

# Current Intelligence

## ■ Alternative dispute resolution system for disputes arising from '.tr' extended domain names in Türkiye

Internet Domain Names Regulation (herein after stated as 'Regulation')<sup>1</sup> and Internet Domain Names Dispute Resolution Mechanism Notice (herein after stated as 'Notice').<sup>2</sup>

### Legal context

#### Overview

On 14 September 2022, TRABIS ('.tr' Network Information System) took over the management of '.tr' extended domain names with the Regulation coming into force in Türkiye.

According to the Regulation, domain names can be allocated as documented or undocumented. Undocumented allocation is carried out within the framework of the 'first come, first served' rule. This rule is applied to domain names with the most commonly used extensions such as '.com.tr', '.org.tr', '.net.tr', etc. In the former legislation, it was necessary to prove (with documentation) that the owner of the domain name held another right (for example, trade mark, trade name, etc.) in order to obtain a domain name with the '.tr' extension. Therefore, the Regulation has an innovative perspective in terms of previous practice in Türkiye.

It is also possible to waive from domain names, as well as cancel them, according to the new Regulation. Waiver and cancellation of the '.tr' extended domains were also possible in the former legislation; however, there was no clarity regarding the waiver.

According to the new Regulation, in the case of waiver, the domain name remains suspended for 2 months. During the suspension period, the domain owner will be able to request the re-allocation of the domain name in their name by submitting a petition. At the end of

this period, the domain name becomes available for allocation to third parties. For the cancellation of a domain name, a court decision or an award from DRS Providers must be brought before TRABIS and the registrar. In case of incorrect or incomplete information, the domain name will be cancelled according to the Regulation.

That said, the sale of domain names will not be possible until September 2025, and the transfer of domain names will be possible until the same date only in the limited cases listed in the Regulation. Although Article 13 of the Regulation establishes that the sale and transfer of domain names is possible, in provisional Article 2 it is stated that sale of the domain names is not allowed for 3 years from the entry into force of the Regulation, and transfer of domain names is allowed only in the following cases:

- In the event of death, absence, presumption of absence of real persons (the owner of the domain name), the domain name can be transferred to legal heirs.
- Legal entities may transfer their domain name due to reasons such as mergers or acquisitions.
- Real and/or legal persons holding a trade mark and/or patent may also transfer the domain names of the trade mark and/or patent they own in case they transfer their rights regarding this trade mark and/or patent.
- Real and/or legal persons who have registered intellectual or artistic works may also transfer their domain names regarding their intellectual or artistic works, in case they transfer their rights regarding these intellectual or artistic works.

According to Chapter 6 of the Regulation, the alternative dispute resolution process for disputes arising from '.tr' extended domain names have begun to be carried out by the DRS Providers accredited by TRABIS.

Further, the provisional Article 3 of the Regulation stipulates that, in order for disputes to be resolved through DRS Providers accredited by TRABIS, the domain names subject to the complaint must have been obtained or renewed after 14 September 2022. This provisional article informs us that the only legal remedy currently available against domain names with '.tr' extension, obtained before 14 September 2022 and which has not expired yet, is filing a lawsuit before Turkish courts. However, possible litigation processes are beyond the scope of this article.

This note: (1) summarizes the alternative dispute resolution system regarding '.tr' extended domain names which came into force in Türkiye as of 14 September 2022; (2) examines the newly formed jurisprudence in accordance with the awards rendered by the Dispute Resolution Service Providers ('DRS Providers'), which started their duties with the entry into force of the new legislation and (3) addresses some of the current practical questions.

1 Full text of the Regulation is available at <https://www.resmigazete.gov.tr/eskiler/2010/11/20101107-2.htm> (accessed 1 November 2023).

2 Full text of the Notice is available at <https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=18750&mevzuatTur=Teblig&mevzuatTertip=5> (accessed 1 November 2023).

## Dispute resolution procedure of domain name disputes

Before summarizing the alternative dispute resolution process, it is necessary to examine how the parties give their consent to alternative dispute resolution before the DRS Providers. Accordingly, the complainant gives its consent to alternative dispute resolution while submitting its complaint petition to the DRS Providers. The domain owner however gives its consent to the alternative dispute resolution while applying to obtain the domain name from the registrar. In fact, according to Article 14 of the Regulation which was updated on 10 June 2023, the registration agreement between the domain owner and the registrar must include the clause, 'in case an alternative dispute resolution process regarding the domain name starts, the name, surname and e-mail information of the domain owner will be shared, and the domain owner will participate to the alternative dispute resolution.'

As of October 2023, there are two DRS Providers that have been accredited by TRABIS. One is BTIDER<sup>3</sup> and the other is TOBB UYUM<sup>4</sup> within the body of the Union of Chambers and Commodity Exchanges of Türkiye. When the complainant submits the complaint petition to one of either of these DRS Providers via the centres' website, the dispute resolution process begins. The language of proceedings is Turkish unless otherwise agreed by the parties. It must be noted that the Regulation does not restrict the language of proceedings. Therefore, in theory, it is possible for the parties to agree to any language for the proceedings.

After the dispute resolution process begins, the domain owner is notified within 3 days of acceptance of the complaint by the DRS Provider. The domain owner has 10 days to submit a response. It is important to note here that the 10-day period starts after the date of notification of the complaint and the period is 10 calendar days, meaning that weekends and public holidays are counted within these 10 days.

After the domain owner's response time expires or the domain owner submits their response to the complaint, there is a 15-day period for a panellist or a three-member panel (*the choice of which is left to the parties*) to render their decision. Within 10 business days from the notification of the decision to the parties, the decision of the panellist or panel will be enforced, unless one of the parties submit a preliminary injunction decision to the DRS Provider.

It should be noted here that, when specifying periods in the Regulation, the use of the expression 'business day' in some parts and the use of the expression 'day' in other parts leads to inconsistency and ambiguity. In this case, a calculation regarding the deadline is made by including weekends in the parts expressed as 'day', while in places where the expression 'business day' is used, weekends are not included in the calculation of the deadline. Similarly, it is unclear whether the periods start on the day following the date of the notification or on same date of notification. We believe that in order to eliminate these uncertainties and ensure integrity in the Regulation, the starting date of the periods should be specified clearly and whether 'business day' or 'day' should be applied when calculating the duration of the periods, in general.

The complainant is not able to apply to another DRS Provider regarding the same domain name until the first complaint is finalized before one of the DRS Providers. That said, there is no obstacle for the complainant to apply to another DRS Provider after the decision is rendered. In addition, there is no limit to the number of times the complainant can file a complaint before the DRS Providers, and although it is unlikely that the outcome of the complaint will change if there is no new information or document in the file; theoretically, it is possible to file unlimited complaints regarding the same domain name, since there is no restrictive provisions in the Regulation on this issue.

## Dispute resolution process for '.tr' extended domains in Türkiye

### Analysis

#### According to the legislation

It can be said that the amendments made within the scope of the Regulation and the Notice are quite parallel to Uniform Domain-Name Dispute-Resolution Policy (UDRP) system. Nevertheless, the Regulation has subtle nuances from the UDRP rules in terms of criteria for the examination of the complaints.

In this context, pursuant to Article 25 of the Regulation, if the following conditions exist together, the domain name subject to the complaint may be transferred to the complainant or cancelled depending on the complainant's request:

- (a) The domain name in dispute is similar or identical to the trade mark, trade name, business name or other identifying marks owned or used in commerce,
- (b) The party who has allocated the domain name does not have a legal right or connection with this domain name,

<sup>3</sup> BTIDER website: Available at <https://www.btider.org.tr/> (accessed 1 November 2023).

<sup>4</sup> TOBB UYUM website: Available at <https://www.tobbuyum.com.tr/> (accessed 1 November 2023).

- (c) This domain name must be allocated or used in bad faith by the domain owner.

The first point here is that, unlike UDRP rules, not only is the trade mark right taken into account when examining the priority rights of the complainant as per the first condition, but the complainant's trade name, business name or any other identifying marks used in the commercial life will be taken into account too.

We consider this issue as significant because in some cases, even if the rightholders have not registered a trade mark, they have the right to file a complaint regarding the domain names bearing the complainants' other marks used in commercial life.

Another important point relates to the bad faith examination. According to UDRP rules, the contested domain name must be both registered and used in bad faith. However, in the Turkish Regulation, the presence of one of these conditions is considered sufficient for the third condition to be met due to the use of the word 'or' in the legislation concerning the relevant condition.<sup>5</sup>

### According to the jurisprudence

In the period of over a year since the new legislation came into force, an applicable case law has started to develop with decisions rendered by the DRS Providers.<sup>6</sup>

With regard to the first condition, in cases of unregistered trade marks, proof of genuine use is required. In some cases, the existence of a trade mark application alone is not considered sufficient<sup>7</sup> to prove the previous right of the complainant. As parallel with the decisions rendered according to UDRP rules, the complainant's trade marks descriptive or non-distinctive characteristics, are not taken into account as a factor in the examination of the first condition.<sup>8</sup>

It is seen from the precedents that the trade names of the complainant's are also taken into account in the examination of the first condition even if the complainant has no other rights<sup>9</sup> as stipulated under the Regulation. Again, it is seen that business names, which are the names used to identify the business and to distinguish between

different businesses in the same industry, are also taken into account in terms of fulfilling the first condition.<sup>10</sup> In addition to these, the names used in artistic activities, such as pseudonyms, are also taken into account as 'other identifying marks',<sup>11</sup> as well as the previous dated domain names<sup>12</sup> of the complainant.

As can be understood from precedents, there is a broad perspective in the examination of the first condition. We believe that such a broad examination is a significantly positive development, especially in cases where the previous right holder does not have a trade mark registration but has other rights.

In terms of the interpretation of the second condition, there does not appear to be any difference from the decisions in which UDRP rules are applied. In cases where the complainant can prove at first glance that the domain name owner does not have a legitimate right, the burden of proof for the second condition falls on the domain owner.

As for the third condition, as mentioned above, either the domain name should be registered or used in bad faith. Here, it is seen that many different factors are taken into account in the precedents for the determination of bad faith.

For example, in some decisions, the fact that the domain owner stated that they wanted to transfer the domain name to the complainant in their reply was considered as an indication of bad faith.<sup>13</sup> In some cases, the domain name is considered to have been allocated in bad faith, by taking into account the allocation time of the contested domain name, along with other elements, if it has been obtained after the new regulation with the 'first come, first served' rule coming into force.<sup>14</sup> In addition, the fact that the domain name owner did not share full and real information while obtaining the domain name was taken into account as an indication that the domain name was allocated in bad faith,<sup>15</sup> as well as the domain name owner's other domains which had also been allocated in bad faith.<sup>16</sup>

Regarding the third condition, we believe that a holistic examination is made in terms of bad faith. In fact, the separate examination of obtaining or using the domain name in bad faith may assist panellists on a panel to render

5 Art 25 of the Regulation: '[...] This domain name must be allocated or used in bad faith by the domain owner.'

6 The awards rendered by TOBB UYUM are available at <https://www.tobbuyum.com.tr/kararlar.php> (accessed 1 November 2023).

The awards rendered by BTIDER are available at <https://www.uysmazlik.com.tr/karar-panosu/> (accessed 1 November 2023).

7 TOBB-UYUM-2022-82 'mtech.com.tr' [2022].

8 TOBB-UYUM-2022-000015/'tatildeyiz.com.tr' [2022]; TOBB-UYUM-2022-89/'implantturkey.com.tr' [2022]; TOBBUYUM-2022-(111)/'ismakinasiyedekparca.com.tr' [2022];

UCM-2022-00009/'tesekkur.com.tr' [2022]; UCM-2022-00028/'izmirpsikiyatrist.com.tr' [2022].

9 UCM-2023-00018/'hazera.com.tr' [2023];

UCM-2023-00048/'lazersan.com.tr' [2023].

10 TOBBUYUM-2022-(143)/'bahels.com.tr' [2022].

11 UCM-2023-00080/'mabelmatiz.com.tr' [2023].

12 TOBBUYUM-2023-(169)/'mossta.com.tr' [2023]; TOBBUYUM-2022-(143)/'bahels.com.tr' [2022]; UCM-2022-00010/'hangi mlak.com.tr' [2022].

13 TOBBUYUM-2022-(125)/'biblosresorts.com.tr' [2022].

14 TOBBUYUM-2023-(224)/'tarte.com.tr' [2023].

15 UCM-2023-00065/'ayaginagelsin.com.tr' [2023].

16 TOBBUYUM-2023-(243)/'supersube.com.tr' [2023].

fairer decisions in cases where the domain owner's bad faith is under question.

### Broader practical significance

We would like to emphasize that a significant innovation is the case in Türkiye, in terms of both the acquisition of '.tr' extended domain names and the resolution of disputes arising from them when we compare the new legislation and interpretation to the old practice. As of September 2023, domain names with '.tr' extension only (without top level domains such as '.com', '.org' or '.net') have also started to be allocated by the registrars and thus, we assume that domain name disputes will gradually increase over time.

However, it should be noted that there are some shortcomings in the new regulations. One important example would be the fact that the process that results in the cancellation and transfer of the domain name, which is a property right (and which would be taken to mean the

termination of the property right), is regulated by a regulation, not a law, creating a lacuna in law in terms of current practice.

In addition, the inability to apply to DRS Providers under terms of existing legal regulations against domain names purchased/renewed before 14 September 2022 forces the right holders to pursue a significantly time consuming and gruelling litigation process, which in turn leads to doubts and concerns for the right holders to take action against the domain names that violate their rights.

All that said, it is expected that these deficiencies will be completed so that the new process in '.tr' extended domain names will be integrated in a wider scope.

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