



## **IMPACTS OF CONSUMER LAW NO 6502 ON INSURANCE ACTIVITIES: COMPARING WITH EU LAW**

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### **Abstract:**

*As is often the case in many developed and developing countries, in our country, too, the consumer is protected and the extent and limits of this protection is expanding day by day. The last step in this direction was the Law on the Protection of Consumers No 6502, which entered into force on 28.05.2014 and provides important changes and developments. While these developments were achieved within the scope of the consumer legislation, in the insurance legislation area a strong protection has been brought comprising all insurers/insured which is independent from this and is not limited to the consumers. While this protection has been brought onto a new level with the Law on Insurance no 5684 which entered into force in 2007, it has been reinforced with the Turkish Law on Trade entering into force in 2012. While the Law on the Protection of the Consumer No 6502 provided a protection outside the insurance legislation for consumer insured it also has brought about diffused accountability in terms of implementation of the legislation. The most important common issue in terms of legislation developments in the insurance and consumer legislation is the effort to reflect the principles, rules and developments accepted for consumers and insurance products/services in the European Union Acquis to national law. In this context our study has been assessed together with the principles and implementing procedures accepted by the Consumer Law in terms of insurance activities and the regulations included in the Insurance Law and related secondary legislation ("Insurance Legislation"). Meanwhile an attempt has been made to refer to the relationship between insurance and consumer legislation within the scope of the EU legislation.*

### **Keywords:**

Distance Marketing, Insurance, Consumer, Directive on Distance Marketing of Financial Products, Law No. 6502, Turkish Insurance Legislation

## **1. A General View of Insurance Activity by Consumer Legislation**

With the Consumer Act, no doubts remain that insurance activity is clearly made subject to legislation scope. Prior to this Act, for a long time, the Supreme Court of Appeals had held that insurance contracts had a commercial nature as they were regulated in the Commercial Act and could not be regarded as consumer contracts<sup>1</sup>. In fact, the protection provided by the insurance legislation, adequate protection is provided and furthermore, this protection is provided by taking into consideration characteristics of the insurance contract. Therefore, it would be more accurate and appropriate to take advantage of provisions foreseen to protect the insured, rather than general provisions foreseen to protect the consumer<sup>2</sup>. However, in this new process to be experienced with the Act no 6502 On the Protection of the Consumer, it should be expected that present evaluations and approaches on time change significantly with practice.

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1 11.HD., E.2000/10656, K.2001-197, T.18.01.2001: 27(2001)6YKD. S. 855-857.

2 EKŞİ Nuray, Prof., Law Applicable for Insurance Contracts with Foreign Factors In Turkish and European Union Law, 1st edition, January 2012, p.18.

While the Consumer Act also regulates financial services including insurance, in its general justification, one of the most important objectives in going for a change in law is stated to be the transposition, into national law, of the Directive no 2002/65/EU on the Marketing of Financial Services, Directive no 2005/29/EU on Unfair Commercial Practices, Directive no 2008/48/AT on Consumer Credit Contracts, Directive no 2008/122/EU on Resale and Change Contracts for Time Share Vacation and Long Term Vacation Products, Directive no 2001/83/EU on Consumer Rights which the EU has issued recently.

In this framework, even though it is expressed that the Directives were reviewed and our national law is shaped accordingly, it is seen that the systematic structure which systematically regulates in separate texts and thus distinguishes the distance marketing of financial services and the regulations relating to the protection of the Consumer<sup>3</sup> was abandoned during transposition into our national law and that financial services were also regulated within the general consumer legislation protection. The most important adverse result of this is that financial services were also entirely included in the provisions on the general consumer protection and against this, in the regulation of many provisions which have become practicable, financial services were not taken into consideration. On the other hand, it is understood that this transposition has been made without taking into consideration the legislation, for example, in the field of insurance, by only taking into consideration the Consumer Legislation to the evaluation and transposition in a limited scope. For example the Directive 2002/65/EC of the European Parliament and of the Council of 23.9.2002 Concerning the Distance Marketing Of Consumer Financial Services and Amending Directives 90/619/EU, 97/7/EU and 98/27/EU<sup>4</sup> (“Distance Marketing Directive”), has been transposed under the Insurance Legislation and in fact, even though partially, the Turkish Commercial Act “Insurance Book” to our domestic law to a large extent and without being limited to the consumer. When transposing this Directive, a regulation was brought about without building adequate connection, and in fact without taking into consideration at all, any letter regulation which takes into consideration the same Directive and which has been regulated including the Regulation on the Information of Insurance Contracts under Insurance Legislation<sup>5</sup> and Article 1423 of the Commercial Act<sup>6</sup> However, while it was sufficient to make the effort of detailed regulation on this subject under the Insurance Legislation which specifically regulates and to that end, to made a reference to the said legislation or holding it reserved<sup>7</sup> a second regulation was brought on the same subject which is independent of that and which separates from place to place. Furthermore, when insurance companies are implementing these articles they shall need to make a distinction based on, and take into consideration whether the policy owner/insured is a consumer, which will make it even more difficult to implement and construe together these two separate regulations. On the other hand, as it was not foreseen that provisions of Article 17 et seq. of the Consumer Act could not be applied to insurance contracts as a financial service<sup>8</sup>, in the face of the fact that the present provisions have not taken into consideration, aside from the corresponding regulations in the Insurance Legislation, insurance practices and precedents on the insurance product and insurance service where the premium is generally paid by installments, it is a significant problem experienced in practice and legal aspects.

3 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council) (“Consumer Rights Directive”) According to Article 3, paragraph d, financial services are outside of the Directive scope. [http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index\\_en.htm](http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm).

4 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directive 97/7/EC and 98/27/EC

5 OG 28.10.2007 – 26684.

6 Even though in the Consumer Act General Reasoning the existence of the Code of Obligations and Commercial Act drafts existing at the same time and that they have been taken into account are mentioned, it is evident that they have not been taken into account adequately or ever.

7 Even though only in Article 49 (5) of the Consumer Act special arrangements have been reserved by saying provisions in favor of the consumer are applications to insurance contracts and, in contracts related to individual retirement, on the other hand, those given in other legislation regarding the period for backing-down, apart from this no special provisions have been reserved in any other place in the Consumer Act.

8 Even though in the article's reasoning it is stated that financial leasing contracts are explicitly included in the scope, there is no arrangement that other financial services have not been included in the scope.

Likewise, how a defective service in an insurance product shall be and particularly, how the consequences foreseen under Article 13 of the Consumer Act shall be applied seems to be another similar problematic area which is not easy to resolve.

However, at this point, by secondary regulations brought by the Undersecretariat of Treasury's General Directorate of Insurance, which is the regulatory and controlling authority for Insurance activity, it is seen that the deficient style of viewing regarding the insurance activity in the Consumer Act is also being shown against the Consumer Legislation. For example, in the Regulation 9 on Activities to be Considered within the Scope of Insurance, Insurance Contracts Made in Favor of the Consumer and Insurance Contracts Made from Distance, which was published by the Undersecretariat of Treasury a short time before 28.05.2014 which was the date the Consumer Act entered into effect, both in its definitions article, article 4(f) and in Part 3, where Insurance Contracts Made in Favor of the Consumer and Insurance Contracts Made from a Distance are regulated, it is seen that article 49, regarding the distance sale of financial services, of the Consumer Act which was to enter into effect just one month later was not taken into consideration. This difference arises, for example, from the definitions article which is the start of the work. While in article 4(f) of the said regulation, "Distance contract: contracts drawn up in written, visual, telephone and electronic media or by using other electronic communication instruments without the contracting parties coming face to face"; in Article 49 of the Consumer Act, in turn, it is defined as "Distance contract relating to financial services are contracts drawn up through the use of remote communication tools between the provider and the consumer within the frame of a system created for the remote marketing of financial services."

## 2. Place of The Consumer, and Consumer Legislation in Terms of Insurance Legislation

At a time the Insurance Act which entered into effect in 2007 involved ambiguity in terms of the insurance activity of the prior Act on the Protection of the Consumer No 4077, a relationship was established in terms of the application of the Consumer Legislation by referencing such provisions of the Consumer legislation which are applicable in terms of insurance. Such arrangements included in the Insurance Act<sup>10</sup> can be grouped under the following headings:

Insurance Agency – Insurance Act Art. 23 (9) / has held services offered due to agency activity as defective service under article 4/a of Consumer Act no 3077<sup>11</sup> and regulated them to be subject to the consequences of said provision. With this form of regulating, it was penned in a manner which can be applied for the defective rendering of the agency's intermediating service to all insureds in the sense of the Consumer Act without regards to whether they are a consumer. On the other hand, due to the insured not resorting to legal processes in disputes arising from the insurance contract even in cases it went into the insurance company's responsibility and the agency could be responsible, no court decision or application was found regarding the application of Paragraph 9 of Article 23. Along with this, what the said intermediating service is and how the said provision and especially its consequences shall be applied to that is a legal matter which needs to be separately considered. Arbitration in Insurance - Insurance Act Art. 30 (14) / One of the preconditions for referring to the Insurance Arbitration commission foreseen with the Insurance Act is that the issue has not been previously submitted to the arbitration committee for consumer problems. In this manner among the alternative judicial systems the existence of consumer courts is also accepted. Goodwill - Insurance Act Art. 32 / Complaints pertaining to announcements and advertisements are regulated to the notified to the advertising board operating pursuant to the Consumer Act. Accordingly, insurance companies and intermediaries may not arrange their brochures, prospectuses and other documents and their announcements and advertisements of all kinds in a manner to cause an understanding which is outside of the limits and scope of the rights and benefits they shall provide for the insured with their undertakings and may not make statements to persons and organizations which are contrary to facts,

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9 OG 28982 / 25.4.2014.

10 Even though the Activities To Be Appraised Under Insurance are mentioned in the insurance contracts made in favor of the consumer in Article 8 of the Regulation On Insurance Contracts Made In Favor Of The Consumer And Insurance Contracts Made From A Distance (OG 28982 / 25.4.2014), it has been stated in the Sector Announcement no 2014/22 of the Undersecretariat of Treasury that this expression "consumer" does not mean a consumer in the sense of the Consumer Legislation and that the concept of contract made in favor of the consumer is an application of the contracts made in favor of the third person specified in the Code of Obligations and it is valid for all contracts made in that scope.

11 This article corresponds to article 13 of the new Consumer Act no 6502.

misleading, deceptive and causing unfair competition. In the event of finding contrariety to this provision the case is reported to the Advertising Board operating pursuant to the Act on the Protection of the Consumer. Apart from this regulation found in the Insurance Act, the “Insurance Book” section of the Turkish Commercial Act entered into force in 2012, has explicitly set forth the presence of the Consumer Legislation in insurance contracts, even if by a single article. According to the said article, Obligation to Elucidate – Commercial Act Art. 1423.(3) / the Undersecretariat of Treasury determines the form of the announcement to elucidate the consumer by taking into consideration the regulations of various countries and particularly, the European Union.

### 3. Principles Regarding Carrying the Consumer Act into Effect

As with all law amendments, here also the question of what the position of the act and its consequence will be in the face of exiting practices comes to the fore. The answer to that, in turn, is given in the Consumer Act Temporary Article 1. As per the said article the following procedures and principles have been specified:

- 3.1 For the consumer transactions prior to the date on which the Consumer Act entered into effect, whether they are binding and their consequences, *as a rule*, the provisions of such law are applied which was in effect when such transactions were realized. However: such provisions which are contrary to this Act of such contracts which were drawn up before the date the Consumer Act entered into effect and are still valid, are not applied starting from the effective date. If foreclosures and lapse of time periods which had started running before the date the Consumer Act entered into effect have not expired, the foreclosure or the lapse of time expires with the passage of the time foreseen in this Act.
- 3.2 Lawsuit brought before the date the Consumer Act entered into effect continue to be heard at the court to which they were brought.
- 3.3 Until the regulations foreseen in the Consumer Act enter into effect, such provisions of such regulations and other legislation which are repealed with this Act and which were issued on the basis of the Act on the Protection of the Consumer which are not contrary to this Act are applied. However, with new regulations having been published on miscellaneous dates as of the date of this student, the said provision has found field of application for a short time.

In this framework in terms of this law amendment and of determining according to which consumer law one is to act in the transition period on the starting of the application of the new law, firstly the date of the transaction and/or the date of the lawsuit and the date on which the Consumer Act enters into force should be determined and according to this the rights and obligations should be determined to the requirement of the above paragraphs.

### 4. Insurance Activity in Consumer Legislation and Qualification and Area of Application of Insurance Contract

Insurance activity in Consumer Act and the conditions for qualifying and applying the insurance contract within the frame of related provisions can be collected under the following headings:

- 4.1 Insurance can be a consumer transaction. According to Article 2 (1) of the Consumer Act, the field of application of this Act covers all manner of consumer transactions and applications directed at the consumer. Consumer transaction in turn, means, according to article 3(1) of again the same act, all kinds of contracts and legal transactions in goods or services markets which are drawn up between real or legal persons acting in commercial or professional purposes or acting in their name or account, including public legal persons and consumers.<sup>12</sup> Within the scope of this definition insurance contracts are now also accepted explicitly as a consumer transaction.
- 4.2 Insurance is a Service. According to article 3(1) item (d) of the Consumer Act, “Service” comprises the subject matter of all kinds of consumer transactions, outside of goods provisioning, performed or undertaken to be performed in return for a fee or interest.

In this framework, insurance contract, as a consumer transaction is included in the service scope.

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<sup>12</sup> In the reasoning of Article 3 of the Consumer Act, it is stated that with this definition, interpretations arising from the application and narrowing the scope of consumer contracts would be prevented.

- 4.3 Insurance is a Financial Service. In the Consumer Act “Financial Services” were defined, not in the definitions article, but in its article 49.<sup>13</sup> In fact, definition in this manner also reveals the ambiguity of the intention of the lawmaker regarding how they wanted to position the financial services, which also included insurance, within the Consumer Act. According to this article, financial services means all kinds of banking services, service related to credit, insurance, individual retirement, investment and payments.
- 4.4. The Pre-condition of Being Able to Apply Consumer Legislation to Insurance Contracts is the Policy owner/Insured Having the Quality of “Consumer”. Even though Insurance is accepted as a consumer transaction in the sense of the Consumer Act in Insurance contracts, the other important condition in terms of the Consumer Act finding an application area in insurance is that the policy owner/insured having a consumer quality in the sense of article 3 (k) of the Consumer Act. According to article 3 (k) of the Consumer Act, “Consumer” means real or legal person acting on purposes which are not commercial or professional<sup>14</sup>. In the reasoning of the said article, even though one of the essential amendments made to the definitions article is expressed to be exclusion of the notion of legal person from the notion of a consumer, based on the expression “acting on purposes which are not commercial or professional” in the article, it is understood that the legal persons meant here rather means those listed in Article 16 of the Commercial Act no 6102. According to the said Article 16, as, commercial companies; foundations, associations operating a commercial business to achieve their objectives, and Organizations and enterprises founded by the State, Provincial Special Administrations, municipalities and villages and other public legal persons to be managed according to private law provisions as per their own founding laws or to be commercially operated are also deemed to be merchants. They shall not be considered within the scope of consumer<sup>15</sup>.

This definition does not fully respond to the cases where “Group Insurance Contracts” are in question in the sense of Art. 1496 of the Turkish Commercial Act no 6102. According to paragraph 1 of the said article, insurance can be taken with a single contract in favor of persons included in a group, which consists of at least ten people and which has the possibility of being designated by the policy owner as to who comprises it according to certain criteria. Particularly, in cases where a commercial company is the policy owner and designates its employees as the insureds and takes out health or life insurances, according to whom shall the “consumer” definition be determined. On the other hand, moreover, in cases where a real or legal person is appointed as the beneficiary. On the other hand, in cases where, moreover, a real or legal person is appointed as the beneficiary according to the Commercial Act no 6102 and this particularly is the company taking out the insurance or a person of a miscellaneous merchant qualification it may become even more difficult to determine whether they are the consumer. The simplest solution in that case shall be to decide through a determination of whether the person to whom the amount or indemnity in the insurance contract shall be paid falls within the “Consumer” definition according to article 3 (k) of the Consumer Act.

- 4.5. The Consumer Legislation may, principally, be applied to insurance contracts in all cases where it is not explicitly excluded. The Consumer Act has not provided for a systematic regulation with respect to which provisions cannot be applied in terms of insurance activity and insurance contracts. As a principle in the circumstances, all provisions which are befitting in content may be applied also for the insurance activity and insurance contracts. When viewed in this scope, the sole article where it is explicitly excluded is

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<sup>13</sup> The definition given in the Consumer Rights Directive, Article 2, Para. 12 and the Distance Marketing Directive Article 2, item (b) has been taken in to our domestic law. (“financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature.) <http://eur-lex.europa.eu/LexUriServ/>

<sup>14</sup> However, according to Distance Marketing Directive Article 2, item (b), “consumer” means the **real person** starting contractual relationship outside of their own commercial purpose, craft or profession within the contracts specified in this Directive, and legal persons are excluded from this. (“**consumer**” means any **natural person** who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession). <http://eur-lex.europa.eu/LexUriServ/>

<sup>15</sup> At this point, the provision of Article 16 (2) of the Turkish Commercial Act No 6102 should not be overlooked in this appraisal. According to this Article, it has been stipulated that the State, City Private Administration, municipalities and villages and other public legal persons and associations operating for public benefit and foundations spending more than half of their income to works qualifying as public duty, shall not themselves be considered as merchants whether they operate a commercial enterprise either directly or by hand of a legal person managed and operated according to the provisions of public law.

regulated as the “Contracts drawn up outside of the work place” in Article 47 of the Act of the Consumer no 6502 16. Pursuant to Para. 7 of the same article, the Ministry of Customs and Trade is authorized to establish, by regulation, the application procedures and principles including but not limited to which contracts shall be kept out of scope. As per this authority, as per Article 2, Para. 7 item (a) of the Regulation on Contracts Drawn up Outside of the Work Place<sup>17</sup>, it is regulated that also for insurance contracts within the scope of Financial Services, the provisions of this Regulation may not be applied. In fact, it needs to be expressed that, of the insurance activity, the marketing and sales, which are realized especially through intermediaries, are realized within the scope of contracts drawing outside of the work place and therefore, if this exception was not given, the principles brought by the said provision, despite not very suitable for insurance contracts, would have to be applied and by this significance the importance of protecting this exception in the new regulation.

### 5. Insurance as an Alternative “Guarantee” in Consumer Legislation

The Consumer Act has, in terms of certain sales types, foreseen the provision of one of a certain type of assurances from the seller/provider to the consumer against the situation that in particular, the seller/provider fails to satisfy its undertaking for certain reasons, including bankruptcy. In this scope, it is expressed that building completion insurance has also been brought as an alternative assurance in view of practices around the world.

In this framework, for projects above a side to be determined according to the criterion of the no of residences in the project or the total price for the project, an obligation was brought to the seller to provide an assurance before starting sales, as per Art. 42 of the Consumer Act, for residential sales with pre-payments, and with Article 50 Para. 8,<sup>18</sup> for Time Share Vacation and Long Duration Vacation Service Contracts.

Assurances outside of insurance, according to the reasoning of the said articles, items such as the progress system determined by the Ministry of Customs and Trade, tied loan, prepayment amount have been specified. For which situations the seller provides this assurance, in turn, is not clearly set forth in the act's articles. Again in the reasoning of the said articles, it is stated that, against the payments which the consumers have made, it is intended to take under assurance either the their acquisition of the residences for which they have insured, or own the time share property, or the monies they have paid, and, even though the bankruptcy of the seller is mentioned among the causes which shall result in this situation, no limitation has been brought on this subject in the articles given in the act.

Again, according to the said articles, the indemnity, assurance and similar guarantees provided within the scope of building completion insurance provided within the scope of these articles, may not be included in the bankruptcy or liquidation desk, may not be seized, and no provisional injunction and provisional attachment may be placed on them.

The Undersecretariat of Treasury has, according to the same articles, the authority to determine the scope of the said insurance, its conditions and application principles. In this scope, the Building Completion Insurance General Conditions in relation with the sale of residences with prepayment has been published by the Undersecretariat of Treasury on 11.03.2015<sup>19</sup>. According to these general conditions, the subject of the insurance shall be the provision of assurance, according to these general conditions and the policy special conditions, to the beneficiaries specified in the assurance account, in the event the seller cannot complete the project, specified in the policy, which is the subject of the residence sale with prepayment, for reasons of the seller going bankrupt or the real person seller dying or declared disappeared. With this insurance, the insurance company shall issue a policy for the project which is the subject of the

<sup>16</sup> In the reasoning of the Consumer Act article 47 this change has been explicitly stated and it is stated that it has been harmonized with the Directive 2011/83/EU of the European Parliament and the European Council on Consumer Rights dated 25.10.2011.

<sup>17</sup> OG 29236 /14.01.2015.

<sup>18</sup> On this subject additionally the Regulation on Time Share Vacation and Long Term Vacation Service Contracts Regulation (OG 29236/14.01.2015) was published.

<sup>19</sup> These general conditions were regulated to also include Time Share Vacation and Long Term Vacation Service Contracts and were put into effect to start from 16.03.2015.

residence sale with prepayment and allocate a general assurance limit to the seller, and after residence sales are made to the consumers within the project scope, it shall issue and give an independent surety bond for each consumer, with the residence price being the top limit.

## 6. Prohibition on Compelling Insurance in Consumer Legislation

In Article 32 Paragraph 5 of the Insurance Act, a prohibition has been brought that the right of persons to select their insurance company cannot be restricted and that within the elements of a contract, in cases where one of the parties is compelled to take out insurance in any matter given in this contract, all kinds of conditions placed regarding the insurance in question being taken from a specific company shall be deemed void. A similar regulation has been brought in paragraphs 2 and 3 of article 10 of the Regulation on Insurances Connected with Personal Loans. According to these regulations, in turn, in mandatory or voluntary insurances, the right of the person using the credit to select the insurance company may not be restricted. All manner of conditions put in the insurance contract or in the credit contract, regarding the insurance to be taken from a specific insurance company, are void. The credit organization informs the credit user that the insurance may be taken out by them or by another insurance broker. The credit organization is obliged to accept the insurance policy which the person using the credit has taken out through another insurance company or insurance broker and which contains the requested coverage.

However, the Consumer Act has brought another prohibition that is different from this prohibition in the Insurance Legislation. It has been regulated that no insurance can be made in relation with the credit without the consumer's explicit request, either written or via the permanent data register, for Consumer Credit Contracts, in Article 29 of the Consumer Act and in Article 26 of the Consumer Credit Contracts Regulation (the "Credit Regulation")<sup>20</sup>, and in its Article 38, in turn, for Residence Financing Contracts. The only way to forestall this prohibition, on the other hand, as foreseen again in the same articles, is the consumer's explicit request. However, even in such a case, again as foreseen in the insurance legislation, it is requisite that the coverage which the consumer has obtained from the insurance company they wish is accepted by the creditor.

In the event the consumer wishes to take the insurance from the insurance company brokered by the creditor, on the other hand, as per Articles 29 (Credit Regulation art. 26) and 38 of the Act mentioned above, this insurance should be matching the credit subject, for amount insurances the remaining debt amount, and its due date. In the sense of explaining this article, the Undersecretariat of Treasury has published the Sector Announcement no 2014/18 on 25.08.2014. According to this Announcement, it has been expressed that the matter of "contracting for long term or with renewal to fully cover the credit period", for insurances where the insurance term is not equal to the credit period and contracted with renewal, by taking into consideration the time remaining until the end of the credit period in the final renewal term, it should be ensured that the credit period and the insurance term are matching and in a sense, to be understood as issuance of insurance contracts with a term of less than one year<sup>21</sup>.

According to the Article 26 Para. 2 of the Credit Regulation, additionally for amount insurances which are made with credit connection, in cases where the credit debt is repaid before maturity or a change occurs to the credit debt structure, the insurance contract is terminated. However, provided that at the time such transactions are realized the consumer is additionally informed by the creditor and their explicit approval is obtained, the policy may be continued with existing terms or based on the change made to the credit debt structure, the existing insurance policy coverage amounts and the insurance term may be rearranged. In Article 29 of the Consumer Act in the event of breach of

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<sup>20</sup> OG 29363/22.05.2015.

<sup>21</sup> Additionally in the same Announcement, it is stated that based on the fact that insurance contracts connected with existing credits as of the effective date of the Consumer Act it was found necessary they have to be harmonized with the consumer credit and residential financing contracts to which they are attached to in terms of the credit remaining debt amount and credit maturity, annual or long term insurance contracts for which the credit maturity and the insurance term are not compatible in this sense have to be terminated, in the event of request from the insured when the credit maturity expires, with other requirements remaining reserved, by making a premium return or paying surrender value and that in this framework insurance companies and also the credit organizations having agencies need to take measures along these applications. <http://hazine.gov.tr/default.aspx?nsw=TrR3vg8KCNGoDQ4jjQvkw-H7deC+LxBI8=&mid=366&cid=35&nm=647>.

Consumer Credit Contracts and the obligation in its Article 38, by the Ministry of Customs and Trade, as per Consumer Act art. 77(3), for those whose breach has been determined, the administrative fine foreseen in again the same article shall be applied (TL 1.162 for year 2016) **for each transaction or contract** determined to be in breach<sup>22</sup>.

## 7. Impact of Consumer Legislation on Informing, Bidding and Drawing up for Insurance Contract

**7.1. Avoiding Sale.** The Consumer Act amendment, even though does not bring a significant change in the sense of the content of Article 6 of the Consumer Act, in the face of insurance being deemed also a service as a credit transaction, it is evident that it shall be implemented. In that sense, it would be advisable for insurance companies to review their proposal processes directed at the credit based on this article and revise by more clearly setting forth their conditions for their services to be displayed, and the justified reasons for rejecting (by also taking into consideration insurance practices and precedents); because, according to Paragraph 2 of the said article, it shall not be possible to avoid without just reason.

In the event of acting contrary to this article, in turn, by the Ministry of Customs and Trade, as per Consumer Act art. 77.(1) of the Consumer Act, for those who act to the contrary, the administrative fine foreseen in again the same article shall be applied (TL 232 for year 2016) **for each transaction or contract** determined to be in breach.

**7.2 Offering Services Not Ordered.** Another important provision which Insurance Companies should take into consideration is that, as per Article 7 of the Consumer Act, in the event they conclude or offer an insurance product which has not been ordered, they shall not be able to claim any rights against the consumer. There is no regulation in the Insurance Legislation regarding the subject of Marketing by Sending without Ordering and/or Requesting. On the other hand, this point regulated in Article 7 of the Consumer Act<sup>23</sup>, shall need to be applied also to insurance contracts in cases which bear similar conditions, because insurance contracts have not been explicitly excluded. According to Article 7 Para. 1 of the Consumer Act, if the insurance company sends such insurance product or offers such services which have not been ordered, it may not claim for any rights against the consumer. In such cases, the fact that the consumer has kept silent or has used the goods or service shall not be construed as a declaration of acceptance regarding the drawing up of the contract (Para. 1). According to the reasoning of the said article, with the regulation made it has been intended to prevent the consumer incurring a debt through the sending of goods or the offering of services they have not ordered. On the other hand, the person who claims the service has been ordered is obliged with proving this claim (Para. 2). It is seen that the Consumer Act has taken the regulations in the Europe Legislation partially to our domestic law, however, it has not taken into consideration such regulations which may be considered as important.

However, in Europe Law, in the Distance Marketing Directive no 2002/765/EC, this matter has been regulated in the form of two articles. In Article 9 of the said Directive, Services Not Ordered have been regulated in terms of ("Unsolicited Services"). According to this, financial services provided to the consumer without any request from them, which in particular, also contain an immediate or forward payment request, should not be permitted. In the case a service not requested has been sent, the consumer has no obligation to provide a response that they do not approve. However, Directive Article 9 shall not be applied in terms of tacit renewals in distance sales where it is drawn up in a valid manner according to domestic law provisions.

<sup>22</sup> Imposing administrative sanction pursuant to the above article shall not impede the proceedings to be carried out by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative / judicial sanctions to be imposed pursuant to the Article 77(20) of the Consumer Act, as per other laws, meaning in particular, the Articles 34 and 35 of the Insurance Act No 5684.

<sup>23</sup> An arrangement in parallel with this article is given in Article 27 of the Consumer Rights Directive



In Article 10 of the Directive, on the other hand, Communications Established without the Other Party's Consent ("Unsolicited Communication") is regulated. Of this article [...], it is stated that calls made without human involvement, via automatic calling systems (Automatic Calling Devices) and fax are subject to the consumer's prior permission. Distance communications apart from this, on the other hand, where a one-to-one call is in question are regulated to be permissible only in the event the consumer's assent is obtained or at least they do not explicitly object. It is also explicitly regulated that in all types of such communications the costs for this cannot be passed on to the consumer.

### **7.3. Tying the Insurance to a Condition or the Provision of Purchasing Other Goods/Services.**

Another provision which Insurance Companies need to take into consideration at the point of proposal is that, as per Article 6(3) of the Consumer Act, unless a precedent, commercial custom or usage or a justified reason on the contrary, they may not tie the sale of the insurance product on conditions of that service determined by it such as quantity, no, size or the condition of purchasing another goods or service. For example, such as the health insurance proposal shall be appraised or the insurance contract shall be made in return for purchasing a "check-up" service from a specific place. However, in order for such practices to be carried out, or to continue with those already done, in terms of putting forth "a precedent, commercial custom or usage or a justified reason on the contrary", it would be advisable for insurance companies to make their practices and precedents more explicit and clear and to review and development all their documents including information forms and their application processes in terms of being able to put forth the just reason in each instance.

In the event of acting contrary to this article, in turn, by the Ministry of Customs and Trade, as per Consumer Act art. 77.(1) of the Consumer Act, for those who act to the contrary, the administrative fine foreseen in again the same article shall be applied (TL 232 for year 2016) **for each transaction or contract** determined to be in breach<sup>24</sup>.

**7.4. Sales by the Installment Payment.** In Article 17 of the Consumer Act installment sale contracts are regulated. This article's installment sale contract, installment sale contract is defined as contracts where the seller or the provider undertakes the delivery of the goods or the performance of the service and the consumer pays the amount part. In the said article and its reasoning, it is expressed that the manner of the consumer's payment gains importance rather than the time the performance of the service is made and if the payment has been made in parts by the consumer, then the sale contract shall be in question. Additionally, there is no provision that this article may not be applied in terms of financial services, including insurance. Under the circumstances, in cases where the insurance contract premiums are foreseen on the policy to be paid forward, it can be said that without additional regard to the form of payment (credit card, eft, cash, etc.), in cases where the policy owner/insured is a consumer, Article 17 of the Consumer Act and the Regulation On Installment Sale Contracts<sup>25</sup> shall find an application area for insurance product sales which are outside of cases considered to be distance sales. In this framework, it would be advisable to take into consideration the regulation and consequences the said article brings. In Article 5 of the Installment Sale Contracts Regulation, the condition of it being drawn up as written and otherwise it shall not be valid, by evaluating jointly with the liability to give a policy in the sense of the insurance legislation, it would be legally appropriate to accept that it will be realized by giving by hand or, for distance sales, with permanent data register.

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<sup>24</sup> Imposing administrative sanction pursuant to the above article shall not impede the proceedings to be carried out by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative / judicial sanctions to be imposed pursuant to the Consumer Act article 77(20), as per other laws, meaning in particular, the Insurance Act no 5684 articles 34 and 35.

<sup>25</sup> OG 29236 / 14.01.2015. According to Article 2, Para. 4 of this regulation, even though it is expressed that this regulation shall not be applicable for shopping made by credit cards, based on this article, in cases where credit card is used in insurance contracts as a payment means, it is difficult to conclude that this regulation shall easily be inapplicable by deeming this as shopping.

In insurance contracts, apart from health insurances or, in some branches, advance payment discount, no delay interest or discount becomes in question between advance or deferred payment or in case of early payment. However, from now on, it would be advisable for insurance companies to review such practices and if they do, or intend to have such practices, and bring clear arrangements regarding this in their information forms for such matters, proposals, policies and special conditions. Accordingly, Article 18 (1) pertaining to installment sale, the consumer has the right to back-down from the installment sale contract within seven days, without showing any reason and without payment penal clause. According to the second paragraph of the same article, on the other hand, the manner of exercising the right to back-down has been foreseen. According to this, it is adequate that the notice regarding that the right to back-down is being exercised is addressed to the insurance company within this timeframe. The insurance company is obliged to prove that the consumer has been informed regarding the right to back-down. In that case, for insurance contracts where the premium is paid in installments and its insured qualifies as a consumer, it shall be necessary to give a 7-day right to back-down for consumer insureds. It would be advisable to arrange for this case both in the information and in the policy for insurance products directed at consumers. This right to back-down, may be exercised by the policy owner/insured from the contract being drawn up and the policy issued and delivered until the insurance amount /premium advance payment is paid and the coverage starts.

However, it should be emphasized that, following means of backing-down have been brought for the policy owners/insureds within the frame of Turkish Commercial Act No 6102 without regards to whether they are consumers. The policy owner may back-down from the contract by paying half of the decided premium before the insurer's obligation starts. In case of partially backing-down from the contract, the premium which the policy owner is obliged to pay is half of the premium related to the portion backed-down from. (art. 1430). In the case where life insurances are in question, the policy owner may back-down from the contract within 15 (fifteen) days of the insurer notifying him that he may exercise his right to back-down. If no informing has been made, the right to back-down expires 1 (one) month after the payment of the first premium. (art. 1489). In the case where health insurances are in question, if the policy owner/insured makes a request for cancellation within the first (30) thirty days from the date the contract was issued and if no compensation has been paid to he insured or in his name within this time period, the premiums paid are returned without deductions within five business days. (Private Health Insurances Regulation Article 10(1))

However, in the case the insured, qualified as a consumer, does not have one of those listed above or the exercising of this right according to those would be more appropriate, the right to back-down in Article 18 of the Consumer Act may become more meaningful.

As per the 3<sup>rd</sup> paragraph of the said article, before the time for right of backing-down expires, in insurance contracts where the performance of the service is started with the approval of the consumer insured, i.e., the coverage starts with the payment of the advance payment, on the other hand, the consumer may no longer exercise this right to back-down. In the event of acting in default of this article, in turn, by the Ministry of Customs and Trade, as per the Art. 77(1)Consumer Act, for those who act in default of the obligations, the administrative fine foreseen in again the same article shall be applied (TL 232 for year 2016) for each transaction or contract determined to be in default<sup>26</sup>.

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<sup>26</sup> Imposing administrative sanction pursuant to the above article shall not impede the proceedings to be carried out by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative / judicial sanctions to be imposed pursuant to the Article 77(20) of the Consumer Act, as per other laws, meaning in particular, the Insurance Act no 5684 articles 34 and 35.

**7.5. Doorstep Selling<sup>27</sup>.** As the insurance contracts are being drawn up to a considerable extent outside of the business place in the simultaneous physical presence of the parties or, at the business place of the insurance company or broker or via any remote communications tool, immediately after the interview with the consumer outside of the business place, even though it falls within the definition of the Consumer Act Article 47, as it was held out of scope as per Article 2 Para. 2. item (a) of the regulation<sup>28</sup> on this subject, Article 74 of the Consumer Act shall not be applied to insurance contracts.

## 8. Basic Principles which Insurance Contracts are Subject to from the Aspect of Consumer Act

In Article 4 of the Consumer Act information providing basic principles with contracts foreseen in the Consumer Act to be issued in writing and in Article 5 the arrangement regarding unfair conditions has been adopted. According to the Article 5, Para. 1 of the Consumer Act, “unfair condition” means contract conditions included in the contract without negotiating with the consumer and cause imbalance to the detriment of the consumer in the rights and obligations of the parties arising from the contract in a manner to contradict the rule of honesty.

Accordingly, the insurance contracts are also a contract included in the scope of the Consumer Act and especially the provision regarding distance contracts regarding financial services in its Article 49, in addition to the principles regulated from the insurance legislation, as a rule also the principles regulated in Consumer Act Article 4 and Article 49<sup>29</sup> shall be applied to insurance contracts. In terms of unfair conditions, on the other hand, according to Article 5 of the Consumer Act<sup>30</sup>, it has been regulated that the provisions of this article shall be applied to the contracts prepared by organizations or persons, companies, such as insurance companies, which are performing their activities with a permission given by the law or authorized bodies, without regards to their qualifications.

Insurance companies, in addition to the principles given in the Insurance Legislation and the Commercial Act, should adhere to the following principles, procedures and rules:

- a) Contracts should be drawn up at least in type size twelve, in comprehensible language, in an open, plain<sup>31</sup> and legible manner. (Para.1)
- b) In the event contract terms are written, it is required that a clear and comprehensible language is used which the consumer can understand. In the event a provision given in the contract is not clear and understandable or has multiple meanings, this provision is construed in favor of the consumer (Article 5, Para. 4)<sup>32</sup>.
- c) Insurance companies are required to adhere to the writing and minimum characteristics size used in all documents pertaining to the insurance contract. Additionally, minimum type sizes foreseen differently in the Insurance Legislation are also reserved. For example, according to Car Insurances General Conditions

<sup>27</sup> As set forth in the reasoning of the Article, the provision, regulated in the Consumer Act under the title Doorstep Selling, has been amended together with its title as “Contracts made outside of the business place” and has been harmonized with the Directive 2011/83/EU of the European Parliament and Council On Consumer Rights of 25/10/2011.

<sup>28</sup> Regulation On Contracts Drawn up Outside of the Business Place concerning Consumer Act Article 47 (OG 29236 /14.01.2015).

<sup>29</sup> Principles accepted with this article are studied and attempted to be revealed below under article 10.

<sup>30</sup> Article 6 of the previous Act was penned again. According to the reasoning of the said article, it is expressed that EU Directive 93/13/EU dated 5.4.1993 was transposed to domestic law. This provision is also included in the Regulation on Unfair Conditions in Consumer Contracts (OG 29033/17.06.2014) art. 2(2).

<sup>31</sup> It should not be overlooked that insurance contracts are actually a general transaction condition and in this sense they are also subject to the procedures, principles and consequences given in Code of Obligations no 6098 Articles 20 to 25. Moreover, these articles shall be applied in terms of all insureds, whether a consumer or not.

<sup>32</sup> In this sense, Article 23 of the Code of Obligations No 6098 should also be reminded. According to this, if a provision included in general transaction conditions is not clear and understandable or has more than one meaning, it is construed against the draftsman and in favor of the opposite party.

- article A.7, the determinations made regarding to insurance coverage pursuant to this article should be written in the policy in lettering of at least type size 14.
- d) A copy of the contracts should be given to the consumer either on paper or with permanent data register. (Article 4, Para. 1). Insurance companies have the obligation to give policies to the policy owners/insureds as per the Turkish Commercial Act No 6102. The difference brought by the Consumer Act is that this obligation to give the insurance policy can also be satisfied with “permanent data register”. This can be appraised as an important legal development with regard to the insurance sector. In the Article 3, Para. 1, item f of the Consumer Act, the “Permanent data register” has been defined as all manner of tools or media, such as short message, electronic mail, internet, disk, CD, DVD, memory card and the like, which enables the information the consumer sends or which is sent to them to be recorded and copied without alterations in a manner to permit examining such information for a reasonable amount of time for its intended purpose and which permits access to such information in true form.
  - e) Unfair conditions in the contracts made with the consumers are strictly void. Provisions of the contract other than the unfair conditions maintain their validity. In that case, the issuer of the contract may not assert that had the conditions finally deemed void not existed, he would not have made the contract. (Article 5, Para. 2)
  - f) The unfairness of a contract condition shall be determined according to the time the contract was drawn up with consideration to the quality of the goods or services subject to the contract, the conditions existing during contract drawing up, and the other provisions of the contract or the provisions of another contract to which the unfair conditions relates. (Article 5, Para. 6)
  - g) If a contract provision has been prepared previously and could not have an effect on the consumer content due to being in the standard contract, it is assumed that that contract condition has not been negotiated with the consumer. If the issuer of the contract claims that a standard condition has been severally negotiated, they are obliged with proving this. If, from the evaluation of the contract as a whole, the conclusion is reached that it is a standard contract, the fact that specific elements of a condition in this contract or a single provision has been negotiated does not prevent the application of this Article to the remaining portion of the contract.
  - h) If a contract provision has been prepared previously and could not have an effect on the consumer content due to being in the standard contract, it is assumed that that contract condition has not been negotiated with the consumer. If the issuer of the contract claims that a standard condition has been severally negotiated, they are obliged with proving this. If, from the evaluation of the contract as a whole, the conclusion is reached that it is a standard contract, the fact that specific elements of a condition in this contract or a single provision has been negotiated does not prevent the application of this Article to the remaining portion of the contract. (Article 5, Para. 3)
  - i) In the event one or several of the conditions required to be included in the contract are not included, the incompleteness does not affect the contract's validity<sup>33</sup>. This incompleteness is immediately corrected by the issuer of the contract. Conditions foreseen in the contract may not be changed to the detriment of the consumer during the contract term. (Article 4, Para. 2)<sup>34</sup>
  - j) No additional charges may be requested from the consumer for the deeds which they rightfully expect to be made within the scope of the goods or services offered to them and which are among the legal obligations of the issuer of the contract and the costs which the issuer of the contract has made towards his own interests. (Article 4, Para. 3)

<sup>33</sup> According to Article 22 of the Code of Obligations no 6098 to be applied regardless whether the policy owner/insured is a consumer, provisions of the contract other than general transaction conditions deemed not written maintain their validity. In that case, the draftsman may not claim that he would not make the contract with the other provisions had the conditions deemed not written not existed.

<sup>34</sup> Again, according to Article 24 of the Code of Obligations no 6098, conditions given in the insurance contract or in a separate contract and which give the draftsman the authority to alter a provision of the contract or bring a new arrangement against the opposite party shall be deemed not written.

- k) It is requisite that information pertaining to all manner of fees and costs to be requested from the consumer in reference to the contracts regulated in the Consumer Act, are given to the consumer in printed form on paper as an attachment to the contract. For contracts drawn up via remote communications tools, on the other hand, such information is provided in a manner suitable for the remote communications tool used. Proving that such information has been given to the consumer rests with the issuer of the c. (Article 4, Para. 4)
- l) For reason of the transactions the consumer has made bills may be issued of a valuable paper nature written only to the name and to be separate for each installment payment. Bills issued contrary to the provisions of this paragraph are void from the standpoint of the consumer. (Article 4, Para. 5)

In the event of acting in default of this article, in turn, by the Ministry of Customs and Trade, as per Consumer Act art. 77.(1) and (2), for those who act in default of the obligations in Articles 4 and 5, the administrative fine foreseen in again the same article shall be applied (TL 232 for year 2016) **for each transaction or contract** determined to be in default<sup>35</sup>.

## 9. Defective Services on Insurance

Defective Service has been regulated in the Articles 13 to 16 of the Consumer Act. It is evident that this Article shall also be applied in terms of insurance contracts and services connected to it. However, it is difficult to say that the solution and consequences foreseen in this Article (particularly, such as the consumer's optional rights<sup>36</sup> and lapse of time<sup>37</sup> in Article 15 of the Consumer Act) are appropriate for and applicable to insurance contracts and the insurance activity. Likewise, this difficulty is also in question in article 23 of the Insurance Act, due to the reference made to this article as to the defective service of the insurance, in this case as well. However, as the beneficiaries opt for the companies' responsibility generally dealing directly with the insurance companies for the defective services of the agency as well, this second part difficulty has not come to the fore too much. However, it is considered that the difficulty as to how the defective service shall be applied in terms of the insurance companies shall come to the fore quite frequently going forward. The solution for this, in turn, shall undoubtedly emerge in the arising disputes or with the consumer jurisdiction or general jurisdiction decisions.

In its current form, defective service, in terms of insurance companies, may be in the sale of the insurance product; because according to the Article 13, Para. 2 of the Consumer Act, insurance products or services which contain material, legal or economic deficiencies which do not bear the properties informed by the insurance company, given in its internet portal or advertisements and announcements or which reduce or eliminate its value in terms of purpose of utilization or the benefits which the consumer reasonably expects from it shall be deemed defective and shall be subject to the consequences under this article. A point of problem for insurance companies in this respect is the damage processes. At this point, in cases where verbatim indemnity is in question, for example, for car insurance, in cases of poor service performance of the supplied part or of the contracted provider and in fact which are excluded from coverage by forcing, it may come on the agenda in the form of a claim that the correct product was not sold to them. In this sense, established in terms of correct product and its content, informing gains even greater importance.

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<sup>35</sup> Imposing administrative sanction pursuant to the above article shall not impede the proceedings to be carried out by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative / judicial sanctions to be imposed pursuant to the Consumer Act article 77(20), as per other laws, meaning in particular, the Insurance Act no 5684 articles 34 and 35.

<sup>36</sup> According to Article 15, Paragraph 1 of the Consumer Act, in cases where the service is performed with defect, the consumer is free to exercise one of the rights of having the service re-performed, free-of-charge repair of the work generated as the result of the service, deduction from the price procedure rata the defect or backing-down from the contract against the provider. The provider is obliged to satisfy this request which the consumer prefers.

<sup>37</sup> According to Article 16, Paragraph 1 of the Consumer Act, in the event a longer period is not established in the laws or in the contract between the parties, are responsibility for the defective service is subject to a two-year lapse of time as of the date t service was performed, even if the defect was found later. According to its second paragraph, on the other hand, if the defect has been concealed by gross fault or deceit, lapse of time provisions are not applied.

In such a case of defective service, as well as they may easily request the service, subject to the damage, to be immediately performed [or] back out of the contract with their rights to damages remaining reserved, taking into consideration the lengthiness of the period of limitation, that they may request return of premiums at least in the form of price reduction, during the policy term or at any time afterwards within the period of limitation, becomes probable even if the options are removed. At this point it would be expedient especially with regards to insurance companies that particularly damage processes are reviewed for products directed at consumers and such probabilities are also organized.

## 10. Distance Sale of Insurance Under the Consumer Laws<sup>38</sup>

10.1. In European Union Law the regulation on the distance marketing of financial services, which includes also insurance, is not included in Consumer Legislation and is regulated by a separate directive. However, in our domestic law, this regulation was addressed as an article in the Article 49 of the Consumer Act 39. Additionally this subject has been regulated in the provisions of Distance Contracts Regulation Related to Financial Services (“Distance Contracts Regulation”) published by the Ministry of Customs and Trade<sup>40</sup>.

The first point which the Consumer Act diverges from the EU Distance Marketing Directive is the title it uses. “Distance marketing of the consumer financial services” in the EU Directive it is expressed as “Distance contracts related to financial services” in the Consumer Legislation. According to this, while the Consumer legislation is concentrating on the contract, the EU is leaning to the activity in the original of the Directive. Additionally, while the Consumer Act defines the distance services and distance contracts in connection with it, the EU Directive, emphasizing the financial services directed at the Consumer, concentrates on the distance marketing connected to these. Also in the Insurance Legislation “in the Regulation Relating To The Activities To Be Appraised Under Insurance, Insurance Contracts Made In Favor Of The Consumer And Insurance Contracts Made From Distance (“Insurance Regulation”) both in the title and in Article 9 of the regulation, with the expression “Insurance contracts made from distance” it is again seen to be allocated with only the contract.

According to Article 49 Para. 1 of the Consumer Act and item 4. (1) (b) of the Distance Contracts Regulation, “Distance contract relating to financial services is defined as contracts drawn up between the provider and the consumer through the use of remote communications tools within the frame of a system created for the remote marketing of financial services.

Against this, in the Insurance Regulation Article 4 Para. 1 item (f), the “distance contract” is defined as contracts drawn up in written, visual, telephone and electronic environment or by using other communications tools without the parties coming face to face.

In terms of Individual Retirement Contracts, as per Article 6 Paragraph 1 of the Regulation on the Individual Retirement System (“System Regulation”) <sup>41</sup>, save for Employer group retirement contract<sup>42</sup>, the retirement contract may be drawn up without coming face to face through the company's Internet site or call center or the call center

<sup>38</sup> In the event of contrariety to the obligations given in Article 49 of the Consumer Act, by the Ministry of Customs and Trade, as per art. 77(1) of the Consumer Act, for those who act in default the administrative fine foreseen in again the same article shall be applied (TL 200 for 2014) for each transaction or contract determined to be in default. According to AOPC 77(2) imposition of administrative sanction according to this Act does not prevent the actions to be made pursuant to other laws.

<sup>39</sup> Additionally, even though it is not directly within the scope of our study, the principles and procedures relating to electronic commerce brought with the Act On the Regulation of Electronic Commerce No 6563 (OG 29166/5.11.2014) should also not be overlooked.

<sup>40</sup> OG 29253/31.01.2015.

<sup>41</sup> OG 28462/9.11.2012

<sup>42</sup> Employer group retirement contract is a retirement contract signed on the basis of an employment relationship or in favor of the participant between a sponsoring organization and the company and a contribution is paid by the sponsoring organization in the participant's name (Article 4, Para. 4 of the System Regulation).

authorized by the company.<sup>43</sup> As per Para. 2 of the said article, in distance sale the company informs the person in accordance with the provisions of article 5 and offers a suitable retirement plan proposal. The participant confirms that necessary information relating to the retirement contract, the retirement plan and the system have been given to them and approves the proposal via the call center or electronic signature and thus the retirement contract is made in this manner. Contracts issued on the basis of proposals for which the approval process has not been realized do not enter into effect and no collection may be made by the company for those. The company sends the entry information form and proposal form within five business days following the approval proposal to the participant's defined electronic mail address or fax or mail address in line with their preference.

On the other hand, in Article 2 item (a) of the EU Directive no 2002/65/EC the "distance contract" has been defined in much greater detail. According to this, "Distance contract" means any contract concerning financial services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.)<sup>44</sup> As shall also be seen from these definitions the definition in our domestic law can not fully overlap as compared to the definition given in the EU Acquis. That, in turn, shall undoubtedly present differences in terms of the determination of contract terms to be made based on the definition.

## 10.2. Informing In Distance Contracts

**10.2.1. Subject Matter and Scope of Informing.** According to the Article 49, Para. 2 of the Consumer Act, in distance contracts relating to financial services, it is requisite that the consumer is informed in a clear, understandable manner and appropriate for the communications tools being used, regarding their right to back-down before they declare their will relating to the drawing up of the contract, that they shall come under obligation in the event they give an acceptance declaration, and in other matters the details of which are determined by the Ministry of Customs and Trade. That this informing is being done for a commercial purpose should be clear, and, in cases where voice communication tools are being used, the identity of the provider and the reason for the request for contact should be stated at the onset of the contact. Pursuant to the authority given by the Article 49, Para. 7 of the Consumer Act, preliminary information has been regulated in Article 5 of the Distance Contracts Regulation. This arrangement shall also bring a double-headed arrangement in terms of insurance products; as these matters are regulated in detail in the insurance legislation. In that respect, it would be favorable that the provisions in the insurance legislation on insurance contracts are reserved.

In terms of the Insurance Legislation, the obligation on general informing has been brought in the Article 11, Para. 3 of the Insurance Act No 5684, and it has been foreseen that insurance companies and insurance agencies shall inform the policy owner, the beneficiary and the insured, both during the drawn up of the contract and during its continuation and that the matters relating to this are to be regulated by a regulation. In that framework, Information Regulation has been published by the Undersecretariat of Treasury.<sup>45</sup> Also in insurance legislation, there is an obligation to inform in distance sales<sup>46</sup>. In Insurance Book of the Turkish Commercial Act No 6102, the "obligation to elucidate" has also

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<sup>43</sup> Article 4, Para. 3 of the System Regulation, retirement plans and funds not deemed acceptable by any Undersecretariat of Treasury may not be made subject of distance sales.

<sup>44</sup> <http://eur-lex.europa.eu/LexUriServ/>

<sup>45</sup> Information Regulation Relating to Insurance Contracts ("Information Regulation") OG 26684/28.10.2007.

<sup>46</sup> Principal relevant insurance legislation related to Distance Sales can be summarized as below: Information Regulation and Circulars No. 2008/12 and 2012/9 connected with it; Regulation Relating To Activities To Be Considered Within The Scope Of Insurance, Insurance Contracts Made In Favor Of The Consumer And Insurance Contracts Made From A Distance ("Distance Insurance Contract Regulation") OG 28892/25.04.2014; Circular Relating To Necessary Organization And Technical Infrastructure Within The Scope Of Insurance Contracts Made From A Distance (No. 2014/10); Sector Announcement Relating To Questions Regarding The Application Of The Regulation Related To Activities To Be Considered Within The Scope Of Insurance, Insurance Contracts Made In Favor Of The Consumer And Insurance Contracts Made From A Distance (2014/22) ("Sector Announcement 2014/22"); Regulation on the Principles of Application for Insurances Connected with Personal Loans ("Regulation on Insurances Connected with Personal Loans") OG.29294/13.3.2015.

been brought with Article 1423, not limited to however, also including distance sales. According to Para. 1 of the said article, it is regulated that the insurance company or agency shall notify the policy owner in writing of all information pertaining to the insurance contract to be drawn up, the rights of the insured, the provisions which the insured should particularly take note of, obligations on notifications related to the developments before the insurance contract is drawn up and on the condition that necessary period for review is also allowed and that additionally, as independent from the policy, they shall make public to the insured, in writing, such incidents and developments which may be deemed important in terms of the insurance relationship during the contract term.

In the Article 9, Para. 1 of the Insurance Regulation, insurance contracts made from distance, either directly or through an insurance agency, have been defined in an indirect way as the contract made by use of all manner of communications tools permitting the parties to come to terms without getting together. Following it, in the 1<sup>st</sup> sentence of Para. 4 of the same article, it has emphasized the necessity of informing by providing that provisions of the Information Regulation shall also be applied regarding insurance contracts made from a distance.

On this matter an arrangement was brought in the EU Acquis in Article 3 of Directive No 2002/65/EC. Hereunder, before the consumer is bind with a distance contract or an offer, the provider is especially requested to provide information about: application methods for financial service, distance contract, right of withdrawal, correction application for the consumer party to a distance contract, or complaint authorities other than the tribunal. Additionally, as per again the same article, in distance communication the commercial purpose is required to be explicitly stated and should be done in an understandable manner. It is especially sought that this communication is done according to goodwill rules in commercial transactions and the regulations made to the Member state law regulating the protection of those not granting approval, and of minors.

The consumer's acceptance declaration regarding the drawn up of the contract is established or recorded in physical or electronic medium according to the communication tools used. The provider is obliged with the communication of the right to back-down and with taking necessary measures for the establishing or records to be done in physical or electronic medium.

In that case, even though one needs to be subject to both of the bodies in the sense of activity law, as the public bodies obliged with executing the two legislations are different, in the sense of contracts law, in a distance sale process in which consumers are involved it shall be needed to apply both legislations together.

**10.2.2. Manner of Informing.** According to Information Regulation Article 5, Para. 1, as with the insurance contracts made via remote marketing methods by using insurer, telephone, call center, internet and similar communication tools, in cases where the contracting parties' coming face to face physically and making the informing in writing are not in question, the condition on written informing may not be sought. The insurance company is obliged with proving minimum informing has been done. The procedures and principles relating to the nature of the operations included in this scope and the manner of informing to be done have been established by the Undersecretariat of Treasury with Circulars No. 2008/12 and 2012/9 and continue to be established. Also in the Article 1423, the last sentence of Para. 2 of the Turkish Commercial Act, it has been regulated that the proof that the elucidation announcement has been given rests with the insurer. In the Article 6 of the Insurance Regulation preliminary informing is regulated<sup>47</sup>. This arrangement again shall also bring a double-headed arrangement in terms of

<sup>47</sup> According to the Article 6 (1), Before the consumer states their will for the drawing up of the distance contract relating to the offering of financial services, it is mandatory that they are informed in all matters specified in the first paragraph of article 5, in at least type size according to the communications tool used in a clear, plain, understandable and legible manner by the provider either in writing or with the permanent data register. (2) In the event the distance contract relating to financial services is drawn up via voice communication tools or via an environment where it is drawn up in limited space or time, it is adequate that information given in only the items (c), (ç), (h) and (i) of the first paragraph of article 5 are given in this environment. However, in the event consumer loan contracts are being drawn up from a distance via these tools or environments, it is mandatory that the whole of the preliminary information in its relevant legislation is given a reasonable time in advance of drawing up the contract either in writing or with



insurance products as such matters are not regulated in detail in insurance legislation. In this respect keeping the provisions in the insurance legislation reserved regarding insurance contracts without is appropriate.

In terms of the insurance legislation, according to Insurance Regulation Article 9, Para. 4<sup>48</sup> in insurance contracts made in electronic medium, that informing is deemed done depends on its being confirmed in electronic medium. However, in cases where the matters forming the basis of informing are published in the internet site of those who shall made the distance insurance contract and the means is provided for such persons who wish to be included in the insurance contract to transfer such information to any electronic medium in their domination area, the obligation to provide information is deemed satisfied.<sup>48</sup>

In terms of the form of informing, in Article 1423, Para. 3 of the Turkish Commercial Act No 6102, it has been regulated that the Undersecretariat of Treasury shall determine the form and content of the consumer elucidating announcement by taking into consideration the regulations of various countries, in particular, of the European Union. In fact, the Undersecretariat of Treasury has established these sample forms much before the arrangement in the Turkish Commercial Act, with its Circular On The Application Of The Regulation On Informing In Insurance Contracts no 2008/7 as per the authority granted by the Insurance Act. Today, in insurance companies these forms are being used by improving according to the insurance products. These forms are also used in the sales of distance contracts by transfer to the electronic environment. Information regarding debts arising from the contract, should be done in accordance with the debts arising from the contract arising from the law applied to distance contracts, provided it is notified to the consumer before the contract. In the light of this regulation, by evaluating the matter along with the regulations found within the scope of Insurance Legislation improvements should be made in terms of the form of making the informing on the insurance product directed especially at consumers.

### 10.3. Requirement to Convey All Conditions of the Contract in Distance Contracts

According to Consumer Act Article 49, Para. 3 and Distance Contract Regulation Article 7, Para. 1, it is requisite for the provider to convey to the consumer all conditions of the contract and other matters determined by the Ministry of Customs and Trade either on paper or via the “permanent data register”. The time to fulfill this obligation has again been established in the same Article. According to this, it shall be satisfied before the consumer directs their will to draw up the contract or, in the event the contract is drawn up by using a “remote communication tool” not suitable for written informing upon the consumer's request, then immediately afterwards.

Another point which draws attention in this article is that, in terms of the form of informing, as different from the arrangement given in the Insurance Legislation and the Commercial Act, the concept of “permanent data register” had been brought. According to the definition in article 3, paragraph (f) of the Consumer Act, the “Permanent data register” has been defined as all manner of tools or media, such as short message, electronic mail, internet, disk, CD, DVD,

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permanent data register. (3) It should be understandable that the preliminary informing is made for a commercial purpose in accordance with the remote communications tool used. In cases where voice communication tools are used, the provider or its representative is obliged to state in the beginning of the call the identity of the provider and the person making the voice communication, the information related to the connection of this person with the provider and the reason for the request for call.

48 According to the same paragraph, the obligation to give a policy, foreseen in article 1424 of the Turkish Commercial Act, continues also in contracts made over a distance. In cases where the insurance contract is made in electronic environment, provided it conforms to article 1425 of the Turkish Commercial Act, the policy may also be issued in electronic environment in a manner to enable the policy owner to transfer to any electronic medium in their own area of dominance and take an output. In that case, insurance general conditions may also be given by showing a link address. Additionally, according to article 9, Paragraph 6, in cases where policies are issued in electronic media, the company's obligation to sign the policy shall be satisfied by “electronic signature”. It has been expressed that the “electronic signature” expression referred to in Sector Announcement 2014/22 corresponds to the “electronic tool” expression given in the Article 1526, Para. 2 of the Turkish Commercial Act.

memory card and the like, which enables the information the consumer sends or which is sent to them to be recorded and copied without alterations in a manner to permit examining such information for a reasonable amount of time for its intended purpose and which permits access to such information in true form. It should be considered by the insurer to put to practice such tools as a form of notification which can be used in insurance products directed at consumers.

#### **10.4. Right to Back-down**

**10.4.1.** According to Article 49, Para. 5 of the Consumer Act and Article 8 Para. 1 of the Distance Contracts Regulation, the consumer has the right to back-down from distance contracts related to financial services within fourteen days without showing any reason and without paying penal clause. The provider insurance company and its agency are obliged to prove that the consumer has been informed. As per Article 6, Para. 1, first sentence of EU Directive No 2002/65/EC, member states have foreseen that they ensure the consumer has the right to back-down within 14 days without being subject to penal clause and without requiring to present a reason. As per this regulation of a domestic law it has been aligned with the EU Acquis. However, it is seen that the arrangement that it should be extended to 30 days for distance contracts related with life insurance or personal retirement insurance, as per Article 6, Para. 1, second sentence of EU Directive No 2002/65/EC, has not been taken into our domestic law with the Consumer Legislation.

Against this, according to Article 49, Paragraph 5, last sentence of the Consumer Act and Article 8 Para. 1, last sentence of the Distance Contracts Regulation, for insurance contracts and contracts relating to individual retirement, on the other hand, it has been ruled that provisions given in other legislation relating to time to back-down which are in favor of the consumer shall also be reserved. On this subject, in Article 1489 of Turkish Commercial Act, regardless of whether the policy owner/insured is a consumer, a right and time has been foreseen in terms of life insurances. According to this article, the policy owner in life insurances may back-down from the contract within fifteen days of the insurer notifying them that they can exercise the right to back-down. That the informing has been done is proven by the insurer. Lastly, it would be appropriate that the right to back-down, by the insurance companies, this right is clearly written on insurance products and especially on information forms and especially its start is clarified.

**10.4.2. Start of Back-down Period.** In the Consumer Act and Insurance Legislation, the beginning of the right to back-down granted for distance insurance contracts is not clearly defined. In the Article 8, Para. 2 of the Distance Contracts Regulation, the start of the period for right to back-down shall start on the date the contract is drawn up. However, in the event the date on which all conditions of the contract are given to the consumer on paper or with a permanent data register, the period for right to back-down shall start from the date the consumer has obtained all the conditions of the contract. According to the Article 1489 Para. 1 of the Turkish Commercial Act no 6102 (Insurance Book) , regarding life insurances, it is expressed that the policy owner can back-down from the contract within 15 days from the insurer informing them that they can exercise their right to back-down. Of no informing was done, the right to back-down shall end one month after the payment of the first premium.

According to Article 6, Para. 1 of the EU Directive no 2002/65/EC, the beginning of the period defined for the right to back-down has been regulated in a detailed manner. According to this, the beginning of the period starts either, in cases where the time limit shall start from the date the consumer is informed about the drawing up of the contract, save for those related to life insurance, or, if later than this date, then from the date the consumer has received the information and the general and special conditions of the contract.

**10.4.3. Exercising the Right to Back-down.** According to Article 49, Para. 5, sentence 2 of the Consumer Act and Article 9 Para. 1 of the Distance Contracts Regulation, it is adequate that the notification that the right to back-down has been exercised is addressed to the provider within this period. The provider is obliged with proving that the consumer has been informed regarding the right to back-down. For insurance contracts and contracts relating to individual retirement, on the other hand, regarding the period for backing-down, provisions given in other legislation which are in favor of the consumer are applied. Additionally, in the exercise of the right to back-down, the consumer may, as well as using the form given

in the attachment to the Distance Contracts Regulation, also make an explicit statement informing of their decision to back-down. The provider may also offer an option over its internet site for the consumer to be able to complete this form or sent their back-down statement. In the event a right to back-down is offered to the consumer over the internet site, the provider is obliged to immediately communicate to the consumer the information confirming that consumers' requests for backing-down have reached it [the provider] (the Article 9, Para. 2 of the Distance Contracts Regulation). **10.4.4. Cases Where the Right to Back-down May Not Be Used.** In the Consumer Legislation and the Turkish Commercial Act, the cases where the right to back-down may not be used have not been regulated. However, in the EU Acquis, in the Article 6 para. 1 of the EU Directive No 2002/65/EC, these conditions have been listed. The two cases which may be relevant in terms of insurance contracts have been identified as; in item (b) travel and baggage insurances or similar short-term insurance contracts whose term is list 1 month; and contracts which the contracting parties have fully performed with the consumer's explicit request before the consumer exercises their right to back-down given in item (c). However, cases which the consumer may not exercise the right to back-down in the insurance contract have been regulated [in] Distance Contracts Regulation. In this scope, as per the Article 13, Para. 8, item (b) of the Distance Contracts Regulation provided such provisions given in other legislation which are in favor of the consumer remain reserved, the right to back-down may not be used in travel, baggage insurance policies with a validity period less than one month or similar short duration insurance policies. In this manner, our domestic law has become compatible with the EU Acquis.

**10.4.5. Returning of Payments.** According to Article 49, Para. 5 of the Consumer Act, it has been foreseen that the consumer may back-down from distance contracts related to financial services within the period foreseen without paying penal clause. However, according to the wording of this expression, a deduction apart from the penal clause may become in question. A provision supportive of this has been brought in the Article 10, Para. 1 of the Distance Contracts Regulation. According to this, it has been regulated that in the event the right to back-down is exercised, charges for service performed pursuant to ancillary contract<sup>49</sup> (which can be interpreted as support services in insurance), and, if any, costs paid to a public organization or body and the amounts required to be paid as per the legislation may be requested from the consumer to make a payment. Additionally, according to the last sentence of Para. 1 of the same article, when the amount required to be paid is compared with the total amount for the service foreseen in the contract, it may not exceed the amount falling to the share of the service which has been performed and also the principle is accepted that it may not be interpreted as a penal clause in any manner. This payment shall be made latest within thirty days from the date the back-down notification has been directed by the consumer.

The sanction in the event the right back-down is not realized within the conditions listed above, on the other hand, has been foreseen in the second sentence of Para. 1 of again the same article. According to this, in the event the consumer fails to make required returns and payments they are deemed not to have backed-down from the contracts.

On the other hand, in Article 7, Paragraph 2 of EU Directive no 2002/65/EC, the obligation of member states has been brought to ensure that in cases where the consumer exercises their right to back-down, they are not subject to making any amount of payment. In Paragraph 3 of the same article, in turn, the provider may request the consumer to pay an amount with the stipulation that the provider has duly informed the consumer at the onset. However, unless a prior request of the consumer exists, in the event the performance of the contract has started before the expiry of the backing-down period, the provider may not request any amount.

In the face of the existing regulation in our domestic law, it cannot be said that the requirements of the EU Acquis are fully satisfied.

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<sup>49</sup> Ancillary contract, according to the Article 4, Para. 1 of the Distance Contracts Regulation, item (g), in relation with the distance contract relating to financial services; means the contract related to the goods or services provided to the consumer by the seller, provider or a third person in addition to the goods or service subject to the contract.

### **10.5. Consequences of Breach of the Obligation to Inform**

**10.5.1. Administrative Sanctions.** a) In the event of acting in default of article 49 of the Consumer Act, in turn, by the Ministry of Customs and Trade, as per art. 77, Paragraph 1 of the Act, for those who act contrary to the obligations in Article 49 the administrative fine foreseen in again the same article shall be applied (TL 232 for year 2016) for each transaction or contract determined to be in default. Imposing administrative sanction as per the above article shall not prevent the proceedings to be made by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative and/or judicial sanctions to be imposed as per other laws, meaning in particular, article 34 and 35 of the Insurance Act no 5684 pursuant to article 77(20) of the Consumer Act. b) As per the Article 34, Para. 1, item (b) of the Insurance Act No 5684, in the event of failing to adhere to return decisions passed, regulations and communiques issued and other regulations made according to the Insurance Act by the Council of Ministers, the Ministry to which the Undersecretariat of Treasury is connected to and the Undersecretariat of Treasury, in cases where there is no penalty separately foreseen in the Insurance Act, an administrative fine from one thousand Turkish Liras to twelve-thousand Turkish Liras is applied.

**10.5.2. Contractual Consequences.** a) Insurance Legislation According to Information Regulation Article 7, Para. 1, without regards to whether the policy owner/insured is a consumer, in the event the obligation to inform is not duly satisfied, if, during the negotiation, drawing up and continuation of the insurance contract, stated obligation to inform has not been duly satisfied or misleading information has been given about the insurer or the information form has not been duly delivered or the information included in the information form have been arranged in a manner contrary to facts and if any one of these situations have been effective for the decision of the policy owner, the policy owner may, as well as terminating the insurance contract, also request for the compensation of the loss it incurs, if any. b) In the Article 1423 of Turkish Commercial Act, in the event the elucidating explanation is not given, if the policy owner has not objected to the making of the contract within 14 days, the contract is deemed made with the conditions written in the policy.

## **11. Procedures and Principles in the Consumer Act Regarding the Marketing and Sales of Insurance Services**

**11.1. Announcement and Advertisement.** As per the article 32, para. 1, last sentence of the Insurance Act no 5684, the announcements and advertisements have been made subject to the supervision of the Advertising Board. Additionally, with Circular No 2007/13 on the Announcements and Advertisements to Be Published by Insurance and Reinsurance Companies, published by the Undersecretariat of Treasury, principles have been established regarding the announcements and advertisements which insurance companies and reinsurance companies shall make, such as, in announcements and advertisements statements and predictions which are contrary to the facts, misleading or deceptive and pejorative or derogatory expressions directed at the insurance sector and insurance companies and reinsurance companies may not be included, even if indirectly; in announcements and advertisements containing comparisons, competitive product or business name may not be stated or expressions or symbols evoking such matters may not be used; subjective expressions and evaluations may not be used which are not approved by official authorities or international organizations and institutions, not relying on figures or data; in the event it is undertaken by the insurance company to make the contract that goods or services shall be provided free of charge by the insurance company under the condition that the insurance contract is made, the type, quantity, rate and conditions for benefiting for the goods or service to be offered are shown clearly and in a manner not causing misunderstanding.

Above principles are also applicable to all promotional and informative publications which Insurance Companies and reinsurance companies shall make which bear the characteristics of announcements and advertisements and the publications, documents and formularies used in insurance transactions. With these arrangements in the insurance legislation remaining reserved, Consumer Act article 61 shall be duly applied, indirectly as per article 32 for those who are not consumers, and directly in any case for policy owners/insureds qualifying as consumers. Regulations in the

consumer legislation pertaining to announcements and advertisements shall need to be closely followed-up and taken into consideration in implementations.

Commercial Advertisement, as per the Consumer Act, Article 61, Paragraph 1, has been defined as announcements of marketing communications nature, in connection with commerce, business, craft or profession, realized by written, visual, audio and similar means on any medium by the advertisers for the purpose of ensuring the sale or leasing of a good or service, informing or persuading those forming the target group. As per the same article, for insurance companies placing advertisements, advertising agencies and media organizations, the following procedures and principles should be taken into consideration also in terms of insurance and insurance contracts<sup>50</sup>:

It is essential that commercial advertisements are consistent with the principles determined by the Advertising Board, to public morality, public order, and personal rights and are accurate and honest<sup>51</sup> (Article 61, Para. 2). No commercial advertisement may be made which misleads the consumer, or exploits their experience and lack of information, threatens security of lives and property, motivates acts of force and committing a crime, damages public health, exploits the ill, elderly, children and disabled (Article 61, Para. 3). Including names, brands, logos or other differentiating shapes and expressions and trade titles and business names related to goods and services in articles, news, broadcasts and programs without clearly indicating as advertisement and presentation in promotional nature is deemed as covert advertising. It is prohibited to make covert advertising in audible, written and visual form in all manner of communications tools (Article 61, Paragraph 4). Comparative advertisements may be made of competing goods or services which meet the same needs or directed to the same purpose (Article 61, Para. 5).

As per the article 77 (12) of the Consumer Act, regarding advertisers, advertising agencies and media organizations acting contrary to the obligations stated in said article 61, detain, or, by the same method, correction penalty or administrative fine and where deemed necessary, detain penalty for up to three months are applied. Additionally, the Advertising Board may give these penalties separately or jointly according to the nature of the violation, such as, (for year 2016) an administrative fine of 11.625 Turkish Liras, if occurred via a television channel broadcasting at local level, 232.508 Turkish Liras, if occurred via a television channel broadcasting to the general of the country, 58.127 Turkish Liras, if occurred via the Internet, 29.063 Turkish Liras, if occurred via short message, 5.812 Turkish Liras, if occurred via other media. The Advertising Board may apply the administrative fines specified above to up to ten times in the event the violation subject to the administrative proceeding is repeated within one year.

**11.2. Unfair Commercial Practices.** Procedures and principles accepted with Article 62 of the Consumer Act pertaining to unfair commercial practices shall also be applied in terms of the Insurance Activity and Insurance C/product as a consumer transaction<sup>52</sup>. According to the reasoning of the said article it is stated that in the consumer transaction, all kinds of unfair commercial practices which may affect the decision of the consumer by those across the consumer such as the seller, provider who engages in the commercial practice and that it shall be ensured that this is prevented and the consumers are enabled to make conscious decisions and a purchasing decision which they shall otherwise not give shall be prevented. According to Para. 1 of the same article, a commercial practice, in the event it fails to adhere to the requirements of the professional diligence and significantly disrupts or has a possibility of disrupting to a significant degree the good- or service-related economic behavior of the average consumer it reaches out to or of the average member of the group it turns to, it is deemed as an unfair commercial practice<sup>53</sup>.

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<sup>50</sup> According to Paragraph 8 of the same article, limitations to be brought regarding commercial advertisements and the procedures and principles to be adhered to in such advertisements are established by regulation.

<sup>51</sup> According to Paragraph 6 of the same article, advertisers are obliged with proving the accuracy of the claims in their commercial advertisements

<sup>52</sup> In cases where the unfair commercial practice occurs through advertising, provisions of Article 61 of the Consumer Act are applicable.

<sup>53</sup> According to, again the same article and its reasoning, particularly practices of deceptive or aggressive nature are unfair commercial practices. Additionally, the unfair commercial practices given in the attachment to the EU Directive shall be included in our domestic law with this regulation and such practices shall also be deemed unfair commercial practice. The regulation shall

These types of unfair commercial practices directed at the consumer are prohibited. In the event it is claimed that the commercial practice is unfair, the person engaging in the commercial practice is obliged with proving this practice of theirs is not unfair commercial practice. Regarding those acting contrary to the obligations stated in article 62 of the Consumer Act, cessation of the unfair practice for up to three months or detain sanction or administrative fine (TL 5.182 for year 2016) are applied as per Article 77 (13) of the Act. The Advertising Board may impose such penalties separately or together according to the nature of the default. If the administrative fine has been realized in the general of the country a more severe administrative fine (TL 58.127 for year 2016) is applied.

## 12. Sanctions Under the Consumer Legislation

It has been foreseen in Article 77 et seq. of the Consumer Act. It should be emphasized that, according to Paragraph (2) of the same article, imposing administrative sanction as per the said article shall not prevent the proceedings to be made by the Undersecretariat of Treasury and/or the Prosecutor's Office, as the case may be, and the administrative/judicial sanctions to be imposed as per other laws, meaning in particular, article 34 and 35 of the Insurance Act no 5684. When Article 77 of the Consumer Act is examined, in addition to administrative fines and judicial fines foreseen separately regarding each transaction and application<sup>54</sup>, there also is a general penalty provision pertaining to cases not listed. According to Article 77, Paragraph 18 of the Consumer Act, regarding those not adhering to the obligations, which fall outside of those specified in the article, however, which are brought by this Act, and the measures established by the Ministry of Customs and Trade by regulation or communique, the administrative fine foreseen in the said paragraph (from 1.162 Turkish Liras to 58.127 Turkish Liras for year 2016) shall be imposed. Additionally, in Paragraph 19 of the same article, a top limit has been foreseen in terms of the administrative fines to be applied for specific cases. According to this, save for the administrative fines in the eighth, ninth, twelfth, and thirteenth paragraphs of article 77, in cases where the amount of total administration fines applied in one calendar year as of the date the default is established exceeds twenty-five Turkish Liras, the amount of the total administrative fine, not to be less than this amount and not to exceed one hundred million Turkish Liras, may not exceed five percent of the annual gross income of the real or legal person subject to the fine, accrued at the fiscal year-end previous to the determination of the default. In the event the previous gross income fails to accrue, the gross income accrued as of the determination date is taken into consideration. In cases where gross incomes are not reported or inaccurately reported, the provision of this item is not applied. For banks, financial organizations giving consumer loans and organizations issuing cards, on the other hand, it may not exceed five in thousandths of the equity capital published in the latest financial statements. It is requisite to pay the administration fines imposed according to the Consumer Act within one month from their serving. While in Article 77 of the Consumer Act special and in fact severe sanctions are foreseen for some defaults, in Paragraph 18 of the same article as they have not regulated in this manner, regarding those not adhering to the obligations brought by the Consumer Act and the measures determined by the Ministry of Customs and Trade by regulation or by communique, a sanction of administrative fine has been foreseen from one thousand Turkish Liras to fifty-thousand Turkish Liras.

According to Article 78 (1) of the Consumer Act, the administration sanctions in the second, seventh, eighth, ninth and eleventh paragraphs of article 77 of the said Act shall be given by the Ministry of Customs and Trade; on the other hand, for twelfth and thirteenth paragraphs, they shall be given by the Advertising Board and applied by the Ministry of Customs and Trade. Administrative sanctions in other paragraphs, in turn, shall be given by the governorate where the sanctioned person is headquartered. Against the administration sanction decisions given according to the Consumer Act, administrative justice may be appealed to according to the provisions of the Code of Administrative Procedures no 2577. However, the lawsuit in the administration court is opened within thirty days from the day following the service of the procedure. The fact that an annulment suit has been opened in the administrative court does not stop the execution of the decision.

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additionally establish the procedures and principles relating to the determination of unfair commercial practices and their inspection.

<sup>54</sup> Administrative Fines are firstly, recorded in Criminal Registry. They are seen in the Criminal Registry Records during the execution of the fine. After the completion of the execution it is taken into the Criminal Registry Archive Record. In turn, it is fully deleted with the passing of five years from the date it is taken into the archive.

## Conclusion

The Consumer Act has attempted to adopt the regulations in a manner to also include the Insurance Activity and the Insurance Contracts without bringing a sector distinction, to also take into consideration the relevant legislation of the EU and reflect onto our domestic law. However, as experienced in the preparation and acceptance processes of many other legislation, it is fairly difficult to say, in terms of the general of the legislation, that our country's social and lifestyle differences and level is adequately and duly considered.

The Consumer Act, on the other side, by also taking within its scope without adequate and due consideration of the legislative regulations and practices of the Insurance Activity, which is regulated in a quite detailed and strict manner, has also brought along a difficulty regarding the insurance activity in the forthcoming period in terms of ensuring the harmony of the legislations and correction of differences. Especially the fact that the authorities making and executing these two different legislative arrangements are different, shall make the application of insurance activity even more difficult in the application process too, just as it was in the preparation process.

Even though it can be said that the Consumer Act should as a rule be applied to the Insurance Activity and Insurance Contracts only in the cases where the policy owners/insureds simultaneously match the consumer definition, as it would be difficult for insurance companies to introduce the consumer/non-consumer, policy owner/insured distinction in many insurance branches and/or insurance products relating especially to small risks outside of the Large Risks, from the documentation which they have used to their marketing-sales processes, in actual fact the Consumer Legislation shall have a broader field of application than considered in the Insurance Activity and Insurance Contracts.

It is considered that the most positive development and arrangement regarding the Insurance Activity in the sense of the Consumer Act is that at especially the distance sales point, which is becoming increasingly widespread, the means to reach the consumer policy owners/insureds has been provided via the "Remote Communications Tools" and "Permanent Data Register" which were not set down in this clear a manner with the Insurance Legislation. However, again on this subject, the opinion and approach of the Undersecretariat of Treasury shall determine the scope and limitation for the insurance companies and brokers to take benefit of this means.

For the policy owner/insured qualifying as a consumer it is possible to apply to the consumer jurisdiction in the disputes arising from insurance contracts, within the scope of the amounts and limitation defined in the Consumer Act. However, as per the nature of the disputes, in the face of them not being possible to be resolved only within the scope of Consumer Legislation provisions, and special expertise and experience is required, the danger is high for the Consumer Jurisdiction to make decisions not suitable for the Insurance Activity and Applications and that these impact the sector adversely, and in this framework, to finally create results which would affect the consumer in a more unfavorable manner.

However, without doubt, the continuous and rapid changes and variations which life brings (for example, the increase in distance sales such as the internet, call center, or TV), the consumer behavior, needs and inclinations changing, and this in turn, in the field of legislation necessitates new and additional regulations. Therefore, despite all our criticism, the Consumer Legislation, having transposed to our domestic law many positive and needed regulations relating to our protection who shall at one point be in a consumer position, it is necessary to emphasize that it is a positive act in its general sense which contains much improved and detailed regulations as compared to the Consumer Act No. 4077.

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