



Enforceability of provisions of General Terms and Conditions between Merchants under the Turkish Code of Obligations

The Turkish Code of Obligations No 6098 (the “**Code of Obligations**”) entered into force on 1 July 2012. Although the provisions of the Code of Obligations do not substantially differ from widely accepted principles of law of obligations, newly introduced framework on *general terms and conditions* (*genel işlem şartları*) (“GTCs”) is expected to have significant impact on commercial transactions. Below are the characteristics of GTCs’ scheme:

- **Scope of application.** Legal framework related to GTCs does not have any restriction on its scope of application. That is to say, the Consumer Protection Law No 4077 already sets forth applicable legal regime to *unfair provisions* (*haksız şartlar*) stipulated in consumer contracts. Thus, provisions of the Code of Obligations on GTCs principally aim to regulate GTCs included in commercial agreements. For instance, provisions in a loan agreement that will be executed between a bank and a joint stock company may be qualified as GTCs and suffer the legal consequences. Yet, legal framework on GTCs will apply to consumer contracts as well, where the provisions of the Consumer Protection Law No 4077 are silent. This is the legislator’s intent. In addition, in accordance with the explicit wording of the Code of Obligations, provisions on GTCs will be applicable to agreements that are subject to private law, and where a private party and public entity are involved.
- **Qualification.** GTCs are contractual provisions that are unilaterally drafted in advance by a party having higher bargaining power, to use them in the future in similar contracts. GTCs are usually included in *contracts of adhesion*, also known as *standard form contracts* or *pre-printed contracts*.
- **Consequences.** GTCs that unfairly distort the contractual balance against the non-drafting party will be qualified as *unwritten*, if
 - their existence and content are not explicitly and particularly brought to the attention of the other party; or
 - they are totally strange to the particular nature of the contract and its subject matter; or
 - they allow the drafting party to unilaterally amend the contract.¹

Although the GTCs will be interpreted as *unwritten*, thus legally unenforceable, the validity of the remaining provisions of the contract will be binding on parties. Also, if a provision of GTCs is ambiguous, it would be interpreted in favor of the non-drafting party.

- **Adverse proof.** A party may bring the proof of any of the below to challenge the qualification of GTCs and to claim such provision enforceable:
 - Proof of negotiation of and discussion on alleged GTCs with other party (provided that any statement in the text of the contract in that sense will not be enough to evidence this *per se*); or
 - Even if it had discussed and negotiated alleged GTCs with other party, other party would have agreed on them anyway.

¹ For instance, pursuant to the Turkish Commercial Code No 6102, neither validity nor excessiveness of penalty clauses executed between merchants can be challenged before courts. However, if they are qualified as GTCs, they will be deemed unwritten.