on one surface of tobacco product packets covering not less than forty percent of the area and on the other surface covering not less than thirty percent of the area, and the By-Law provides that the combined warnings shall cover not less than forty percent of the other wider outer surface of the same tobacco product packet.

#### **Use of power to regulate**

Even if one would consider for a moment that the Law provided that TAPDK was authorized to specify the principles and procedures for combined warnings, then this would raise the question whether TAPDK really used its power to regulate in accordance with the law.

In legal convention and theory, when the lawfulness of use of power is investigated, factors such as apparent error, being disproportionate, balancing, and reasonable measure are considered, and when these factors are found to exist, than it is concluded that the power to regulate has not been used objectively. The harmonization of basic human rights and the public good constitute one of the most important issues of democratic states and the rule of law. The principle of proportionality plays the leading role in the judicial examination of this issue. The principle of proportionality as in the meaning of the provisions of Articles 8 through 11, Articles 14 and 15, and Article 1 of Protocol 1 of the European Convention of Human Rights, is used by the European Human Rights Court and the European Court of Justice when ruling about sanctions and liabilities. The principle of proportionality is a fundamental principle of the European Union law and it has been incorporated in Article 13 and 15 of the Constitution regarding consumers as amended by Law No. 4709 dated 3 October 2001, and as such it acquired a positive basis.

The principle of proportionality which embraces the principles of measure, necessity, and availability in Constitutional law, is also used in administrative law as a tool to examine compliance with law. The examination of proportionality, which comes about especially with respect to limitations brought on basic human rights, often appears in the convention of Council of State rulings, where concepts such as fair balance, reasonable measure, comparison, and proportion are referred to.

What needs to be emphasized here is, considering that the manufacturing and sale of tobacco products is a legal activity in a legal product market, how one should establish a balance between the commercial activities of enterprises engaged in this industry and measures that need to be taken about effects of products on public health.

Article 3 of Law No. 4207, which describes protective measures, provides a list of the prohibited activities. These include the measure which indicates that tobacco products may not be advertised or promoted in any way by using the names, brands, or signs of tobacco products and of producer companies. However, the use of brand names and logos on the packets of tobacco products does not constitute advertisement or promotion. What has been prohibited is advertisement and promotion in any way by using the names, brands, or signs of tobacco products and of producer companies. Advertisement and promotion signify an activity carried out on media other than the product itself. The brand name, logo and other signs that exist on the product itself belong to the product, they convey the differentiating properties of the product to the consumer, and for this reason, they cannot qualify as advertisement. Article 4/4 of the Law prohibits only incorrect and incomplete information, and deceptive description, brand name, color, figure, and sign on tobacco product packets and labeling.

Brand name, logo and similar marks are signs that are used to distinguish the goods a commercial enterprise produces and puts on the market from similar other goods, and they are used to make the goods specific in the mind of the consumer. As such, they are intellectual and industrial property rights of their holder. The prevention of use of brand names, logos and similar other marks, as long as there are no legal restrictions, is in contradiction of Constitutional freedoms of property and work. Their use can only be restricted for the public good, pursuant to Article 35 of the Constitution.

For this reason, even though it is possible to narrow the area where the brand name is to be placed as a result of specification of the area for the warning on the packets of tobacco products on grounds of public health, the stipulation introduced in TAPDK Decree dated 13 May 2009, which requires combined warnings to be placed on the most visible wider front surface of unit packets of all tobacco products covering the top section of the surface starting from the line of lid opening or from the end line of the banderol and not less than sixty five percent (65 %) of the total area, creates a regime in which the warning message becomes the dominant visual aspect of the product. This, in turn, disregards the property rights of the producer and will result in eliminating market competition. As the suggested regime is void of any rational and reasonable basis for achieving the goal pursued by TAPDK, by infringing on the essence of the right, it does not satisfy the principle of proportionality.

## **CONCLUSION AND REQUEST**

Based on the reasons explained above, I respectfully request that the Court primarily decides for stay of execution of Article 3 of TAPDK Decree dated 13 May 2009 and numbered 4721, which is found to be in contradiction of the law, and the legal grounds of this Article, Paragraph 10 of the 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, which entered into force on the date of its publication in the Official Gazette dated 5 April 2009, and that they are abolished as the result of the lawsuit, and that the defendant administration assumes the judicial expenses and representation fees.

Representative of Plaintiff  
Att. Gülcan İlkkutlu

## **Appendices:**

1. TAPDK Decree dated 13 May 2009 and numbered 4721

2. By-Law Regarding Principles and Procedures for Methods of Production, Labeling and Inspection of Tobacco Products in View of Protection against Their Harms
3. Power of Attorney