

Protection for Insurance Customer Under Turkish Laws

Presentation to the AIDA_Turkish Insurance Law Association
Ahmet Karayazgan, Karayazgan Law Firm
Istanbul, May 3, 2012

Part 1 Definition of “Insurance Intermediaries and “Consumer”

Part 2 “Unfair Commercial Practices” of Insurance Intermediary

Part 1

Definition of “Insurance Intermediaries” and “Consumer”

Who is “Insurance Intermediary” ?...



Definition for “Insurance Intermediary”

Provision 2 (1) (b) of Insurance Law No. 5684

- Insurance Agents
- Insurance Brokers

[EU Law _ Insurance Mediation Directive
(2002/92/EC)]

“Insurance Intermediary means any natural or legal person who, for remuneration, takes up or pursues insurance Mediation”

Who is “Insurance Intermediary” ?...



- Insurance Agents

1. “Real person” or “Legal entity” Agents

- Definition

- Provision 2(1)(L) of the Insurance Law no. 5684

- “Insurance agency: A person who have adopted it a profession to intermediate to insurance contracts in the name and account of insurance companies or to offer the same on behalf of insurance companies within a certain place or region based on a contract without assuming any title like commercial representative, commercial attorney, sales officer or employee and who carries out the preparatory studies before the execution of the contract and assists in the payment of the indemnity through enforcement of the contract,.”

[Collection authority?.... Missed ?...]

Who is “Insurance Intermediary” ?...



- Insurance Agents

1. “Real person” or “Legal entity” Agents

- Legal Basis

- Provision 23 of Insurance Law no. 5684
- Regulation on Insurance Agents
- Provisions of Turkish Commercial Code.

- Professional Requirement and pre-requisites

Inc. the registration of the agents to the registrybook kept by TOBB ; technical personnel

[EU Law _ Insurance Mediation Directive
(2002/92/EC) Pr. 4 / Professional Requirements]

Who is “Insurance Intermediary” ?...



- Insurance Agents

1. “Real person” or “Legal entity” Agents

- “Exclusivity” (unless otherwise agreed in the agency contract) under Turkish Commercial Code for the insurance agent.
- Authorities to be given:
 - Execution of the insurance agreements
 - Collection of premium
 - Support on the claim handling
- Limitation on commercial activity (there are exceptions)
 - Agent’s main and sole activity should be the “insurance intermediation

Who is “Insurance Intermediary” ?...



- Insurance Agents
 1. “Legal Entity” Agents
 - Entities ?....
 - Dealers such as automotive ...
 - Travel Agents
 - “Call Center” ????....

Who is “Insurance Intermediary” ?...



- Insurance Agents

- 2. Banks and other institutions

- Other Institutions_

- that have been established by a special law and empowered to carry out the insurance agency by their law [not clear !...]

- Leasing and finance companies... [covered!...]

Who is “Insurance Intermediary” ?...



- Insurance Agents

- 2. Banks and other institutions

- Legal Basis

- Provision 23 (10) of Insurance Law no. 5684 and
 - Provision 6 of the Regulation on Insurance Agents

- No major pre-requisite

- All authorities can be given inc.the collection authority

- No limitation on commercial activity

- “Exclusivity” mostly not an issue, usually otherwise agreed in the bancassurance contract

Who is “Insurance Intermediary” ?...



- Insurance Brokers

- Definition

- Provision 2(1)(d) of the Insurance Law no. 5684

“Broker: Persons representing the parties who want to execute insurance or reinsurance contracts, acting impartially and independently in the selection of companies with which such contracts are to be made, observing the rights and benefits of the people who want to purchase coverage, having adopted it a profession to execute preparatory studies before the execution of the contract, and to assist if necessary in the execution of the contract or collection of indemnity,

Who is “Insurance Intermediary” ?...



- Insurance Brokers
 - Legal Basis
 - Provision 21 (2) of Insurance Law no. 5684
 - Provision 6 of the Regulation on Insurance, and Reinsurance Brokers
 - Professional Requirements and Pre-requisites
inc. being registered in the registrybook kept by Treasury.; technical personnel

[EU Law _ Insurance Mediation Directive
(2002/92/EC) Pr. 4 / Professional Requirements]

- Principally, the representative of the [insureds].
 - Exceptionally, executing protocols with the insurers
- Limitation on activity
 - Conducting only insurance and/or reinsurance brokerage activity

Who is “Consumer” ?...



1. Insurance Legislation No. 5684 (“IL”)

- x No definition for the “Consumer”
[Even “Insured” ?...]

- x No difference between the retail and commercial customers (both treated as a “weak party”) in the application of the IL and CL’s provisions

Who is “Consumer” ?...



2. Commercial Law No. 6762 (“CL”)

(which will be replaced by new law No. 6102 as of July 1st., 2012)

- x No definition for the “Consumer”
- x No difference between the retail and commercial customers
- x Only one provision of New CL mentions about consumer = Provision 1423 (3)

“Content and method of disclosure obligation of the insurer and its agents to **the consumer** should be determined by GDI of Treasury considering the miscellaneous countries’ and esp. EU laws”

Who is “Consumer” ?...



3. Consumer Protection Law No. 4077 (“CPL”)

(amended by 4822)

Would CPL be applicable for Insurance ? [Yes]

Insurance Law dated 2007 and No. 5684

The relative provisions of CPL will be applied for insurance sector

x however, the followings are excepted :

- the regulation on the distance selling

[amendment for insurance sector is on the way]

- the regulation on “door to door” selling

Who is “Consumer” ?...



❖ References by Insurance Law to CPL

- x Pr. 23 of IL - [Insurance Agents’ defective services]
Paragraph 3 of the Provision 4/A of the CPL
according to the Pr .23 (9) of IL
- x Pr. 30 (14) of IL – [Recognition of the Consumer]
Arbitration Panel, that acts upon CPL for the insurance conflicts
- accepted as an alternative dispute resolution
- x Pr. 32 (1) of IL – [Breach of “Bona Fides” Principles]
Recognition of the Advertising Board that acts upon the CPL for the complaints re. the insurance advertising

Who is “Consumer” ?...



3. Consumer Protection Law No. 4077

(amended by 4822) (“CPL”)

Definition of “Consumer”

“the consumer can either be a real person or a legal entity purchasing, using or benefiting from a good or service without having any profession-oriented (*i.e* commercial) purpose.“

[EU Law_ Provision. 2(a) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

“consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”]

Who is “Consumer” ?...



❖ “Legal entity” as a consumer ...

- x Turkish Court of Appeals has generally ruled that
 - trading companies, whether joint stock corporations or limited liability partnerships, can in no way be deemed , within the scope of the Consumer Protection Law and,
 - therefore not able to benefit from the rights granted to , the consumers by such law.
- x "legal entities", can be charitable foundations and associations that are not entitled to conduct any commercial activities.

Part 2

“Unfair Commercial Practices” on Insurance Intermediaries

What is “Unfair Commercial Practices”



EU Law ‘Unfair Commercial Practices Directive’

(2005/29/EC _ 11 May 2005) *

- ✓ This Directive addresses commercial practices directly related to influencing consumers’ transactional decisions in relation to products.
- ✓ It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products.
- ✓ This is particularly important [for complex products with high levels of risk to consumers], such as [certain financial services products].
- ✓ Directive consequently complements the Community *acquis*, which is *applicable to commercial practices* harming consumers’ economic interests.

What is “Unfair Commercial Practices”



EU Law Provision. 2(d) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

‘business-to-consumer commercial practices’ (hereinafter also referred to as “commercial practices”) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

What is “Unfair Commercial Practices”



EU Law Provision. (5)(2) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,
and

(b) it materially distorts or is likely to materially distort the
economic

behaviour with regard to the product of the average
Consumer, whom it reaches or to whom it is addressed, or of
the average member of the group when a commercial practice
is directed to a particular group of consumers.

What is “Unfair Commercial Practices”



EU Law_ ‘Unfair Commercial Practices Directive’

(2005/29/EC _ 11 May 2005)

Briefly, “Unfair commercial practices” are those which:

- do not comply with the principle of professional diligence ,
- may influence consumers’ transactional decisions.

What is “Unfair Commercial Practices”



EU Law Provision. (5)(3) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

In particular, commercial practices shall be unfair which:

- (a) are misleading as set out in
 - ✓ Pr. 6 “Misleading commercial practices”, and
 - ✓ Pr. 7 “Misleading omissions”, or
- (b) are aggressive as set out in
 - ✓ Pr. 8 “Aggressive commercial practices”
 - ✓ Pr. 9 “Use of harassment, coercion and undue influence”

What is “Unfair Commercial Practices”



EU Law Provision. (5)(3) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

- ✓ Pr. 6 “Misleading commercial practices”
 - if it contains false or untrue information or is likely to deceive the consumer, even though the information given may be correct.
 - In particular, this information relates to:
 - the existence or nature of the product;
 - the main characteristics of the product (such as such as its availability, benefits, composition, date of manufacture, geographical origin, the results to be expected from its use, etc.);
 - the price, the trader’s commitments and the nature of the sales process;
 - the need for a service or repair;
 - the trader (their identity, qualifications, code of conduct, etc.);
 - the consumers’ rights on aspects of the sale of consumer goods.

What is “Unfair Commercial Practices”



EU Law Provision. (5)(3) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

- ✓ Pr. 8 “Aggressive commercial practices”
- Consumers’ transactional decisions must be made freely. They cannot be taken following the use of harassment, coercion or undue influence.
- Several items must be taken into consideration for the determination :
 - the nature and the duration of the aggressive practice;
 - the possible use of threatening or abusive language or behaviour;
 - the exploitation of any specific circumstance affecting the consumer in order to influence his/her decision;
 - the non-contractual conditions imposed on the consumer for exercising their contractual rights.

What is “Unfair Commercial Practices”



EU Law_Provision. (5)(1) of ‘Unfair Commercial Practices Directive’ (2005/29/EC _ 11 May 2005)

“Unfair commercial practices” shall be prohibited.

What is “Unfair Commercial Practices”



Business Code of Practice (All Intermediaries) such as ...

- Advising and Selling / General Sales Principles
 - Being suitable for the costumer’s needs and demands
 - Fair analysis of the market
- Products Disclosure
- Documentation
- Letters of Appointment / POA
- Professional Liability Cover
- Competence / Technical Personnel
- Confidentiality of Client Information

What is “Unfair Commercial Practices”



Business Code of Practice (For Brokers) such as...

- Relationship with clients
- Remuneration
- Choice of Insurers
- Disclosure to Insurers
- Documentation
- Accounting
- Binding Authorities
- Claims
- Renewal
- Transfer of Client
- Servicing
- Complaints

“Unfair CP” in Turkey



- Arrangement for
 - “Misleading commercial practices” [not well organised!...]
 - “Aggressive commercial practices” [?]
- No “Business Code of Practice” for insurance

“Unfair CP” in Turkey



- Rules set out in the legislation...
 - Insurance Law No. 5684
 - New Commercial Law No. 6102
 - Regulation on Insurance Agents (*O.G. 14.04.2008 – 26847*)
 - Regulation on Disclosure Obligation in Insurance Contracts (*O.G. 28.10.2007 – 26684*)
 - Regulation on Insurance and Reinsurance Brokers (*O.G. 21.08.2008 – 26913*)
 - Communiqués, Circulars and Sectoral Announcements

“Unfair CP” in Turkey



Pr. 11 (3) of IL – Insurance Contracts

- GDI of Treasury shall issue a regulation
- covering the “disclosure of information” obligation of the Insurance companies and insurance agencies [not brokers !...]
- to the policy owner, beneficiary and the insured
- during both the formation and maintenance of the insurance contract.

[EU Law _ Insurance Mediation Directive
(2002/92/EC) Provision 12 /Information requirements for
Insurance Intermediaries; Provision 13/ Information Conditions]

“Unfair CP” in Turkey Insurance Intermediaries



Pr. 32 (1) of IL – Breach of “Bona Fides” Principles

- Insurance companies and intermediaries [!]
 - x cannot issue any brochure, explanation, other document, ads and commercials to result in an understanding outside the limits & scope of the rights and benefits which they shall provide to the insured, and
 - x cannot make unreal, misleading, deceiving declarations and statements which may give rise to unfair competition.
- Any breach of this provision referred to the Advertising Board that acts upon the CPL.

“Unfair CP” in Turkey Insurance Intermediaries



Pr. 32 (2) of IL – Breach of “Bona Fides” Principles

- Insurance companies, reinsurance companies, [intermediaries]
- are obliged to refrain from acts which may endanger the rights and benefits of insureds,
- to act in accordance with the legislation and principles of the business plan, and to behave in compliance with the requirements of insurance and the rules of goodwill.

“Unfair CP” in Turkey Insurance Intermediaries



Pr. 32 (5) of IL – Breach of “Bona Fides” Principles

- Nobody [!] can restrict the people’s right to choose an insurance company.
- Where the parties are held responsible to provide insurance in any issue referred to in a contract within the limits of that contract, if such responsibility requires the execution of the insurance contract with a certain company then any such provision shall be void.

“Unfair CP” in Turkey Insurance Agents



Pr. 27 (3) of IL – Ins. Agents Executive Committee

Committee shall perform the following duties:

- To establish professional rules in order to ensure that insurance agent activities are performed equitably and fairly, a business ethics exists, and members of the profession work with in solidarity and with such attention and discipline required by the insurance agent profession, [!]
- To determine the ethical codes and try to achieve uniformity in insurance agent practices,
- To take and implement measures in order to prevent unfair competition and unfair practices among insurance agents.

“Unfair CP” in Turkey Insurance Agents



Insurance Law No. 5684

Pr. 23(17) - Confidentiality of Customer Info

Insurance agencies and people working for them cannot disclose the information and secrets they come to know due to their jobs without the permit of the relevant parties.

“Unfair CP” in Turkey Insurance Agents



Regulation on Insurance Agents (*O.G. 14.04.2008 – 26847*)

- Pr. 7 - Compulsory P.L. Insurance
- Pr. 11(4) - Breach of “Bona Fides” Rule /pr.32 of IL
 - 6 months temporary stay of activity
- Pr. 22/23 - Technical Personnel Requirement & Training

“Unfair CP” in Turkey Insurance Agents



Regulation on Disclosure Obligation of Insurance Contracts (O.G. 28.10.2007 – 26684) - *Disclosure Form*

- Insurance Company and Insurance Agents [!]
- During the Negotiations and Conclusion of the Contract
- During the Contract Period
- Disclosure to the Public / Launching a Web Site [by comparison]

In the lack of the fulfilment of the disclosure obligation (pr. 7),

- Termination of the contract
- Claiming all loss and damages
- Causal link between breach and loss required

“Unfair CP” in Turkey Insurance Brokers



Regulation on Insurance and Reins. Brokers

(O.G. 21.08.2008 – 26913)

- Pr. 9 - Compulsory P.L. Insurance
- Pr. 11 - Obtaining Offers
 - * min 3 different ins. comp.
 - * report re. the offers and their comparison.
 - * prohibition for the portfolio undertaking

“Unfair CP” in Turkey Insurance Brokers



Insurance Law No. 5684

Pr. 22(5) - Confidentiality of Customer Info

Insurance brokers and people working for them cannot disclose the information and secrets they come to know due to their jobs without the permit of the relevant parties.

“Unfair CP” in Turkey Insurance Brokers



Regulation on Insurance and Reins. Brokers
(*O.G. 21.08.2008 – 26913*)

- Pr. 13 - Remuneration
 - * limited with commmission and consultancy and risk manageent fee
- Pr. 15 - Taking precautions in the sense of the Distribution of Portfolio
- Pr. 16 - Duties against its clients
 - * Advising and providing proper information
 - * protecting their rights
 - * acting in good faith

“Unfair CP” in Turkey Insurance Brokers



Regulation on Insurance and Reins. Brokers
(*O.G. 21.08.2008 – 26913*)

- Pr. 18 - Accounting (financial sheets) and Books to be kept
- Pr. 22/23 - Technical Personnel Requirement & Training

“Unfair CP” in Turkey

Recent Developments



New Commercial Law No. 6102 (“NCL”)

Provision 54-63 of the NCL / **Unfair competition**

- ✓ do not amend the description of unfair competition, but expand its scope.
- ✓ Increase the numbers of the sample cases and also sets forth rules [to provide protection for consumers and public interest.]

“Unfair CP” in Turkey

Recent Developments



Provision 54-63 of the NCL / Unfair competition

✓ Current [TCL],

- there must be an abuse of economic competition for an action to be considered unfair competition,

✓ [NCL],

- an action that constitutes an abuse in principle will be considered unfair competition without considering the abuse of economic competition.

“Unfair CP” in Turkey



✓ The NCL, the description of unfair competition is expanded in a manner that will not only affect competitors.

x **Current [TCL]**, protecting

- for competitors and protect fair competition.

x **[NCL]**, protecting

- Competitors and ensuring fair competition,

- Also the purchasers/consumers in a comprehensive way.

✓ Another new aspect is that the provision also sets forth acts, which covers use of unfair general terms of contracts.

“Unfair CP” in Turkey



❖ Acts or Practices Violating “Bona Fide” Principle

- To decry others’ businesses, business products or activities in a false and misleading way,
- To make false and misleading statements regarding one’s own business, business products or activities,
- To create confusion with others’ businesses, business products or activities,
- To compare one’s own, business products or prices with others, their business products or prices in a false, misleading, discrediting way,
- To mislead customers concerning the real price of the product by way of providing additional products or services,
- To limit the freedom of choice of the customers with aggressive sale tactics,

“Unfair CP” in Turkey



❖ Acts or Practices Guide for the Breach or Termination of an Agreement

- To conclude contracts with customers by leading them to breach agreements signed with others,
- To try getting advantages to one's own or third parties by proposing unfair benefits to the employees, attorneys or other associates of third parties,
- To lead employees, attorneys or other associates to disclose or to get confidential information on production or business,
- To lead persons to cancel or terminate sale contracts or consumer credit agreements signed with others for signing of contract.

.

“Unfair CP” in Turkey



❖ Acts of Unauthorized Benefiting from Others’ Business Products

- Unauthorized benefiting from the business products such as offers, calculations or plans which are trusted to them,
- Unauthorized benefiting from the business products such as offers, calculations or plans of third parties,
- Benefiting from others’ work products, which are ready marketing by way of transferring them through technical duplication methods.

.

“Unfair CP” in Turkey



❖ Unlawful Disclosure of Confidential Information, Violation of Business Terms

- ✓ Use of General Contract Terms Violating Bona Fide Principle:
 - 1 Use of general contract terms materially diverging from legal provisions which are applicable directly or through interpretation, or
 - 2 Use of general contract terms, which includes distribution of rights and obligations materially in contrary to the nature of the agreement.

“Unfair CP” in Turkey



Provision 1423 of the NCL / Disclosure Obligation

- Insurance companies and Insurance agents [!]
- During the negotiation and conclusion of the contract
- During the contract period
- Info regarding
 - the contract terms and conditions
 - the insured's rights
 - the terms that require a special attention
 - the insured's notification obligations
 - the developments and events that may affect the insurance relationship during the contract period.

“Unfair CP” in Turkey



Provision 1423 of the NCL /

Disclosure Obligation

- In the lack of the fulfilment of the disclosure obligation,
 - the contract is deemed to be concluded
 - provided that the policyholder does not object within the 14 days with respect to the conclusion of the contract.

“Unfair CP” in Turkey



Provision 1524 of the NCL /
Launching an official website.

Under the **[NCL]** ,

- Companies will be obliged to share
 - necessary information (such as official announcements, details of accounts, statements, and
 - the necessary information within the scope of an information society and the principle of transparency); and
- will be responsible for the accuracy of this information.

In Summary

1. No definition of “Consumer”
... in the Insurance Legislation, but in CPL
2. No different treatment between retail and commercial customer
...in the application of IL and TCL provisions re. insurance
3. No explicit definition for “unfair trading practices”
...Provisions re. “unfair trading practices” disorganized and not harmonised.
...whereas harmonisation will considerably increase legal certainty for both consumers and business.